



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Rowlands

**Respondent:** Denbighshire County Council

**Heard at:** Mold On: 3, 4, 5, 9, 10 and 11 May 2023  
Welshpool On: 7 June 2023

**Before:** Employment Judge P Davies

**Members:** Mr S Husain  
Ms P Humphreys

**Representation:**  
Claimant: In person  
Respondent: Miss A Gumbs (Counsel)

## RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is

- (1) The claim of unfair dismissal is dismissed.

## REASONS

1. By a claim received on 19 April 2022 the Claimant Mr Simon Rowlands complained of unfair dismissal from his employment with the Respondents Denbighshire County Council. In the outline of claim it is said amongst other things that the reality of the situation is that the Claimant was a hardworking dedicated individual who tried to protect disabled employment in Denbighshire and “blow the whistle” on more senior officers who were not doing their jobs, wasting public money and breaking

the law". The Claimant says he did not gain anything from establishing his company or creating any conflict of interest.

2. The Response denies that the Claimant was unfairly dismissed. It said the reason for the dismissal was conduct. That the Claimant set up and registered a new company which breached the Respondents code of conduct and was considered serious insubordination. The standards breached within the code of conduct were, disclosure of information, outside commitments, personal interest, which said conduct constituted gross misconduct. The sanction of dismissal was reasonable in all the circumstances. Furthermore it is said that if the Tribunal finds unfair dismissal on grounds of any procedural irregularity the Respondent contends that notwithstanding any such irregularity the Claimant's dismissal was inevitable in all the circumstances and thus any damages should be reduced to nil on grounds of *Polkey*.
3. The Tribunal heard oral evidence from the following: Nick Bowles, Service Manager of Cefndy Healthcare; Anne Lloyd, Interim Head of Community Support Services; Phil Gilroy, formerly Head of Community Support Services; Helena Thomas, former Service Manager and Investigator; Rhian Morrelle, Head of Children's Services and Disciplining Officer; Tony Ward, Corporate Director of Economy and Environment and Joint Appeals Officer; Geraint Davies, Statutory Head of Education and Joint Appeals Officer; and the Claimant, Simon Rowlands. Nicola Jane Pierce had provided a witness statement but was not called to give evidence. Miss Pierce's witness statement was not agreed evidence. At material times Miss Pierce was the Business Support Manager at Cefndy Healthcare.

### **Background matters**

4. The Claimant started work for the Respondents as a Revenues Assistant on 4 June 2001. After a number of promotions, the Claimant was appointed as Commercial Service Manager at Cefndy Healthcare and Manufacturing on 11 August 2017. Cefndy Healthcare is part of Denbighshire County Council and it provides employment for disabled people through the manufacture and sale of aids to daily living. As Commercial Service Manager the Claimant was responsible for sales, marketing, finance and procurement. Mr Phil Gilroy said that Cefndy was quite a difficult part of the portfolio to manage due to its unique nature and the management team had always struggled with being part of the Council due to procurement rules etc. There are about 40 people employed in Cefndy Healthcare and Manufacturing.
5. Apart from the role of the Claimant as Commercial Service Manager, there was an Operational Service Manager for Cefndy Healthcare Manufacturing, Mr Nick Bowles, who had responsibility for managing the

operational staff involved in the production side of things at Cefndy. Mr Bowles was a Joint Service Manager with the Claimant from 2017. Mr Gilroy had been happy to set in place this joint working arrangement. Both the Claimant and Mr Bowles agreed that they had a reasonable working relationship for a number of years and had shared an office.

6. From 1 April 2019 Miss Anne Lloyd took over line management responsibility for Cefndy Healthcare from her Line Manager, Mr Phil Gilroy who was Head of Community Support Services at the time. Prior to this Miss Lloyd had not had any responsibility for Cefndy. Miss Lloyd told the Claimant and Mr Bowles that she envisaged doing nothing differently as to how Mr Gilroy had been managing the service and that nothing much was meant to change for the Claimant and Mr Bowles.
7. The Claimant says that he was told in March 2019 at a meeting with Mr Gilroy that he would be passing line management to Miss Lloyd, who was one of his two principal managers, to free up some of his time. The Claimant says he was surprised by this appointment. In particular the Claimant says that he felt it likely the change was to do with increasing Anne Lloyd's responsibilities so she could attract a £10,000 per annum market supplement. The Claimant says he discussed the matter with Nick Bowles since they were concerned that Anne Lloyd may need to justify the extra money by getting involved in a business she did not understand or have any prior experience in. The Claimant raised concerns with Hilary Evans, Human Resources Business Partner, and the situation led the Claimant to raise a formal grievance about the decision.
8. The formal grievance was dated 4 December 2019 (page 595 – 1600). The grievance related to three main issues namely use of the Claimant's DCC lease car for travelling; request for pay review; and ADM process. Under the heading request for pay review amongst the matters set out is that the Claimant says on 14 June 2019 he met with Anne Lloyd for a performance appraisal and had a lengthy discussion about pay and the reasons he felt a review was appropriate. The Claimant says that Anne Lloyd said she had not had the chance to talk to Phil yet but would discuss his request and again Anne Lloyd stated that CSS was already having to find £1,000,000 so it was unlikely there would be a pay increase for anybody. The Claimant says that he had made reference in the performance appraisal to his work on the contractual arrangements between the Respondents and Medequip, and his responsibility for the Gwent Wide Integrated Community Equipment Service of which he was Chair of the Management Board with 42 staff based in Newport. The Claimant refers to Mr Gilroy's comment in his performance appraisal that next year will be challenging given that the continued pressure and the budget and the need to develop different ways of delivering the service that the Claimant was well placed to support this. The Claimant also refers

- to a comment of Anne Lloyd that since taking over line management of Cefndy in April 2019 she had been getting to know the Claimant and understand his roles and responsibilities. There are significant challenges ahead to ensure Cefndy is a viable and sustainable operation. The Claimant will have full involvement in developing a robust business plan and project proposal to determine the future of the operation along with his peer and the wider project team. In his formal grievance the Claimant refers to there was no change to his grade despite his additional duties and that “I now know that Anne herself had just had a £10,000 market supplement so she was not only misleading me but actively discouraging me from challenging my own pay. This dishonesty causes me to distrust Anne and question her agenda”.
9. The reference to the ADM process in the December grievance goes back to the circumstances which arose shortly after Miss Anne Lloyd took over the line management responsibility for Cefndy. Miss Lloyd says that the Claimant and Nick Bowles came to her predicting £100,000 overspend. After discussions with Mr Gilroy, Miss Lloyd considered that she had to have greater involvement in the business to ensure that she could provide support to both Service Managers to help and look at solutions and how they could reduce the predicted overspend. Mr Gilroy asked for a report to be developed that looked at alternative delivery models (ADM) at Cefndy. Miss Lloyd says around the same time the service was also offered Corporate Project Management support and so Matthew Hazelwood (Matt) who was a Project Manager, was brought in to assist with the task. Mr Hazelwood prepared an options report (page 612 – 623). In the strategic overview Mr Hazelwood says “Cefndy Healthcare a section of Community Support Services (CSS) has been operating since 1976 and provide “supported employment” through the manufacture of aids to daily living that are sold in the UK and Europe. The income is made up of the direct sale of manufactured aids (91%), a service contract with Medequip (4%) and DWP funding for supported employees (5%). Cefndy is operating in an increasingly competitive market, costs are increasing, profits are being squeezed and staff costs are high compared to other competitors. Due to these pressures Cefndy forecasts overspends for 19/20 through to 22/23. Historically Cefndy has had cash injections to help with viability (£500,000 in 2015) and at 10/12/19 the projected overspend for Cefndy is £274,000 (includes redundancy costs) which will require a cash injection by the Respondents to cover the amount”. It is noted by Mr Hazelwood that not being a legal entity opportunities are missed to trade and business diversification and more freedom in these areas would help Cefndy develop new business. In the options for appraisal there is reference to – inhouse modification; local authority trading company; independent entity; outsource and closure.

10. Both the Claimant and Mr Bowles met with Mr Hazelwood several times to discuss possible solutions for Cefndy. Mr Bowles says that the Claimant favoured moving in a more commercial direction or ADM whereas Mr Bowles was happy to remain as an employee of the council. However Mr Bowles says he was open to considering alternatives if they provided the best option for long term sustainability. Miss Lloyd says she did not exclude the Claimant from meetings with Mr Hazelwood although one meeting in particular that Mr Hazelwood and Miss Lloyd attended with the Head of Finance to talk about the options report and the financial implications of making Cefndy a different delivery model, the Claimant did not attend. Miss Lloyd denied that she was excluding the Claimant as there were several meetings which he did attend. We accept the evidence of Miss Lloyd in relation to this matter.
11. The Claimant's view was that Mr Hazelwood's report did not provide any direction for Councilors to decide on the best way forward and he explained his concerns to Miss Lloyd.
12. In December 2019 a meeting took place between Anne Lloyd, Hilary Evans, Nick Bowles and the Claimant and a representative from the Legal Department of the Respondents. The purpose of the meeting was to discuss the possibilities as identified in the options report of Mr Hazelwood. At that meeting the Claimant declared an interest in any future business that may be established by the Respondents and that he would want to be the Managing Director of any such business. There was no mention by the Claimant of setting up any private company. The Claimant confirmed in his oral evidence that he was not talking at this time of setting up his own private company.

### **Events in 2020**

13. On 16 January 2020 the Claimant was sent the outcome of his formal grievance and a meeting was held on 18 December 2019 with Mr Phil Gilroy and Hilary Evans. The use of the Claimant's own car for journeys in excess of 100 miles was partially upheld in relation to the first part of that grievance. In respect of the request for pay review it was confirmed by Mr Gilroy that a market supplement had been agreed following the submission of a business case and reasons given by Mr Gilroy for that decision. Mr Gilroy agreed to a request for a job description review of the Claimant and he upheld this element of the grievance. In relation to the ADM process Mr Gilroy said "during our discussions you explained that you were frustrated at the start of the ADM process as you believed you were not being consulted effectively on the options being considered. However you also noted that this is no longer the case. Your perception was the change had taken place following the submission of your grievance, however I confirm that the details within your grievance had not

been shared. I explained that some early discussions did take place outside of Cefndy. This was due to concerns about potential conflict of interest given some of the comments you had made. I also noted and you acknowledged that as the ADM work progressed you have been fully involved. As a result you agreed that this element of your grievance did not require a further action”.

14. The Claimant received that decision on 23 January 2020 and confirmed receipt of the grievance outcome letter on 28 January 2020. The Claimant appealed against the grievance decisions on 5 March 2020. In that document the Claimant says that he has been treated differently to another member of staff and made to feel that his contribution to Cefndy Healthcare and Denbighshire County Council is not valued. He says he has been misled several times by senior officers and the actions do not only go against the Authority’s core values but also the principles of public life. He says his grievance was not taken seriously from the start and the procedure was not followed. The finding was unreasonable in view of the evidence you produced about it being more cost effective to the Respondents if he used his lease car for travel and that he has consistently performed in his role have never had any negative feedback yet responsibility has been taken away from him and given to someone with no experience of running a £5,000,000 manufacturing/service business. He says that he can now prove that the HR Business Partner, Head of Service and Principal Manager have colluded to create a situation whereby the Principal Manager would be entitled to a market supplement whilst denying him the same opportunity. He says that he was misled during the grievance meeting and the notes which have been provided are inaccurate and uncomprehensive. Timescales for replying to his grievance were not adhered to which has added to an already stressful situation. The notes of the grievance meeting and confirmation that his appeal time would be 10 days from receipt of the letter and that information was eventually provided on 4 March. He says he has clearly been exploited and treated differently, there seems to be collusion between the parties involved to cover it up and not investigate his claims in a fair and impartial way. He says he has followed all policies and procedures whilst knowing that in the background the people responsible for the stressful situation are exerting additional pressure and trying to find issues with his work. His current line manager is unsupportive and takes every opportunity to undermine him. He says that he is being victimised for raising the grievance and that he has been advised to make arrangements for the appeal with Hilary who is not in any way impartial. His initial grievance should not have been heard by the same people who made the original decision. He says that he has been exploited for the last 2 years and that when he has tried to address the issue he has been faced with barrier after barrier, he has been misled, unsupported and the grievance process

has not been adhered to. The Claimant sets out a detailed timeline in his appeal.

15. In March 2020 a decision was made by the Council to close Cefndy temporarily due to the COVID-19 pandemic. Both the Claimant and Mr Bowles were concerned about the potential impact that closure could have on customers and also they felt that Cefndy had a part to play in supporting the pandemic response and the staff should be considered as key workers. As a result of representations made by the Claimant and Mr Bowles to the Head of Service that decision was reversed. Cefndy continued to operate throughout the pandemic. During the initial lockdown the commercial team including the Claimant worked on the production side of the business producing equipment in the factory. Mr Bowles said that this hands on production support was because a lot of production staff were shielding which made it difficult for the factory to operate as normal. The Claimant says that he was exposed to a different part of the business and therefore allowed a chance to get a better understanding of the production.
16. The Claimant was concerned at the lack of documentation and instruction given to the staff and raised his concerns with Anne Lloyd and suggested precise work instruction manuals and better process control which would not only increase workload but also address some concerns raised by the production team. The concerns that the Claimant had were told by Anne Lloyd to Mr Gilroy and it was agreed that that was not the right time to follow up the matters because of the pandemic.
17. From June 2020 the Claimant mostly worked from home and there would be conversations over the telephone or by virtual meetings. After the formal parts of the meetings both the Claimant and Nick Bowles together with Nicola Pierce would remain on calls for another discussion.
18. On 11 June 2020 there was a one-to-one meeting between the Claimant and Miss Lloyd. It is noted that the discussion included resurrecting the paper that is required for Cabinet regarding the future of Cefndy clearly demonstrating an options appraisal and making a recommendation for the way forward. It was noted "Anne explained that Phil was keen for us to look at how we had managed with a reduced workforce over the last 12 weeks and think about the viability of Cefndy if we continue to manage with similar staffing levels. Simon agreed to lead on writing the report by utilising Kenny Hughes and Hilary Evans as appropriate and Anne will support with whatever is required. We agreed that we would aim for the paper to be ready by the end of August to go to Cabinet in September."
19. Whilst the position regarding Cefndy was that sales had fallen dramatically in May and June and that there were the financial concerns, the Claimant

- says that he and Nick Bowles did not agree on the best route forward so they decided to write individual papers. On 27 July the Claimant sent an update on the Cefndy Healthcare and Manufacturing commercial position, (dated 24 July 2020) which analysed as far as the Claimant was concerned the general position. In the position summary the Claimant says that in order to make the business sustainable for the future there needs to be an immediate cost reduction exercise to realise the benefits of running a business more efficiently. To reviewing the business necessary functions, there have been 5 roles identified as not required and one post that can be reduced to 50%. The cost of redundancies based on an end date of 30 November 2020 will be circa £134,000. The Claimant says that options for the future of Cefndy were explored in the latter part of 2019 but failed to provide a clear strategic direction for the future. The Claimant recommends that the paper is considered with a view to start a consultation on redundancy as soon as possible. The restructure should run parallel to building a business case for an alternative delivery model which reduces the financial risk to the Respondents and removes the legal barriers preventing the business from full commercial potential.
20. Mr Nick Bowles did not agree with the position taken by the Claimant and considered the Claimant's projections overly pessimistic. Mr Bowles spoke to Anne Lloyd in around late July early August and later prepared his own projections to support his position. Mr Bowles prepared a spreadsheet with his own projections and also discussed with the Claimant what he was about to send on 3 September 2020. The email from Mr Bowles to Anne Lloyd headed "comparative data" is on page 1445 of the bundle. Mr Bowles recommended a holding position he maintained until the end of quarter 2 and any required structural changes are worked through in detail during quarter 3 for implementation during quarter 4 for the start of the new financial year. Mr Bowles goes on to say that several projects have been negatively impacted by the workforce disruption since March, these include, reworking of ISO manuals to reflect current practices and resources and the implementation of a new maintenance system. Mr Bowles said that a further advantage of addressing any structural changes in quarter 4 is that it allows for a decision to be made regarding the proposed hybrid delivery model and would negate the need for additional consultation.
21. The Claimant produced another report entitled "Cefndy Healthcare Manufacturing a Recovery Plan" dated 1 September 2020 in that the Claimant said that if the only other option available is closure then he cannot see any harm in exploring a hybrid model in further detail. The model protects disabled employment, reduces financial risks and mitigates against any potential legal challenge. He refers to the Gwent contract (GWICES) which is delivered using a very similar model whilst not identical the concept has been proven to work. For clarity the new

company would not be owned by the Respondents but there would be a close link and appropriate governance put in place.

22. The Claimant then produced more detailed proposal as to how a hybrid model could work and another report entitled “Another Failed Business or Flagship Social Enterprise?” was submitted by the Claimant on 29 September 2020 to Miss Anne Lloyd and Mr Phil Gilroy. In the introduction it is said that the purpose of this report is to explain and gauge political support for a bespoke and innovative solution which will prevent the closure of Cefndy Healthcare, it is not intended to be a business plan or comprehensive explanations or proposals. The report should be considered alongside the two previous reports relating to Cefndy performance.
23. Mr Gilroy having seen what the Claimant had been proposing to outsource an element of the Cefndy operation suggested that there be input from HR Legal and Finance and on 10 September in an email asked if there were news about anyone joining a meeting to discuss the proposal from the Claimant. In that email Mr Gilroy says “it should hopefully be a one-off but I do need HR, Legal and Finance to enable us to make a quick decision on viability”.
24. On 25 September 2020 Mr Gilroy chaired a meeting to discuss the Claimant’s hybrid proposal which was attended by Gareth Williams (Senior Accountant), Louise Dougal (Senior HR Business Partner), Jennifer Capelen (Solicitor) together with the Claimant. The notes from the meeting are contained in an email from Mr Gilroy dated 25 September 2020. It has 8 bullet points which are not supportive of the model put forward by the Claimant. The response from HR Louise Dougal was copied to the Claimant by Mr Gilroy and that response being a final response was on 1 October 2020. Again these were not supportive of the points which were being made by the Claimant. In the email of Miss Capelen of 2 October 2020 Miss Capelen says she does not have any further comments to make at this time but she understands the Claimant’s responses to the comments she has raised (and Louise and Gareth) but without any evidence of how figures have been reached or more details of the set up for the social enterprise she could not comment any further. Miss Capelen says put bluntly, there isn’t any more detail provided in this report to change her previous comments. She says it is disappointing that the Claimant felt they were being negative as she certainly did not intend it to be like that. Legal are duty bound to point out the legal risks to any proposal and that is what she has done here.
25. The Claimant was disappointed with the responses from the meeting and prepared an annex to his report which he wanted to be presented to the councillors and for him to present the report to Cabinet Briefing. The

- Claimant sent an email on 2 October 2020 to Mr Gilroy setting out his feelings that not one comment or observation is positive or encouraging and that it seems all the members of the group have done is to try to find reasons why they should not progress rather than use their professional expertise to find a solution to the problem. The Claimant expressed disappointment at Mr Gilroy's decision not to allow him to present this personally.
26. On 2 October 2020 in reply to the Claimant's email Mr Gilroy said that in discussion with the Leader he has agreed to postpone the discussion with Cabinet Members as the Agenda next week is very full but this also gives Mr Gilroy the opportunity to fully absorb the information provided and that while he acknowledges the Claimant's opinion of the professionals responses following the meeting he has forwarded the Claimant's report for further consideration.
27. On 5 October 2020 Mr Gilroy emailed the Lead Member for Wellbeing and Independence Councillor saying that HR Finance and Legal basically said Simon's plan was not achievable or beneficial and the Claimant wanted to present at Cabinet Briefing but Mr Gilroy told him that would not be appropriate and that Anne will work on alternative changes when she gets back next week.
28. The reference to Anne Lloyd preparing reports was that in the background Anne Lloyd had been working with HR to submit two other reports for consideration of the Council. One of the reports potential closure of Cefndy and says that to close Cefndy would cost around £1.2 million. The other Community Support Services Cefndy Restructure Report which referred to changing the business model quite significantly with a phased approach. This refers to roles being deleted from the staffing structure and the creation of new posts together with right size Cefndy's production operations to focus on the most profitable products. There was also reference to some unused land in or around the Cefndy site regarding the alternative use by Coleg Llandrillo.
29. The Union Representative for the Claimant and Mr Bowles on 25 November 2020 had emailed Mr Gilroy asking him to consider a business case from Simon to Nick to be presented to Cabinet Members. Mr Gilroy replied to say that he was happy to consider any further information that can help in discussions with Cabinet Members as he had requested on a number of occasions.
30. On 3 November 2020 Mr Gary Williams heard the Appeal from the previous grievance outcome of the Claimant. The Appeal against the use of a lease car for travel was not upheld. It was agreed with the decision that there should be a pay review and Mr Williams said that he could not in

- this Appeal deal with an eventuality that has not occurred. In respect of the ADM process Mr Williams said “the outcome letter in respect of this limb of your grievance stated that at the original grievance meeting you confirmed that this element of your grievance required no further action. At our meeting you confirmed this to be the case and I have not therefore considered this aspect”.
31. The Claimant says that because he had raised concerns that he noticed a distinct change in Anne Lloyd, Phil Gilroy and Hilary Evans’s attitudes towards himself and began to feel vulnerable. He says he was warned by Bridget Stokes, the Union Branch Representative that he had upset some powerful people and might want to think about a compromise agreement to make things easy. A recording was produced of conversations with Bridget Stokes which did not have this remark as part of it and it is something which we do not find likely to have been said by Ms Stokes.
32. On 2 November 2020 there was another one to one meeting between the Claimant and Miss Anne Lloyd. It was noted that the future of Cefndy was being discussed at Cabinet Briefing today (2 November) and will give everyone a focus once it’s known what the steer from Cabinet is. In relation to Cefndy it was said that lead in time on orders is still sitting around 3 weeks and expecting an order from the customer in Ireland ahead of Brexit. Under the heading of “Brexit” it was said that there are going to be some import/export issues. The Claimant fears maintaining customer supplies is going to be one of the challenges along with importing from Holland. There are some technical issues which could affect exports to Southern Ireland in relation to CE/CA marks, roughly £400,000 worth of business. It is noted there was an update from Nick on this situation. It is accepted by the Respondents that the Claimant did make protected disclosures regarding the Brexit position and the CE marking at this meeting.
33. On 27 November 2020 the Claimant emailed Mr Gilroy regarding forecast outturn to say that projected outturn is now £207,784 overspend. The Claimant says this is based on the current status but he really cannot stress enough how this will impact if we continue without any strategic direction. The Claimant says within the next few months we are facing some huge challenges which will lead to an unrecoverable and illegal situation if not addressed immediately.
34. Mr Bowles had had various informal discussions about illegal trading and Brexit with the Claimant. Mr Bowles said that the Claimant had been raising illegal trading for a number of years because Cefndy was not a legal entity and should not have been trading or charging. Mr Gilroy answers the 30 November 2020 in an email of 30 November 2020 saying

that he expects the Claimant to deal with putting in place plans to deal with the huge challenges.

35. The email of 27 November is not admitted by the Respondents to be a protected disclosure. For reasons which will be set out later in this Judgment we find that this was a protected disclosure. Mr Rowlands replies on 30 November to Mr Gilroy saying that both himself and Nick are unclear what the strategic direction is and how can new business be chased when he does not know if they have accreditations or not and with a backlog of over a month with non-compliant products and no plan to address either financial or legal problems. He says he has raised the various challenges with Anne a number of times and detailed them in reports and he is unable to put mitigation in place because the issues are outside his remit and scope of control. Mr Gilroy says that he suggests that the four of us meet that is the Claimant, Mr Bowles and Anne Lloyd and himself, so that he can understand what needs to be done by whom and to address the things which have been raised. It is noteworthy that Hilary Evans in an email of 30 November says that in relation to what the Claimant had said that she would look back and see what reference there is to Brexit and from previous comments she was under the impression that the Brexit issue related to import of components although there may be implications regarding trading in Southern Ireland. Miss Anne Lloyd spoke to Mr Bowles following the one to one with the Claimant. His view was that all products were produced by Cefndy were aids to daily living rather than medical devices and that they did not need CE markings for products that are manufactured inhouse at Cefndy. Also that Cefndy was a distributor in some circumstances which means it need not CE mark those products. Also that Cefndy does not manufacture medical devices and is only a distributor it did not need an authorised representative in place. Mr Bowles did say there were a couple of issues that needed to be resolved with a few customers but that he was working on it. Mr Bowles said that he had the guidance produced by the Medicines and Healthcare Products Regulatory Agency in order to come to the view that he had.
36. On 1 December 2020 Mr Bowles emailed the Claimant regarding his views and he set out what he perceived to be the exceptions to the aids to daily living. (Page 1451). There were queries about whether there should be discontinuance. The Claimant responded in an email of 1 December 2020 agreeing that they may be better off discontinuing sales of some products but not an identified one call T220. The Claimant says that they definitely need to consider the slings (given the potential risk) as there was some debate over this going back a couple of years and he was not sure what the conclusion was. He also raised the issue of bed rails which definitely need CE marking. He was going to call Mr Bowles to discuss the matter.

37. There is a dispute about whether Mr Bowles was told by the Claimant in about October/November 2020 about the fact that they should buy the assets from the Respondents and continue to operate the service as a private business or social enterprise and that Mr Bowles indicated he was happy to be made redundant from the Respondents and return on a consultancy basis. Mr Bowles does not agree that he agreed to do this together although he did indicate to the Claimant that he would have been happy to take some form of consultancy work if ultimately the decision had been made to close Cefndy and set up an alternative delivery model. Mr Bowles stressed that it was a matter for the Council to determine. The Claimant says on 10 November 2020 he made a telephone call to Mr Nick Bowles telling him that he had set up a private company and that Mr Bowles and himself were content they had a rough plan in place should the Respondents decide to close Cefndy Healthcare and Manufacturing. We did not accept that there had been this conversation and agreement at this time. It is unlikely as a result of how matters progressed that the Claimant would have told Mr Bowles about the setting up of the private company and/or that Mr Bowles had agreed to participate fully in the venture. The actions of Mr Bowles in informing the Respondents when he says he did become aware of the private company suggests that Mr Bowles would have been uncomfortable with the idea of having a private company set up in the way that the Claimant had done at that time in November 2020 and was unlikely to have remained silent if he knew at this time about the existence of the private company. Therefore we reject the evidence of the Claimant about this matter and prefer the evidence of Mr Bowles regarding the knowledge and involvement that he had in relation to what was going on at this time.
38. On 7 December 2020 Mr Gilroy sent an email to Mr Bowles and Mr Rowlands and copied to Anne Lloyd regarding the Cabinet Briefing feedback. There had been the Cabinet meeting on 7 December 2020. In the email Mr Gilroy says that the Cabinet Members agreed that the closure of Cefndy is not something they wish to consider at this stage although it will remain an option in the future should the financial situation not be resolved. They also agreed with corporate colleagues that creating a separate social enterprise site company of the commercial element of the business carries too many risks. Mr Gilroy then says this leaves us with a need to reduce the overspend of the next year through a mixture of reducing costs and increasing profitability. He and Anne Lloyd would spend some time considering the option based on previous discussions with Mr Bowles and the Claimant and conversations with other Council departments in order to develop a proposal for consultation. Mr Gilroy says they welcome any suggestions to address the budget situation. Mr Bowles says that following that email he had a telephone discussion with the Claimant and the Claimant started talking about a company being set up to facilitate importing and exporting after Brexit. Mr Bowles says he

highlighted concerns about this to the Claimant and that it would carry a significant risk as it would ultimately be a matter of control of supplies and customers to a third party without much control of what the third party does in the future. The Claimant says that he and Mr Bowles discussed the supply of products to the EU post 1 January 2021 and that it would be not practical for the Respondents to have any contracts in place by 1 January 2021 but there was a possibility they could use Cefndy Enables Limited as a conduit for European trade. Mr Bowles says that this is incorrect as he did not know about the existence of Cefndy Enables Limited except in the last couple of days before Christmas 2020 or very early January 2021. We accept the evidence of Mr Bowles for the reasons already indicated that it was only at this time that he discovered that Cefndy Enables Limited had been set up and that was because he typed in Cefndy into Companies House and could see that a company had been registered in the name of Cefndy Enables Limited with the Claimant as the sole and only Director. There was a discussion from the Claimant how he saw the company operating but Mr Bowles said that what he had done was risky and that he should not have done it without disclosing it to the Council. Mr Bowles believed that there was a conflict of interest and the Claimant indicated he had been told to sort the problem out and that was his solution.

39. We accept the version given by Mr Bowles about his unease and concerns expressed about what had been undertaken by the Claimant. The Companies House website for Cefndy Enables Limited indicates that the creation was on 10 November 2020 and that the registration arose from the fact that the Claimant on 9 November 2020 opened a tied business bank account and in turn registered the company as Cefndy Enables Limited on 10 November 2020.
40. In mid-December 2020 the Claimant emailed Mr Bowles regarding the MHRA registration and wanting further details and information connected with that. The Claimant says that he found that some of the CE files were completely empty which combined with the recent loss of ISO accreditation gave him huge concern about the general state of the technical/health and safety systems within Cefndy and this was something he was going to discuss with Anne Lloyd at his scheduled one to one meeting on 21 September 2020.
41. The scheduled meeting on 21 September 2020 had to be cancelled as Anne Lloyd had to deal with a situation in a care home. As a result of the Claimant's concerns regarding CE marking and Brexit Miss Anne Lloyd told the Claimant that she would set up a meeting with Mr Gilroy and Mr Bowles in early January as it would not be possible before Christmas and the Claimant was asked to prepare a report paper in advance of the meeting that identified the issues considered the implications and

proposed some solutions. Miss Lloyd followed up with an email of 21 December 2020 to the Claimant asking for to report to herself and Mr Gilroy ahead of the meeting.

42. Cefndy Healthcare and Manufacturing closed for Christmas at 12.00pm on 24 December 2020 and reopened on 4 January 2021.

### **Events in 2021**

43. There was a meeting held between the Claimant, Mr Gilroy, Miss Lloyd, Mr Bowles and Mr Kim Jones on 5 January 2021. This meeting was recorded by the Claimant secretly. The purpose of the meeting was outlined by Mr Gilroy. The issues that had not been addressed will need to be addressed. The Claimant then says there are numerous issues and talks about contracts being needed to be in place and the need for an authorised representative and says that he realised that actually they cannot contract because first of all they have no legal powers to do so and second of all who would be contracted and how would they do that. The Claimant says then he started to look at medical device regulations and discovered that effectively they were putting medical devices onto a marketplace illegally because they do not have the correct documentation in place for doing so. So the Claimant's says there are numerous issues with not only Brexit but the way we are trading full stop. Essentially from what he can see is that Denbighshire simply does not have the powers to do what they were doing. Mr Gilroy says that people were not trying to rubbish his idea. Miss Lloyd says the whole point is that the Claimant raises issues around Brexit and they are trying to overcome them and that the report around social enterprise did not highlight in any detail what the upcoming issues were with Brexit. Mr Gilroy says as part of that meeting that what he is saying is that in the Claimant's role he needs to give them the detail and some potential solutions and that the solutions that he has given so far have not been acceptable to the Council. The Claimant says that they were asking him to give a legal view when he has no legal training and it is unreasonable.
44. This meeting on 5 January lasted about 20 minutes which the Claimant considered was a particularly difficult meeting and that Mr Gilroy was not interested in the Claimant's concerns. The Claimant says that he mentioned setting up a business and Mr Gilroy said you can do whatever you like but it will be nothing to do with the Council. The Claimant says because of the mood of the meeting and the abrupt ending of it Cefndy Enables Limited was not discussed as planned.
45. From the transcribed notes it is clear that Mr Gilroy was wanting more information from the Claimant and was pointing out that what the Claimant had said so far in reports and his ideas did not find favour with the

- Council. It is surprising that the Claimant did not mention that he had formed a private company and that it could be a vehicle to overcome the problems. That was the point and purpose of this meeting to look at what the issues that had not been addressed or need to be addressed. It was emphasised a number of times by Mr Gilroy and Miss Lloyd that they were looking for solutions. We do not accept that the Claimant was waiting for Mr Bowles to say something about the private company. It was his responsibility, the Claimant's, to put forward what he had done and the fact that it was a solution as far as he was concerned to the problems. We do not accept that because the meeting was considered to be difficult that it was the reason why the Claimant did not mention that he had formed this private company. There was ample opportunity for the Claimant to put forward his point of view regarding the private company.
46. Following this meeting Anne Lloyd asked Mr Bowles if he could outline the issues relating to Brexit with possible solutions so that this could be passed to Legal for further consideration. Mr Bowles did this by sending an email dated 6 January to Miss Lloyd (page 379). Mr Bowles explained about whether a product could be a medical device (CE marked) or an aid to daily living (and not CE marked). He provides a number of links to explain distinctions and what the Regulations require. There were four options outlined namely to explore the viability of imports/exports being facilitated by a separate company; only sell aids to daily living into the single market; understand the Respondents legal position and what are the financial resource implications for appointing an agent in the single market for products; and discontinue export sales which is a loss of +20% of turnover.
47. Miss Lloyd sent the email to Mr Gilroy on 6 January and asks if Legal can have a look at this. Mr Gilroy asked Mr Gary Williams to look at the issues or if they need to externalise this. Mr Williams on 7 January says that they do not have internal expertise on EU compliance and will need to put this out. Someone will be identified and instructed to give appropriate external advice.
48. Mr Bowles says that after discussions with the Claimant he became increasingly concerned about the financial viability of Cefndy especially as Cefndy Enables Limited could take business from Cefndy and have control over its import/export activity. Mr Bowles says he was also increasingly concerned that he would become culpable in all of this as he had known about Cefndy for at least a week or so by this stage. He therefore decided to call Anne Lloyd and told her to look up Cefndy on Companies House. Mr Bowles denied that he had told the Claimant that he would tell Anne Lloyd about Cefndy Enables Limited before 5 January. Mr Bowles says that it was not his place to do so and we accept that

evidence of Mr Bowles as clearly that company had nothing to do with Mr Bowles but was the vehicle for the Claimant's ideas.

49. Mr Bowles is clear that he did tell the Claimant that it would explain his idea in terms of how it could facilitate import/export activities and from the email of 6 January from Mr Bowles he does refer to one of the options being a viability of imports/exports being facilitated via a separate company. We accept that this was the extent to which Mr Bowles agreed to discuss with Anne Lloyd this option. We reject the Claimant's view that it was specifically to talk about Cefndy Enables Limited that Mr Bowles agreed to discuss with Anne Lloyd.
50. Miss Anne Lloyd agrees that she received a phone call from Mr Bowles informing her to look at Cefndy on Companies House. She did as suggested and saw the company Cefndy Enables Limited with the Claimant noted as the sole and only Director. Miss Lloyd informed Mr Gilroy about this matter and Mr Gilroy sent the link for the company to Mr Gary Williams and Catrin Roberts of HR. On 7 January Mr Williams sent an email to Lisa Jones saying "Simon has actually set up his own company by the looks of this link sent by Phil and has even included "Cefndy" in the company name! Can somebody do a company search on this company and get hold of all the company documentation?". Mr Williams also sent an email to Louise Dougal copied to Catrin Roberts which says "it looks like Simon has created his own company with himself as the only Director, and he's even registered it with the name that includes the word "Cefndy"! Perhaps we can discuss this next week when we speak with Catrin. It looks like a conflict of interest at the very least". On 8 January 2021 Louise Dougal emails Mr Williams saying "Hi Gary, I am meeting Catrin first thing Monday. I think this is an immediate suspension? In terms of the damage he could do, I spoke with Hilary last night, he will already have done everything he needs, so leaving it now till Monday I think is fine, but for me this is now a conflict issue...."

### **Suspension of Claimant**

51. On 12 January 2021 the Claimant was invited to attend a meeting with Anne Lloyd, Hilary Evans and Bridget Stokes. At this meeting he was suspended from duty with immediate effect and told that Anne Lloyd and Hilary Evans would be at his house shortly to collect the Respondents equipment. The Claimant recorded this meeting. A transcript appears on page 1490 to 1510. After being told, the Claimant says that he has uncovered the IMS non-compliance which goes back years and secondly every single medical device that Cefndy have put on the marketplace has been done illegally. The Claimant also says as part of the conversation that he suspects there is some sort of game going on in the background and essentially if he did not create that company in order to put devices on

the European market legally it would either have been breaking the law or losing money for Cefndy. He says he has not made any transaction with that company as yet and there would not have been any transaction before they were informed in writing. The Claimant asks about what terms and conditions of the Respondents excludes him from setting up a company, to which the answer is given, Code of Conduct, and the Claimant says he is confused because so legally how does Nigel Jones have a company then. The Union Representative, Bridget Stokes says during the suspension meeting “and I have done investigations with Helena, lots of them. She is very transparent. She is very honest, you really need to be mindful and I know you are in shock”. The Claimant also says he was expecting it because what has gone on here is Nick hasn’t done his job for the last 4 or 5 years and he doesn’t want me to highlight that he will highlight it because “I’ve got all the evidence it’s not a problem.” This conversation took place after others had left and was conversation between the Claimant and Bridget Stokes. The Claimant says “at the end of the day he has been bullied for years by these people Bridget you know and his actions are not unreasonable given what he has gone through. It goes back to Deb when you know again that wasn’t dealt with properly. I found papers says the Claimant since Deb left where here and Phil were at the time trying to negotiate my position to make it easier to get rid of me. That was before Deb left so you know this has been going on for years and years and now we’ve come to this.” Bridget Stokes says that because the Claimant has clear evidence it could turn out that they offer you a settlement as a shut-up clause, if that is the case “Simon then it has to be worth it”. The Claimant is further critical of Mr Bowles because he says “and I knew exactly what Nick has been playing at because obviously his work has not been done. He’s broken the law and again I will write to the MHRA and tell them and they can deal with that”. The Claimant again refers to Nick Bowles as saying “Bowles has clearly been that’s why he was off this afternoon isn’t it?... That’s exactly what he’s been playing at... well let’s see because now I’ll highlight everyone he’s fucking done, I’ll write to the MHRA if I have to”.

52. Given the expressions used by the Claimant about Mr Bowles it is not likely that the Claimant would have asked Mr Bowles to play a proactive part in informing the Respondents about the fact that the Claimant had set up a private company.
53. A letter of suspension dated 12 January 2021 had been drawn up and given to the Claimant. The allegation was “you have personally set up and registered a new company which breaches Denbighshire County Council’s Code of Conduct and is considered a serious insubordination”. It said the terms of reference of the investigation would be sent to the Claimant shortly. The letter is signed by Mr Gilroy. Reasons for the suspension concerned that continued attendance at work may place the Council at

- risk, impede the necessary investigation, and result in a repeat of the gross misconduct. It was considered in the best interests of all parties that the Claimant is not present in the workplace while the investigation is being conducted. It was said the suspension would be reviewed on a regular basis and if at any time continued suspension is not appropriate the Claimant would be notified and expected to resume his duties immediately. He would be kept informed of the progress of the investigation.
54. Mr Gilroy says that he had worked with HR to agree the terms of reference and parameters of the investigation.
55. In the witness statement of Nicola Pierce she says that she was asked by both the Claimant and Nick Bowles to contact Home Care Medical in Ireland, who are one of Cefndy Healthcare and Manufacturing's biggest customers, to advise them that they would need to order through Cefndy Enables Limited from January 2021. As part of the new supplier set up Home Care Medical requested bank details of the new entity. Miss Pierce says that she asked Simon Rowlands and Nick Bowles for the details. They were provided by the Claimant. She also says that the Claimant told her under no circumstances was the customer to use them for payment unless instructed to do so a message that she passed on to them. Miss Pierce was not called to give evidence and to be challenged about what she said but insofar as she says that their contact was made with the customer to order through Cefndy Enables Limited this is accepted by the Claimant who as part of a later investigation said that he had set up a system as an automated one so that when orders came into Cefndy Enables Limited they were sent on to Cefndy Healthcare automatically. The Claimant said he could not tell when they had been set up or when they had lapsed but the subscription was set up around January. It is also clear from bank accounts for Tide Bank which were disclosed as part of the Tribunal proceedings that the Claimant had made a Director's loan of £5,000 into that account on 28 December 2020 and that on 5 January 2021 a direct debit went to Sage Global Services of £10.80 and on 14 January a payment out to Krisma Young Marketing of £50. There were other transactions shown up to 18 January.
56. In the absence of Nicola Pierce we do not accept the full extent of what is set out in the written statement of Nicola Pierce. Mr Bowles denied giving such instructions to Nicola Pierce or being involved. We accept the evidence of Mr Bowles. The matters were dealt with between the Claimant and Nicola Pierce and that would be expected since the Claimant had full control of not only the bank account but also the private company Cefndy Enables Limited.

57. It should also be noted on 18 January 2021 there was a payment out from the Tide bank account of £3,000 to Lloyds Business Account because the Claimant had opened a second business account for the company on the basis that Lloyds account allowed more transactions to take place. There has not been disclosure of the Lloyds bank account by the Claimant either to the investigation, disciplinary appeal hearing or to the Tribunal.
58. On 15 January 2021 the Claimant emailed Hilary Evans with several questions relating to his suspension. (Page 1122 to 1123). Amongst the questions raised by the Claimant is whether the whistleblowing policy can be used to approach the Chief Executive and Leader about the illegal and negligent trading that is taking place on Phil's instruction and a copy of the terms of reference for the investigation. Hilary Evans replied on 18 January 2021. The Claimant was not satisfied with the answers. The Claimant sent a further email on 18 January 2021 and this was replied to by Hilary Evans on 21 January 2021. The Claimant was not satisfied as he considered the disciplinary policy had not been followed. On 10 February 2021 the Claimant emailed again to Hilary Evans and as part of that email the Claimant says "it's 4 weeks today since you assured me I would have the terms of reference and response as to what part of the code of conduct I have breached. Clearly this has materialised because the whole situation has been contrived by Phil Gilroy and Anne Lloyd to avoid me raising issues with their lack of strategic direction, failure to act on issues (which have resulted in the current situation with Cefndy as trading illegally)". Hilary Evans on 12 February attaches to her reply the terms of reference. Hilary Evans says she will forward to the Investigating Officer and that person will make contact with the Claimant. Hilary Evans says the risk assessment is currently being reviewed and the Claimant will be notified once this has been completed. Hilary Evans says that as previously explained the Claimant will be provided with the opportunity to discuss the situation with the Investigating Officer which is also the forum to raise any questions regarding consistency of the application of the Respondents policies and procedures. Hilary Evans also says she informed the Claimant that should he wish to raise a concern the appropriate route was through the grievance policy or the whistleblowing policy.
59. The Claimant refers to disclosure of documentation regarding terms of reference being referred to in an email from Hilary Evans to Phil Gilroy on 22 February which attaches the terms of reference in an email saying "Hi Phil, as discussed, thanks Hilary".
60. Mr Gilroy said that he could not recall when the terms of reference had been typed whether it was between or after the suspension. Mr Gilroy confirmed that the terms of reference had been put together between himself and HR. We find that Mr Gilroy was fully aware of the terms of

reference before they had been sent to the Claimant. The email referred to of 22 February does not by itself mean that Mr Gilroy had not seen the terms of reference and had agreed the terms. The Respondents have a procedure-investigation framework (page 152) which sets out various matters including roles and responsibilities during an investigation process. The investigation framework provides guidance and advice for managers tasked with carrying out employment investigations and should be read in conjunction with the Respondents policies including disciplinary and grievance procedures. It is said that “each investigation will be different, and the approach taken will be dependent upon the nature of the allegations. The process outlined in this document is designed to be a guide and is not prescriptive”. Under the heading “Set Terms of Reference” it said “at the outset of an investigation, terms of reference must be set. These should be compiled, with the help and advice of HR if appropriate, and agreed by the Deciding Officer. Terms of reference set out the guidelines for an investigation and give specific direction on what allegations should be investigated and the proposed timescale for the investigation”. In the disciplinary policy there are set out timescales (page 230). For example a manager is to review suspension every 4 weeks. Under the heading of “Disciplinary Policy and Procedure” it is said the Deciding Officer is responsible for compiling the terms of reference and informing the employee of allegations and formal process. In the flowchart in cases of alleged misconduct, gross misconduct it is said the Line Manager meets with the employee to establish the facts. They then lead to no case to answer, informal action, or formal action. Under the heading of “What are Disciplinary Matters? Introduction” the following appears “the disciplinary procedure deals with issues relating to unsatisfactory conduct and aims to help and encourage employees to improve their conduct. This process will be used to manage conduct issues with the aim of bringing about improvement rather than punishment. However for cases of gross misconduct, sanctions including dismissal may be imposed”. It also says that “the policy and procedure will apply to all employees of the Council...”.

61. There was email correspondence between the Claimant and Hilary Evans regarding the terms of reference and why it has taken so long for them to be provided. The Claimant referred to parts of the disciplinary policy and asked for assurances the risk assessment will be reviewed by someone independent of CSS. In that email of 15 February the Claimant reiterates that he has established a company but has no customers, not suppliers and no products so is not trading or creating any conflict of interest. Hilary Evans explains in an email in reply that it had been determined it was to be a Deciding Officer being Rhian Morelle who would deal with the matter as Mr Gilroy was part of the investigation.

62. There is reference in the Disciplinary Policy to a suspension risk assessment being completed by the manager with HR and agreed by the Head of Service. The risk assessment in this case was dated 13 January 2021. Mr Gilroy could not remember when he authorised the suspension as this was during a period where everyone was busy with COVID. Mr Gilroy said that he had seen the suspension letter, he thinks he authorised it, but it was over 2 years ago and he could not be confident that it was before 18 January. In his witness statement Mr Gilroy says that he authorised the Claimant's suspension on 8 January 2021 and that a suspension risk assessment was completed before making his decision.
63. Whilst there is a degree of lack of clarity about the matter we accept the evidence of Mr Gilroy that he had authorised the suspension and seen the suspension letter before 18 January.
64. For the avoidance of any doubt we do not consider that any delay in providing the terms of reference or the matters referred to by way of risk assessment which may have not followed the Disciplinary Policy exactly, means that there was unfairness generally in relation to the way that the matter was dealt with by the Respondents.
65. The Claimant refers to an email of 13 January which Louise Dougal had sent to Catrin Roberts (page 394) where Louise Dougal says that "this person will likely end up at Tribunal, he is a difficult character to manage in a meeting". The Claimant says that the decision was already made to take disciplinary action as it would not otherwise not likely end up at a Tribunal. We disagree that this was the interpretation of the words used by Ms Dougal. In the circumstances of the meetings and the ways matters had progressed it would not be an unreasonable assumption to have made at that time. However, in another email of 13 January 2021 sent by Louise Dougal to Catrin Roberts which includes reference to "shocked, started to get angry and Bridget advised him to not say anymore", there is a reference to "he did mention that Phil had told him to do it and then 3 smiley faces". Ms Dougal says that they are getting Helena to investigate it because they can't use Phil or Bruce, I think she will do a good job and someone totally new. The Claimant says that the tone of this email was upbeat and almost mocking. It is understandable why the Claimant considered that the tone was unacceptable with the phrase containing 3 smiley emojis. It is unfortunate that Ms Dougal expressed it in the way that she did with the emojis and it might be considered as not a professional way to provide information. However in relation to the Investigator doing a good job this reiterates the opinion of the Union Representative, Bridget Stokes about Helena Thomas being someone who is professional and thorough in undertaking the tasks that she is asked to perform. We consider that this is the proper interpretation of the expression about Helena doing a good job.

## Investigation

66. On 2 March 2021 the Claimant met Helena Thomas, Investigating Officer, for the initial investigation meeting. The Claimant says they confirmed that they knew each other and had worked together briefly a few years earlier. A note from Helena Thomas of 3 March 2021 to Hilary Evans confirms this conversation (page 4). Ms Thomas says that before meeting the Claimant on 2 March 2021 she had looked him up through Facebook to see if she recognised him but did not recognise his photograph but when she met him she realised that she had met him before and they had worked together although not closely. The Claimant says that it was late March early April 2021 he received a friend request on Facebook from Helena Thomas. In evidence Helena Thomas said she would often check on Facebook but had no intention to make any friend request. She must have pressed the wrong button because there was no reason to be friends and she did not do it intentionally to become a friend. The fact that there was such a request can be seen on page 883 of the bundle. We find on the balance of probabilities that Ms Thomas did make a mistake and that it was not done with the intent to bully, harass, pressurise or in any other way to have an influence over the Claimant. Having heard from Ms Thomas we have no doubt that Ms Thomas would not have compromised the investigation by making such a request. There would be no point or purpose in doing that and we accept that although she must have pressed the button as an act itself it was not done with the intent of becoming a friend of the Claimant. We do not accept that this was a matter that took place after the initial meeting of 2 March 2021.
67. In the email of 3 March 2021 Ms Helena Thomas sent to Hilary Evans Ms Thomas says she is not sure how realistic the Claimant's concerns about Cefndy either in terms of the Respondents or impact of Brexit were or are. While she feels the first of these when she interviews Anne and Phil she is not sure she will get clarity regarding the Brexit issue and asks is there anyone in the Respondents who is familiar with issues regarding the impact of Brexit on trading and implications it might have in Cefndy. Ms Thomas says she thinks the crux of the investigation/report will be on mitigation in terms of what Simon did and why.
68. Hilary Evans replies to Ms Thomas's email on 3 March 2021 saying that in terms of Brexit implications then Phil will be the best person to speak to. Ms Evans says that she is aware that discussions took place between the Claimant, Phil and Anne prior to the Christmas break and there was a follow up meeting in January. Ms Evans's understanding was that Phil had asked the Claimant on two separate occasions to pull together a report outlining the potential impact on Cefndy in order that Phil could then request advice from the Legal Department. She believes Phil did speak to

Gary Williams about the need for some legal advice and Gary had confirmed that the expertise was not available within his legal team they would commission external legal advice.

69. On 19 March 2021 Hilary Evans emailed the Deciding Officer, Rhian Morelle and said “if you can please confirm you are happy for the suspension to remain in place I will notify SR”. It says once again Hilary Evans is instructing the Deciding Officer what to do. Having heard from Rhian Morelle we do not accept that Hilary Evans was instructing the Deciding Officer what to do and the Deciding Officer was not taking instructions from Hilary Evans about matters that needed to be determined as part of the decision.
70. Again the Claimant says that in relation to an email of 23 April 2021 where Helena Thomas emails Hilary Evans that she says “if he’s not given opportunity to show me the information he would only claim investigation was biased. He’s already said the investigation into his grievance was flawed.” The Claimant says this clearly shows a biased Investigating Officer. We reject this suggestion since what was said by Helena Thomas was based upon criticisms that had been made by the Claimant through his grievance and generally.
71. On 27 April 2021 Helena Thomas requests information about perceived risks for Cefndy and if further advice has been sought and its outcome. Anne Lloyd replies on 27 April 2021 that the Association for Public Service Excellence (APSE) ran a webinar which Nick Bowles attended and this cleared up a lot of confusion for us and subsequently Nick, Anne Lloyd and Laura May Walker from the Legal team met with a representative of APSE who confirmed that how Cefndy was currently and has always been trading is legal, there are no concerns from them about us continuing to provide services into Europe and Ireland following Brexit and her recommendation was that we should not consider trading as any other entity as so many trading arms of Local Authorities are currently failing. Miss Lloyd goes on to say that there was an issue raised by the Claimant about the requirement for CE marking of products that were trading into Europe and Ireland following Brexit. To date and the matter is ongoing as long as Cefndy are producing aids to daily living and non-medical devices which is primarily what they produce there is no requirement for CE marking. At this point in discussions both parties are checking relevant legislation and would meet shortly to agree a way forward but it does not appear to be as big an issue as may have been perceived. We find that this was a legitimate view to be provided by Miss Lloyd in response to the request from Ms Thomas and in the light of the APSE meeting is understandable.

72. The Claimant says that an email of 28 April 2021 from Helena Thomas to Hilary Evans saying that they have had advice and there are no problems so much of the rationale for his actions has gone and that she'll reference this in a report and include Anne's email response within it and that she suspects they will get some reaction to it from him. The Claimant says that tonal contents demonstrates the Investigating Officers attitude towards him. If this is meant to be a negative attitude then it is something which the Investigating Officer was entitled to express at that time on the information that she had been provided and did not mean that the Investigating Officer was biased towards the Claimant.
73. The Claimant says that on 11 May Mr Gilroy had an email from an unknown person asking if they should remove the Claimant from the Respondents intranet. The Claimant says this proves that Mr Gilroy had no expectation that the Claimant would be returning and communicated this with other members of staff. We reject this assertion by the Claimant since the actions and since the questions asked would not be an appropriate question in the context of the suspension and investigation into the Claimant.
74. On 6 May 2021 the Claimant had submitted a whistleblowing disclosure pro forma which outlined the nature of disclosure as being four separate disclosures namely a Senior Officer of Denbighshire County Council (Nigel Jones) has been operating and financially benefitting from a business he owns with his wife.
- 1) I believe Nigel has used his position in DCC to influence decisions in the favour of his company. Phil Gilroy is fully aware of the situation and concerns have been raised with him on at least three occasions, as far as I am aware (I may have evidence, but I don't currently have access to my DCC files). Concerns have also been raised with Anne Lloyd and Hilary Evans.
  - 2) Cefndy Healthcare and Senior CSS Managers are knowingly placing medical devices on the UK and EU markets without the correct certification or territory specific representation. This is illegal and done by Nick Bowles in the full knowledge of Phil Gilroy and Anne Lloyd. Not only this but the technical files to support the certification either do not exist or at the very minimum are incomplete. Nick Bowles is also making false customs declarations on behalf of Cefndy Healthcare in the full knowledge of Anne Lloyd and Phil Gilroy. The potential risks to DCC are huge, not just from a reputation perspective but also financially (Cefndy could be forced to recall all CE marked products placed on the EU market since January 2021 at a

huge cost). If an accident occurs with one of these products, then DCC will be liable.

- 3) Nick Bowles (in the full knowledge of Anne Lloyd and Phil Gilroy) is completely ignoring DCC contract procedure rule, UK law and medical device Regulations when buying products from Skan-Staal (the same company charged £50,000 by Nigel Jones) and Eurathon. There is no authorisation or control over the expenditure with Skan-Staal, the goods are ordered (with no authorisation) from China through Skan-Staal (based in Holland) and paid for in USD, this means all DCC systems and controls are bypassed. There are countless other examples of new suppliers with no evaluation, there are invoices received on the back of verbal orders, no quotations and just a general disregard for CPR's. Procurement has been a longstanding problem at Cefndy with rumours circulation about bribes and the relationship with Skan-Staal since I joined in 2008. Allegedly a previous General Manager (Bill Whitaker) set up these relationships in order to channel DCC money to himself, on many occasions I have questioned the benefit of Skan-Staal's involvement but have never had a reasonable response.
- 4) Over £300,000 has been spent to an Italian company called Crippa on the purchase and maintenance of two CNC (tube vending machines). This was subject to tender, but the specification was written to favour the Crippa machines (there were even complaints from other suppliers stating this. Nigel Jones and Nick Bowles met with Crippa in Germany and were hosted by them in Italy before the tender specification was written. Nick and his wife were also hosted in Italy by Crippa, as far as I am aware this was authorised by Phil Gilroy and I assume recorded in the appropriate register? The company has not delivered the service expected and a significant amount beyond the original contract price had been spent with Crippa without any challenge. The Claimant goes on to say in his whistleblowing document that in January 2021 Phil Gilroy instructed Cefndy to carry on purchasing medical devices from China and placing them on the EU market illegally. The Claimant says he was so concerned that he told Nick Bowles that he would be using the whistleblowing policy to raise his concerns. Nick had a conversation with Anne Lloyd and I was suspended the following week by Phil Gilroy. I was suspended for creating a company Phil told me I was able to create.

The Claimant goes on to say that he believes there is a wider conspiracy in order to cover up Nick's own incompetence and failure to do his job and that Nick Bowles is responsible for the regulation of Cefndy products and that Phil Gilroy is abusing his power to cover up Anne Lloyd's lack of

direction at Cefndy and his own failure to address these longstanding issues.

75. This complaint was made at a time when Mr Bowles had received an email on 28 April 2021 with an attachment that an order had been placed with Cefndy Enables Limited by one of the customers in Southern Ireland. The email was from Mr Frank Duffy of Home Care Medical and referred to the attached purchase order for additional stock and was asking if the purchase order is acceptable. The purchase order shows the suppliers name as Cefndy Enables and was for a value of £1,499.04. Mr Bowles then spoke to the customer to confirm that Cefndy had not changed its name to Cefndy Enables but the customer was unsure what to believe and therefore Mr Bowles suggested that he speak to someone more senior who could clarify the situation. Mr Bowles asked Anne Lloyd to contact the customer directly. Anne Lloyd then telephoned the customer together with Catrin Roberts, who was then Head of HR, to come on the call with her. They were made aware that the customer had made a payment to Cefndy Enables Limited having been sent the company name and bank details by a Cefndy employee. HR then took the matter forward due to its potential relevance to the Claimant's ongoing disciplinary investigation and this led to a separate internal audit being undertaken by the Council.
76. Hilary Evans sent an email of 30 April 2021 to Catrin Roberts, the subject being "home care order analysis" which contained a spreadsheet which showed three orders for CE and eight orders uploaded onto factor master by NP but not filed on the drive as is the process. Nick Bowles confirmed that NP was aware of CE from discussions with SR. Ms Evans says she was with the Investigating Officer yesterday and she commented that SR is adamant that he has done nothing apart from register CE with Companies House. Mr Bowles attached the document which identified this and several orders where he could not find the original purchase order all identified as being entered on factory master by NP who is Nicola Pierce. The dates are for the three orders 29 March 2021, and two orders on the same date 29 April 2021.
77. Miss Lloyd asked Mr Bowles to get in touch with another European customer to ensure that no further orders had been placed with Cefndy Enables. In an email to Anne Lloyd on 6 May Mr Bowles said that he had spoken to Skan-Staal and that Cefndy Enables was a separate entity. An individual at Skan-Staal confirmed he had spoken to the Claimant several months ago advising the future of Cefndy was at risk and he planned to continue Cefndy as a private company in the event of closure.
78. The Claimant considers that Anne Lloyd took an unofficial investigation alongside the official investigation with Cefndy customers to obtain evidence that fell outside the official investigation. However we find that

the actions taken by Mr Bowles and Miss Lloyd at this time were entirely appropriate bearing in mind the information that they had received regarding purchase orders with Cefndy Enables name on from a customer of Cefndy Health Care.

79. As a result of the information obtained regarding orders having been channeled through Cefndy Enables Miss Helena Thomas was asked to keep the Claimant's investigation on hold and conduct an investigation which related to these financial transactions which involved another member of staff at Cefndy Nicola Pierce. The Claimant was interviewed as a witness as part of that investigation on 27 July 2021.
80. In September 2021 Miss Thomas completed the investigation into the allegations regarding the Claimant. The report prepared was extremely detailed and included meetings with the Claimant and records of their discussions. The report is on pages 577 to 853 of the bundle. Miss Thomas's recommendation was that the case should proceed to a disciplinary hearing for the following reasons (i) The Claimant did by his own admission and the evidence provided in this report personally set up and register a new company (ii) The Claimant on the basis of the evidence provided in this report did in part breach the Respondents Code of Conduct in respect of the disclosure of information (iii) the Claimant on the basis of the evidence provided in this report did breach the Respondents Code of Conduct in respect of outside commitments (iv) the Claimant on the basis of the evidence provided in this report did breach the Respondents Code of Conduct in respect of paragraph 7.1 of the Code. (Employees must inform their Director in writing of any non-financial interest that they consider could bring about conflict with the Authority's interests).
81. Miss Thomas ends her report by saying that the Claimant is a key member of the management team at Cefndy Health Care and questions whether the Claimant's actions as detailed in the report were appropriate. Miss Thomas also questioned whether these actions on the part of the Claimant met the reasonable expectations of the Authority in respect of someone employed at the Claimant's level within the organisation.
82. We reject the assertion of the Claimant that Hilary Evans directed the Investigating Officer and accept the evidence of the Investigating Officer, Miss Thomas, that she was able to follow any line of enquiry she felt was necessary as part of the investigation and was given appropriate access to both witness and documentary evidence. This allowed her to complete what she considered to be a reasonable and balanced investigation and she did not feel that she was being influenced or pressured to arrive at a particular outcome. Documents were provided by the Claimant but the decision about what to include and to exclude was the decision of Miss

Thomas and she was entitled to come to the conclusions that she did regarding what to include or not. We accept the evidence of Miss Thomas that the investigation took as long as it did because of the complexity of the investigation and the fact there was a need to pause the Claimant's investigation to undertake the review by audit and the second investigation. There was also some delay due to the Claimant's Union Representative's annual leave and then Miss Thomas's own annual leave. It is also noteworthy that meetings that had been arranged with the Claimant were conducted with his Union Representative present and included Miss Thomas arranging for access to internal systems that were requested by the Claimant.

83. Miss Thomas was entitled to come to the view that she did with her recommendations after a very thorough investigation and a balanced one taking into account everything that she had obtained from both the Claimant and from other key individuals.

### **Disciplinary Hearing**

84. Miss Rhian Morelle had been appointed as the Deciding Officer. Miss Morelle had been appointed instead of the Head of Service for the Claimant's area because that individual was Mr Gilroy a potential witness in the Claimant's case. Miss Morelle had no direct involvement with the Claimant although she did recognise the Claimant from having attended middle manager conferences pre-COVID where he would have been present but Miss Morelle did not know the Claimant as such. Miss Morelle was aware of the terms of reference and did not consider them to be inappropriate or required further investigation or otherwise to justify the Claimant's ongoing suspension. One of the tasks of Miss Morelle was to regularly review the Claimant's suspension and undertake a suspension risk assessment. The first time Miss Morelle was asked to do this was the middle of February 2021 and after reviewing Mr Gilroy's initial risk assessment Miss Morelle agreed that continued suspension was appropriate whilst the investigation was ongoing. There were further reviews in March, April, May and June and in September 2021. In the middle of October 2021 a decision had been made to move to a formal disciplinary meeting and so it would not be appropriate to remove the suspension. Therefore there would appear to have been a gap in August 2021 regarding the suspension risk assessment but we accept the evidence of Miss Morelle that she did review in accordance with her evidence.
85. Miss Morelle did chair not only the Claimant's disciplinary but also the associated disciplinary that had arisen from the audit investigation. Miss Morelle was provided with a copy of Miss Thomas's investigation report and the appendices in about late September 2021. Miss Morelle believed

that she had all the information required to proceed to the disciplinary meeting. On 1 October 2021 Hilary Evans wrote to the Claimant to inform him that he was required to attend a disciplinary meeting on 19 October 2021. The matters which were set out originally were reiterated in respect of the allegations. The Claimant wrote emails to Hilary Evans following receipt of the investigation report saying that the Investigating Officer had failed to evidence any of the claims made by the witnesses in this case and raised a number of questions including whether there would be the calling of any witnesses for the meeting. The Claimant was told that the Investigating Officer has confirmed that she is not calling any witnesses. As a result of communications from the Claimant Hilary Evans contacted Nick Bowles explaining she had been asked to formally contact him on the Claimant's behalf to ask if he would be a witness at his disciplinary hearing. Mr Bowles decided not to attend as it is not compulsory under the Council's Disciplinary Policy and he had already provided information as part of the investigation process. Similarly, Miss Anne Lloyd was contacted and asked if she would be a witness but responded that she declined to attend as she felt she had no further information to provide over and above that which had been outlined as part of the investigation. Mr Phil Gilroy was also contacted and asked to be a witness and decided he would attend as he felt it important for him to be present to answer any questions that the Claimant or the Deciding Officer may have.

86. Generally in relation to the calling of witnesses the procedure investigation framework under the heading of "key witnesses" says that the Presenting Officer should decide whether to call any key witnesses or rely upon their witness statements and after major consideration with the strength and value of a witnesses evidence. Consideration should also be given to the welfare of a particular witness and whether it would be too traumatic for the witness to appear in person. Witness will not be called upon to appear in person on every occasion. Each case is different and it may be sufficient to rely upon the witness statements provided. An employee may request the attendance of a management witness and both sides have the opportunity prior to the hearing to request the attendance of a particular witness. In the Disciplinary Policy under the heading of "witnesses" it is said that as part of the investigation the Investigating Officer is likely to have interviewed relevant witnesses. Either signed statements will be taken from the witnesses or minutes of the investigatory meeting will be produced and agreed upon. Such statements or minutes are likely to form part of the Investigating Officer's documents to be produced at the disciplinary meeting. However in certain circumstances and at the discretion of Denbighshire County Council it may be appropriate for the Investigating Officer to request that witnesses attend the disciplinary meeting. When it is not possible, reasonable or appropriate for such witnesses to attend the Investigating Officer will arrange for a statement or minutes to be prepared and signed by the witness. It then goes on to say

that similarly there may be circumstances where it is impractical or inappropriate for a witness (at the request of the employee) to attend. Under the heading of “right to time off to be a witness” under “employer requests” in the Disciplinary Policy it says and employee who has been called as a witness as part of the Council’s investigation disciplinary or appeal process is entitled to reasonable time off to fulfil that role by prior arrangement with their manager. This should included time to prepare before the meeting and to attend the meeting. The manager has the right to refuse if not given sufficient notice or if unable to cover the absence. However they should not unreasonably prevent the employee from attending. Under the sub-heading “employee requests” it says “employees do not have to accept a request to be a witness and they should not be pressurised to do so, however they should be encouraged to cooperate as much as possible to ensure a fair and reasonable process”.

87. The Claimant says that the Respondents failed to call any witnesses to the Disciplinary Hearing so any evidence provided in the statements remains untested. Mr Gilroy was called as a witness. It may be more difficult to understand why Miss Lloyd and Mr Bowles declined to give any evidence since the policy encourages them to cooperate as much as possible to ensure a fair and reasonable process and by not attending they will create opportunities for further criticism by the Claimant regarding the fairness of the procedure. It is perhaps particularly surprising since there had been an earlier reference by Human Resources that the case would likely end up in a Tribunal. The declining to give evidence has fueled the perception by the Claimant of a reluctance to fully explain their actions. There may be some circumstances in which the failure to call relevant witnesses would be a significant and important aspect causing an unfairness to the process. However the Tribunal has to consider all these circumstances and the context in which the Deciding Officer undertook the Disciplinary Hearing.
88. Shortly before the disciplinary meeting was due to take place the Claimant lodged a grievance on 18 October 2021 on the basis that he was subject to a disciplinary meeting and had been refused a postponement and the postponement was requested because he wanted access to his laptop from the Respondents in order to prepare his defence and to allow the information he has requested to be sent. After taking advice from HR Miss Morelle agreed to hold the grievance meeting on 19 October 2021 before embarking upon the disciplinary meeting and having heard what the Claimant had said namely that there is additional information that is relevant to the disciplinary it was right to give the opportunity to locate and present that information. It was agreed that the disciplinary team will be reconvened in a couple of weeks.

89. The Claimant was allowed supervised access to his laptop as agreed and a response given to the request made by the Claimant which is on page 915 to 918.
90. On 22 October 2021 the Claimant issued a grievance saying he would like his suspension to be lifted and an explanation as to why it has been necessary for so long after receipt of the investigation report he would request his grievance was heard as soon as possible as every week he is suspended it costs the taxpayer in excess of £1,500. In the grievance the Claimant says that his continued suspension is unjustified, unnecessary and unreasonable. The grievance was investigated by Mr Gary Williams, Head of Legal, HR and Democratic Services. A grievance meeting took place on 10 November 2021 and an outcome letter was provided on 18 November 2021. In relation to the fact there should have been a discussion prior to the Claimant's suspension on 12 January 2021 Mr Williams said he was of the view that there must be in certain circumstances exceptions to this approach based upon the risks considered to apply at the time and that it was within the range of reasonable responses given the risk identified for the manager to consider suspension without such a meeting. In relation to no adequate explanation documentation in respect of reviews of the suspension Mr Williams partially upheld the grievance in respect of the period from July 2021 to November 2021. Regarding whether it was necessary for the suspension to have continued since April 2021 Mr Williams considered that it was consistent with the original risk assessment that the Claimant continued to be suspended until completion of the disciplinary process as the risk regarding investigation and his subsequent hearing would remain the same and therefore he did not uphold this element of the grievance. Mr Williams did not uphold the grievance related to the fact that the Claimant should have been assigned to other or modified duties because the risks identified could not be mitigated by working elsewhere. Regarding reference to bullying and harassment about a further separate grievance under the Council's Whistleblowing Policy Mr Williams says that he could not deal with that as it has not yet been submitted.
91. The Tribunal finds that the Claimant was right to be concerned about the fact that Mr Gary Williams had dealt with his grievance regarding suspension since Mr Williams had expressed being involved to some degree at an early part in the process of suspension. It would have been far better and appropriate for another person to have heard this appeal. However the points made in the letter are points which are based upon the consideration of matters by others especially regarding risks. It was a basis for the continuation of suspension as Miss Morelle had considered as part of her process of reviewing the suspension.

92. The rearranged disciplinary meeting date was 15 November 2021. The Claimant sent information by email on 11 November 2021 in the email of 11 November the Claimant said he would be referring to various legislation relating to medical devices, procurement law and a number of DCC policies which he assumes that he does not have to submit. The Claimant attended the disciplinary meeting and was accompanied by a Union Representative, Miss Carol Clough. The hearing was tape recorded and a transcript of the tape recording appears from pages 933 to 1081. The Claimant made the point that in relation to the Code there was no job, he did not have any additional employment and there was no evidence he had additional employment. He was a Director not an employee. The Claimant said had he started trading or even got to the point of using his position in order to influence how that trade might occur then absolutely he would say there would be a conflict of interest. He would have declared that conflict, it would never have got to that stage because he could not progress any further with regards to what he had done. It was simply an idea between himself and Nick and was not until after 7 December that they knew they had some short term security with regards to Cefndy Health Care. It was then they turned their attention to the pressing issues of Brexit and at that point we said oh actually maybe we could use this Cefndy Enables and maybe that could facilitate it. They were as far as the discussions went because the Claimant says they could not take those discussions any further forward until they had a buy in from Phil and Anne. They did not have authority to do that. So they could not have gone on to create that conflict. That conflict would have come at some point because as soon as we started those discussions as to how the charging would work, how the money would change hands, because again that is what we are really talking about, money changing hands, how people are going to benefit from there. "These discussions that was beyond my control, well you know I would need Phil and Anne to authorise this to be able to get involved in that relationship." The Claimant says that in relation to the company there had been a change because there was an opportunity to move cars around because of lockdown and he started to explore whether there was a genuine opportunity but he could not see how cars moving around was any conflict with Denbighshire County Council.
93. Miss Morelle says "in relation to Home Care Medical that it set up on the system and the bank details are given and all that and that does eventually cause an invoice to be paid in error that you can tell somebody about. I'm not clear what that was, who that was and the money is put back so that's fine, but at that point when Cefndy Enables was being set up would you not have considered that to be trading?" to which the Claimant says "no, because setting up the company on paper is setting up the company on paper. It was Nicola again you refer to" the Claimant says "it was her understanding what was needed to happen that led to those details, so providing bank details, it would be standard for a company" the

Claimant said in relation to the biggest customer in Northern Ireland “if we just say it’s a paper exercise you just need to start ordering through this company rather than through there.”

94. Nicola Pierce was called as a witness and explained that the whole thing was that Cefndy Enables was just an interim so the order would go into Cefndy Enables, Cefndy Enables would order from Cefndy Health Care and there was never any financial loss to Cefndy Health Care, it was just an interim to take the risk away from the Council with regard to trading.
95. The day after the meeting the Claimant sent a closing statement on 16 November 2021. The Claimant also pointed out that the Facebook request was some 36 weeks ago but they actually met for the first meeting 37 weeks ago. That was a challenge to Miss Thomas’s recollection of when she searched Facebook. Even if the Claimant is right about this matter we have already made our findings, we have already considered that it was an error on the part of Miss Thomas and does not affect the veracity of her investigation or conclusions.
96. Miss Morelle said that the conclusions that she reached were hers alone although she did as is standard practice run it past HR who then prepared the formal outcome letter dated 25 November 2021 (page 1091 to 1092). Miss Morelle was satisfied the allegations had been fully investigated and taking into account everything was satisfied the allegations had been proven on the balance of probabilities. After consideration of sanctions available Miss Morelle considered the appropriate sanction was dismissal with immediate effect. Included within the letter was the disciplinary meeting decision with their reasoning set out by Miss Morelle.
97. This detailed decision letter sets out the sequence of matters which occurred in 2021 including the fact that a payment from a Cefndy Health Care customer been made to Cefndy Enables on 2 April 2021 for a substantial sum and the customer was not notified about this until 15 April 2021. Miss Morelle said that indicated there was an active bank account in operation but he was not prepared to give the information in relation to the bank account details. Miss Morelle says whilst there is no clear evidence that the Claimant was told specifically not to set up a company there is evidence that the Claimant was told that Cefndy would not close. Reference was made to other employment whilst working for the Council which indicated that employees may need to have written consent to take any outside employment paid and unpaid and not undertake any outside employment which conflicts with the Council’s interests. Miss Morelle says it is clear that the Claimant’s knowledge of Cefndy Health Care was instrumental in establishing Cefndy Enables and Miss Morelle agrees with the Investigating Officer that it has not been possible to fully establish whether or not you personally gained although a payment was made into

a bank account for which the Claimant was responsible and it was returned some time later. Miss Morelle concluded the information gained in the Claimant's employment was used by him to create Cefndy Enables and noted the reference to the difference between him being an employee or Director however a sole Director can only assume that you would be the only person that could benefit from the company trading. Miss Morelle concluded that by not informing line managers of the Claimant's personal interest in Cefndy Enables that he has breached this element of the Code. Miss Morelle said given that the Claimant had detailed the reason for establishing the company was to eventually support Cefndy Health Care and provide a rationale for the choice of name it was her view there was an intentional link to Cefndy Health Care. Miss Morelle did not agree that the company was set up on paper only because that is evidenced by email accounts and payments to a bank account in the name of Cefndy Enables. Miss Morelle did not find explanations for failing to inform line managers of the Claimant's actions in a timely manner compelling. There was no agreement made between the Council it would go into partnership with a private company made known to him on 7 December 2021 this would not happen and therefore it was reasonable to expect that the Claimant would have been prompted to inform line managers of the existence of the new company at this point and that prior to setting up the company the concerns of a partnership with a private company being expressed by HR Legal and Finance concerns the Claimant had responded to in his report to the Head of Service dated 29 September 2020 and whilst Miss Morelle accepted that she had not seen evidence that the Claimant was explicitly told not to establish a company it was clear that this direction for Cefndy Health Care was not supported.

98. Miss Morelle considered that gross misconduct had taken place and the appropriate sanction was dismissal. Miss Morelle said that the issue of another company creating a company was subject to a different process and does not provide sufficient mitigation for the Claimant's actions. Miss Morelle did not consider that there had been unfair treatment in relation to suspensions and risk assessments but requested that Disciplinary Policy should be viewed in the light of the comments made by the Claimant. In respect of witness attendance it is normal custom and practice that witnesses are not normally called by the Investigating Officer and as Deciding Officer Miss Morelle could also have made the decision to call witnesses however Miss Morelle concluded that this was not necessary and the Disciplinary Policy clear with regard to witness attendance.
99. The reference to another employee creating a company being subject to a different process was that of the disciplinary investigation regarding the allegations against an employee NJ. A report was compiled dated 12 November 2021, a few days before the disciplinary meeting of the Claimant, and the report of Mr Phil Hughes the Independent Investigating

Officer which is on page 1578 to 1594 of the bundle. It was found by the Investigating Officer, Mr Hughes that NJ had declared his business interests in line with the Council offices Code of Conduct [should Nigel Jones be named] albeit neither Director nor Head of Service have placed details of NJ's business declarations on the Code of Conduct register. There is no evidence that private business activities have impacted on the individual's ability to discharge his Respondents roles or that there has been influence of the Respondents in regard to purchasing products from companies who use the private company's services. The Investigating Officer concluded that there had been not identified any evidence demonstrating misconduct on the part of the individual but whilst the individual had financially profited through the company by undertaking work for Cefndy Health Care for two suppliers to provide goods to Health Care from nine other companies were not connected to Cefndy Health Care. Mr Hughes says that the Deciding Officer may wish to consider in the light of this report's finding it is timely to review the Respondents position in terms of whether to engage services of the company. It is noteworthy that in the report there is set out correspondence in 2015 and 2016 regarding knowledge that the Respondents had about the activities of the individual subject of that report. We find that is a very clear distinction between what occurred in disclosure of matters by that individual compared to what was not disclosed by the Claimant.

100. The Claimant refers to a flow chart set out on page 269 to 270 headed "Code of Conduct - declaring an interest – questions to ask yourself." As was pointed out during the hearing this is a document prepared for elected members and not for employees themselves of the Respondents. It does not apply to the position of the Claimant.

101. We find that Miss Morelle was entitled to come to the conclusions that she did on the information that had been provided to her and produced a very detailed rationale for her decision. Miss Morelle said that at no stage was it suggested that the Claimant was only facing disciplinary action because he had whistle blown although Miss Morelle was aware that the Claimant had raised concerns about the trading of Cefndy and various regulations concerned with Brexit. However it is clear that the Claimant had said as in his written closing submission that the reality is a manager who has tried everything to highlight serious concerns in an area of business outside his control and that the whole process had been contrived to prevent him raising concerns that he had with the leadership and regulation involving Cefndy. An individual employee does not have to specifically use the term whistleblowing in order to come within the definition of disclosures which are protected under the relevant legislation. Nonetheless it is clear that Miss Morelle had considered the substance of what had been alleged by the Claimant but nevertheless reached the conclusion that she had regarding the allegations being proven. Miss

Morelle took into account the position of trust in the Claimant as a senior Respondents employee and that had gone completely as a result of his actions. That was contained in the written evidence of Miss Morelle. As the Claimant did not show any sign of having regretted his decision or for being sorry for what he had done that was something that was considered regarding an appropriate sanction.

## Appeal

102. The Corporate Appeals Policy of the Respondents sets out that two Head of Service/Directors need to form an Appeal Panel. Mr Tony Ward, Corporate Director of Economy and Environment, and Mr Geraint Davies, Statutory Head of Education, were appointed as the Appeal Officers. Neither had any recollection of having dealings with the Claimant previously.
103. On 8 December 2021 the Claimant had appealed the disciplinary decision. The Claimant said that the finding was unreasonable in view of the evidence produced and that there is new evidence available which was not available at the time of the original meeting, there were serious procedural irregularities, and insufficient regard was given to mitigating factors. Contained within the document is that the Claimant said there is evidence the investigation was contrived and that he was bullied and harassed by his Line Manager Anne Lloyd, Head of Service Phil Gilroy and the Investigating Officer Helena Thomas. The Claimant says he believes the case was only brought against him because of his intention to raise concerns under the whistleblowing policy and he had not been provided with the legal protection which he was entitled to. The appeal hearing was scheduled for 14 February 2022 but the Claimant's representative was not available and so the appeal was rescheduled for 16 March 2022.
104. The appeal hearing was taped and a transcript of the tape appears on page 1112 to 1418 of the bundle. There was concern about the delay in the appeal hearing taking place. Mr Ward was unsure why it took so long but there had been the holidays of Christmas and New Year and also sadly that Hilary Evans's father had passed away in December 2021 so Hilary Evans was not in work.
105. There was no requirement to call witnesses under the Corporate Appeals Policy although if Mr Ward who chaired the meeting felt that it was necessary he could. Mr Ward said that the Claimant did not provide any evidence to persuade him that the claims of an orchestration of his dismissal by Phil Gilroy, Gary Williams and Anne Lloyd were true in any way. The outcome of the appeal hearing was sent by a letter dated 13 March 2022. In the outcome letter it was said the panel was not convinced

by the Claimant's arguments that the purpose of the company was unclear and that it was a company on paper alone. The panel felt that a manager of the Claimant's seniority and experience should have been able to recognise the potential conflict of interest and that as sole Director of Cefndy Enables it was clearly possible for the Claimant to have gained financially from the existence of that company and they felt it was entirely reasonable to consider this Director role was outside employment. The panel decided that the employee and Director are the same in the context of the circumstances that were under investigation and the primary consideration is that the Claimant had set up a company and did not inform the Line Managers which he should have done.

106. The panel noted in the letter that although the Claimant had been asked to provide any additional/new evidence in advance of the appeal hearing he had failed to do so. The new evidence appeared to be highlighting the fact that Gary Williams had heard a grievance, had contradicted something that Mr Gilroy had said in the disciplinary hearing namely that he had spoken to Gary Williams about a specific matter whereas Gary Williams had stated in the grievance meeting that he had not spoken to Phil Gilroy. It was the view of the Appeal Panel that it was possible for the Head of Service not to remember a conversation correctly. Furthermore it seemed to the panel that Phil Gilroy had been corrected about his comment during the actual disciplinary hearing by the HR Officer who confirmed that Phil had spoken to the HR Manager rather than Gary Williams. Therefore the panel did not feel that it brought any new evidence to the table that was not available at the time of the original meeting because it was established at the disciplinary meeting that Phil Gilroy had actually not spoken to Gary Williams about the matter. The facts in the course of this Tribunal Hearing it was accepted that that was a wrong interpretation by the panel about the sequence of events.
107. In relation to serious procedural irregularities the panel considered the assertion of the Claimant that greater forces were at work here namely Phil Gilroy and Gary Williams but that the Claimant was not saying that the Deciding Officer was involved in this alleged collusion. The panel did not understand how it was possible for the dismissal decision to be pre-determined unless the Deciding Officer was party to the conspiracy. The panel did not consider the conspiracy theory compelling in any way and there was no evidence to support the claim.
108. Other points were dealt with in the outcome letter. It was not a serious procedural irregularity for the Investigating Officer to be determined prior to the terms of reference; it was not a serious procedural irregularity regarding not calling witnesses; the process followed for suspension had no bearing on the decision to dismiss the Claimant; the Panel concluded the Disciplinary Policy was in broad terms followed

namely an appropriate terms of reference, and investigation completed by an Independent Investigator, it said also it appropriated the need for a formal hearing and a formal hearing took place. Therefore the panel concluded this does not constitute a serious procedural irregularity that impacted adversely on the outcome of the disciplinary hearing; the panel did not consider the actions of Anne Lloyd speaking to a customer to be a serious procedural irregularity as it did not form part of the investigation into the allegations against the Claimant.

109. In summary the panel was not persuaded there were any serious procedural errors that adversely affected the outcome of the case. The panel was content that the Council's Disciplinary Policy and Procedure were correctly applied.
110. Regarding the mitigating factors the panel was not entirely convinced by the Claimant's explanation for setting up the company that this was a purely selfless act to safeguard the employment of Cefndy Health Care staff. It was the view of the panel that other cases were not necessarily identical and will have been examined with concerns being highlighted about potential conflicts of interest. With regard to previous good service history the panel was not persuaded that these mitigating factors lessened the severity of the actions taken by the Claimant or the allegations that were investigated. The panel was content that the Deciding Officer did make a reasonable decision in determining that gross misconduct took place. The panel found it difficult to see how the Deciding Officer could have reached any other conclusion based on the evidence presented, that the sanction of dismissal was upheld.

### **Submissions**

111. On behalf of the Respondents it was accepted that three protected disclosures had been made but the fourth one which was alleged on 27 November contained insufficient information. In any event the disclosures had no effect upon the reason for dismissal. The Hazelwood Report raised a number of points. Both the Claimant and Mr Bowles had views in relation to alternative delivery models. The context in which disclosures are made needs to be examined. There were fundamental problems raised in relation to what the Claimant was putting forward as a hybrid model. However no details were provided by the Claimant as requested by the Respondents. It was not inappropriate for the Claimant not to attend the Cabinet meeting because of his status within the Respondents. The reality is the Claimant wants to pursue his own company he set the company up in November 2020 and his motivation is his own interest not saving jobs. His role gave him particular knowledge of Cefndy Health Care and his ability to act in the Respondents best interests was impaired. Whereas the Claimant says that he was trying to protect Mr Bowles

position it is clear in the conversations he had with the Union on 12 January 2021 he had no intention to protect Mr Bowles.

112. The Claimant did not produce any report for the meeting of 5 January because he wanted the Respondents to accept the position was hopeless. The Respondents say the motivation was to rely on his own company. The registration of the company shows that it had interests in the same sector as the Respondents and this was not disclosed by the Claimant. There had been bank accounts opened by the Claimant and a customer given details. It is now known from disclosure of the Tide bank account that there was a payment of some £27,780.59 from Home Care Medical to Cefndy Enables Limited on 1 February 2021 albeit the payment out was made on 2 February 2021. However that payment was not known to the disciplinary or the appeal panel and the second business account of Lloyds is not known as to what it contains.
113. The reason for dismissal was a genuine belief on reasonable grounds after reasonable investigation of the conduct of the Claimant. The Respondents are not saying that any illegality is necessarily unfounded but that solutions were required. There was no difference to any outcome regarding a delay in the terms of reference. The fact that Miss Thomas did not keep decision logs is a matter where this is guidance only but she did keep handwritten notes. In fact the key facts were not in dispute. There was no blanket ban on calling witnesses but there was no obligation to call witnesses and they were not required in this situation. Mr Gary Williams's involvement in the suspension had no impact on the fairness of the dismissal itself. His involvement had been overlooked when he was asked to undertake the grievance.
114. The position of the alleged comparator was very different as set out in the report by the Independent Investigating Officer, Mr Phil Hughes. It was unfortunate that a message was sent by Mr Gilroy to Miss Evans at the conclusion of his evidence which said words to the effect of "I'm sorry about that". Mr Gilroy explained that he had been frustrated by the questioning of the Claimant and had reacted sharply as set out in the transcripts. The Deciding Officer considered that was a personal message to Hilary Evans and not relevant to what she was being asked to consider. The Deciding Officer asked Hilary Evans if she wanted to turn her laptop off and nothing more was said about it. The Claimant did not mention he had seen this message at the time. The Respondents submit there was no other communication from or to Mr Gilroy.
115. As to the matter of the appeal Mr Gilroy was correct, he was a credible witness and it had no impact in relation to the matter of gross misconduct in any event. This was a case in which a large number of

individuals would have had to have colluded as the Claimant says and that just was not the case.

116. There was no procedural issues and that the **Polkey** position is that if it exists it would have made no difference. There was a secondary **Polkey** point if it arises regarding the risk of dismissal in March 2023 regarding the merger of the service managers. As to contributory conduct that would be 100% in all the circumstances.

### **Claimant's submissions**

117. The Claimant says that it is an unfair dismissal because he made protected disclosures. It was not fair in any event because the Respondents failed to follow policies. The Claimant never denied creating a company and he asked Mr Bowles to inform his employers. From June 2020 he raised concerns regarding Brexit trading and identified numerous concerns and had no correct instructions from the Respondents. From 1 January 2021 it was his opinion, although he is not a lawyer, that the only option was for money to be paid into his bank account and so he had given Nicola Pierce bank details but express instructions for no payments. As soon as he became aware of the payments they were sent back.
118. After the Claimant says he made his disclosures there is a change in attitude towards him particularly after the grievance and he was told by his Union Representative he had upset some powerful people and should consider a settlement agreement.
119. The transcript partly of the meeting of 5 January 2021 shows their recollection is about colluding against the Claimant.
120. The Disciplinary Policy requires the Respondents to follow various steps and it was only through his subject access requests that information came to light to show that the steps had not been properly followed. Documents were not created on the days and dates that were alleged.
121. The Claimant says that at the time of suspension he admitted the existence of the company and there is no evidence that the Deciding Officer was involved in viewing the terms of reference or the risk assessment.
122. It took 9 months for the investigation to be completed and the investigator used Facebook against the policy and did not keep logs or ask any questions or include his documents. There were no witnesses called. Miss Thomas gets works from the Respondents. The Claimant had no contact from his manager and policy says it should be every four weeks. HR was directing the Investigating Officer regarding the case

against him and he had to raise grievances. Gary Williams said he had no involvement but he had been involved.

123. During the disciplinary Mr Gilroy declined to answer questions regarding the comparator NJ. At the Appeal Hearing Hilary Evans said it was dissimilar because a Director had been informed 10 days later. The comparator profited from the company whereas he created a company and had not disclosed to managers but not aware that there was any conflict. He had not profited from any company unlike the comparator.
124. There had been trading of CE products in fact were readily available and the outcome would have been different at the appeal. If he had not put in a subject access request and the recording and the report from the comparator the Respondents would have withheld information.
125. Sanction of dismissal does not accord with the policy which is to change behaviour after the disclosures had been made by Mr Bowles then the Claimant's fate had been decided. The Claimant was told not to go into work and told to collect matters at reception but items were missing. Annual leave calculations were incorrect. It took over a year to supply holiday leave matters.
126. The Claimant had to chase the appeal which was way beyond the 30 days that it should have been.
127. The Claimant said he was fully aware of any conflict of interest but said he could potentially be conflicted and he never tried to hide anything or make any income from the company. He felt that the business would close down and that Mr Gilroy did not want to deal with the issues and took an easy way. Mr Bowles had a lot to gain by not admitting certain matters.
128. The decision to dismiss him was unfair and unjust and the Claimant does not believe his conduct was the reason for dismissal the only thing he regrets is giving Nicola Pierce details although he said they are not to be supplied.

## The Law

### **Section 98 of the Employment Rights Act 1996 says**

**“(1) in determining for the purposes of this part whether dismissal of employee is fair or unfair it is for the employer to show (a) the reason (or if more than one, the principal reason) for the dismissal and (b) that a desire or reason falling within sub-section (2) or some other substantial reason of account**

such as to justify the dismissal of an employee holding the position which the employee held (2) a reason falls within this sub-section is it (b) relates to the conduct of the employee (4) where the employer has fulfilled the requirements of sub-section (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case.

Section 103(a) says “an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason or if more than one the principal reason for the dismissal is that the employee made a protected disclosure.

129. The definition of protected disclosure is set out in s47(b) of the ERA 1996.

130. In the case of *Kilraine -v- London Borough of Wandsworth* [2018] EWCA Civ 1436 the Court of Appeal said amongst other things whether a particular disclosure satisfies the test in Section 43(b)(i) should be assessed in the light of the particular context in which it is made. If to adapt the example given in *Cavendish Munro*, the worker brings his manager down to a particular ward in the hospital gestures to sharps left lying around and says you are not complying with health and safety requirements, the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement that then would plainly be made with reference to the factual matters being indicated by the employer at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim, the meaning of the statement to be derived from its context should be explained in a plain form and in the evidence to the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime.

131. The Respondents accept that there were three protected disclosures on 2 November at the one to one meeting where the Claimant said that maintaining customer supplies is going to be one of the challenges along with importing from Holland and that there are some technical issues which could affect exports to Southern Ireland in relation to CE/CA marks roughly £400,000 worth of business. The email which is not accepted as containing a protected disclosure is that of 27 November 2020 where the Claimant says within the next few months we are facing

some huge challenges which will lead to an unrecoverable and illegal situation if not addressed immediately. The use of words are similar to those noted at the one to one and indeed the illegality is clearly set out in relation to the CE marks in particular. Taking the statement in the context in which it was made and the fact that the email in response by Mr Gilroy did not ask for further qualification about what was the unrecoverable and illegal position suggests that it was known quite clearly what the Claimant was getting at regarding the CE marking. In those circumstances the Tribunal find that the Claimant made a protected disclosure in that email of 27 November. The other protected disclosures were via telephone call on 2 December 2020 and at the 5 January 2021 meeting.

132. The analysis of the process by which the Claimant was firstly suspended then the investigation followed by the Disciplinary Hearing and the Appeals Hearing whilst it throws up in some instances issues regarding time scales not being complied with and matters which should not have taken place as set out above such as Mr Williams not dealing with the grievance about the suspension because of his previous involvement, we have already found and repeat that the Investigator, the Disciplining Officer and the Appeals Officers had sufficient material before them to reach the conclusions that they did. We are satisfied that all had honest beliefs in reaching the conclusions that they did and were uninfluenced by individuals such as Hilary Evans or Anne Lloyd or Phil Gilroy in reaching the conclusions that they did but based their conclusions on the evidence put before them and the account given by the Claimant about what he had done and why. The investigation was a reasonable investigation and was thorough and detailed. All reached a conclusion that was a reasonable conclusion on the evidence that was put before them. We reject suggestions that they were unfair or biased in the way that they approached their tasks. We do not accept the evidence of the Claimant that what has been demonstrated has been a conspiracy on individuals that he named or indeed any conspiracy regarding the way that the process evolved.

133. We find that the reason for the dismissal of the Claimant was not because he had made protected disclosures but because of his conduct in setting up the private company surreptitiously carrying out activities in relation to the company and otherwise without informing the Respondents. In short the Claimant was pursuing his own agenda because he thought he knew best and was not prepared to engage with the Respondents in eliminating any irregularity or illegality unless it was by his preferred model of a private company undertaking some of the arrangements in relation to the dealings with customers and other related matters regarding to the manufacture and distribution of products.

134. It is clear from the grievances put in by the Claimant that he considered that he was undervalued by the Respondents and that he believed that the Respondents had not been as open as he wished to his ideas and he formed a very negative view of their positions and views which contradicted his own. This led to the Claimant going along a path which put him in a conflict of interest situation and which was compounded by his actions in taking steps with respect to his own private company without the knowledge or support of the Respondents because he knew that the Respondents would not support what initiative he had put into place. In short he was the author of his own misfortune by the actions that he had taken.
135. Despite his positive aspects of performance appraisal and work record the Respondents were entitled as a reasonable employer within a band of reasonable decisions to come to the conclusion that dismissal was the appropriate sanction because of the actions of the Claimant which were contrary to the interests of his employers the Respondents. This is not a case in which it can be said that the sanction of dismissal fell outside the band of reasonable responses by a reasonable employer. The refusal of the Claimant to acknowledge that what he had done was contrary to the interests of the Respondents was a matter which would not have assisted in his mitigation factors.
136. It is the unanimous conclusion of the Tribunal that the dismissal of the Claimant applying the statutory test in Section 98 of the Employment Rights Act 1996 was that the conduct of the Claimant meant that the dismissal was fair in all the circumstances. It follows that this claim is dismissed.
137. For the avoidance of any doubt, if it was necessary to consider the ***Polkey*** situation, we would have found that if there was any procedural unfairness the Respondents have shown that the Claimant would have been dismissed for gross misconduct in any event. We find that any procedural failure that served to render the dismissal unfair made absolutely no difference and the outcome would have been exactly the same even if a fair procedure had been adopted. Therefore we would have reduced the compensatory award to nil, that is, a 100% reduction, in accordance with ***Polkey*** principles.
138. Further, we consider that this is a case where applying the provisions of s123(6) (reduction of compensatory award) and s122(2) (reduction of the basic award) of the Employment Rights Act 1996 that it would be just and equitable to reduce the compensatory award to nil as the dismissal of the Claimant was caused by his own actions, and also that the basic award should be nil on the ground of the Claimant's conduct leading up to and causing his dismissal.

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Employment Judge P Davies  
Dated: 14 September 2023

JUDGMENT SENT TO THE PARTIES ON 14 September 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche