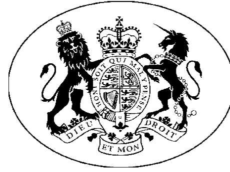

EMPLOYMENT TRIBUNALS

Claimant: Miss B Thomas

Respondent: Harlech and Ardudwy Leisure

Heard at: Cardiff, by video **On:** 30 & 31 October 2023

Before: Employment Judge S Jenkins

Representation
Claimant: Mr A Cooper (Family member)
Respondent: Mr L Fakunle (Solicitor)

JUDGMENT having been sent to the parties on 1 November 2023, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The hearing was to consider the Claimant's claim of constructive unfair dismissal, brought by her in a Claim Form submitted on 8 May 2023.

2. I heard evidence from the Claimant on her own behalf and from six witnesses on behalf of the Respondent: Donna Morris-Collins, Centre Manager: Jodie Pritchard, Director; Heidi Williams, Director; Dylan Wyn Hughes, former Director, Darren Coleman, Swimming Pool Manager; and Joy Hughes, former Director.

3. I considered the documents in a hearing bundle spanning 248 pages to which my attention was drawn, and I took into account the party's representatives' closing submissions.

Issues

4. The Claimant pursued a claim of constructive unfair dismissal, and the issues underpinning that claim which I had to consider were as follows.

   (i) Did the Respondent breach the Claimant's contract of employment? The Claimant contended that there were breaches of express terms of her contract, together with breaches of the implied duty of trust

and confidence.

(ii) Were any breaches fundamental? Were they so serious as to entitle the Claimant to treat the contract as at an end?

(iii) Did the Claimant resign in response to the breaches? Were they a reason for her resignation?

(iv) Did the Claimant, whether by words or conduct, affirm the contract before resigning?

5. The Respondent did not advance any potentially fair reason for any constructive dismissal if there was found to have been one.

6. If I considered that there had been a constructive unfair dismissal, I would then need to assess remedy. In that regard, the Claimant confirmed, during the course of the hearing, that, due to the benefits she received in the immediate aftermath of the termination of her employment and the fact that she fully mitigated her salary losses by obtaining alternative employment in a short timescale, she was not pursuing a compensatory award, only a basic award.

Law

7. In a constructive unfair dismissal case such as this, the touchstone authority remains *Western Excavating (ECC) Limited -v- Sharp* [1978] ICR 221, which noted that three matters fall to be considered:

(i) Was there a repudiatory breach of contract?
(ii) If so, did the Claimant resign in response to that breach and not for another reason?
(iii) If so, did the Claimant nevertheless affirm the contract, whether by delaying too long in resigning, or by words or actions which demonstrated that she chose to keep the contract alive?

8. In this case, the Claimant contended that there were breaches of express terms of her contract. In that regard, I needed to be satisfied that the terms contended were indeed contractual terms, and that they had been breached, although a breach may be anticipatory as well as actual.

9. If a relevant contractual term exists and a breach (actual or anticipatory) has occurred, it must then be considered whether the breach is fundamental — i.e. whether it repudiated the whole contract. A key factor to take into account is the effect that the breach has on the employee concerned.

10. The employer's motive for the conduct causing the employee to resign is irrelevant. It makes no difference to the issue of whether or not there has been a fundamental breach that the employer did not intend to end the contract — *Bliss v South East Thames Regional Health Authority* [1987] ICR 700. Similarly, the circumstances that induced the employer to act in breach of contract have no bearing on the issue of whether a fundamental breach has occurred — *Wadham Stringer Commercials (London) Ltd v*

Brown [1983] IRLR 46, where the EAT stressed that the test of fundamental breach is a purely contractual one and that the surrounding circumstances are not relevant.

11. The Claimant also asserted that there had been a breach of the implied term of mutual trust and confidence. That was explained by the House of Lords in *Malik -v- BCCI SA (in compulsory liquidation)* [1997] ICR 606, where Lord Steyn confirmed that it imposed an obligation that the employer shall not, "*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".

12. It has been clear, since *Woods* v *WM Car Services (Peterborough) Ltd* [1981] ICR 666, that any breach of the implied term of mutual trust and confidence will be a repudiatory breach. However, as noted in *Malik*, the conduct has to be such that it is likely to "destroy or seriously damage" the relationship of trust and confidence.

13. The prevailing law of constructive dismissal in a trust and confidence case has been more recently summarised by the Court of Appeal in *Omilaju -v- Waltham Forest London Borough Council* [2005] ICR 481, where Dyson LJ explained it, at paragraph 14, as follows:

"*1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.*

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H—35D (Lord Nicholls) and 45C—46E (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage *the relationship (emphasis added).*

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik, at p 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".*

Findings

14. My findings relevant to the issues I had to consider, reached on the balance of probability where there was any dispute, are as follows.

15. The Respondent is a social enterprise, operating as a company limited by guarantee. It is run by a small board of volunteer directors. It commenced operations in December 2010, having taken over the management of Harlech swimming pool, which had previously been operated by Gwynedd Council. Since taking over the operation of the pool, it has been supplemented by the addition of a climbing wall and a café.

16. The Claimant had worked at Harlech swimming pool for Gwynedd Council for many years, initially starting there in June 1983, before being transferred to the Respondent in December 2010 under the Transfer of Undertakings (Protection of Employment) Regulations 2006. She started work as a receptionist, but, by the time her employment ended, in February 2023, was a duty manager. She was one of nine employees. She received a salary in return for her work, supplemented by overtime if she worked additional hours. She was not paid an hourly rate.

17. Up until 2020, the Claimant undertook a broad range of duties at the Centre. She was a swimming teacher, an Aquafit instructor, a lifeguard, and a café supervisor. In 2020 however, the Claimant was not able to renew her lifeguard qualification and could not therefore continue with that aspect of her role. Instead, she undertook more duties within the café alongside her Aquafit and swimming lesson duties.

18. The Claimant was issued with a statement of main terms of employment by the Respondent some time after it commenced operations in December 2010. Relevantly, this contained the following clauses.

    "*JOB TITLE*

    You are employed as duty manager and your duties will be as advised by a Board Member or your line manager. Your duties may be modified from time to time to suit the needs of the business." and

    "*HOURS OF WORK*

    Your normal hours of work are 37 per week, as per the weekly rota covering between Monday and Sunday between the hours of 7:15 am and 10.00 pm."

19. The Claimant entered into a new contract in September 2014. That followed discussions with one of the then directors, and focused on the Respondent implementing a new management structure involving four managers, each with specific areas of responsibility, with the Claimant taking responsibility for the café and reception. The new statement of terms of employment, issued in September 2014. contained the following provisions.

    "*JOB TITLE Duty Manager*" (The previous wording referring to duties being modified from time to time to suit the needs of the business was not

included.)

"*HOURS OF WORK.*

Your normal hours of work are 37 per week, as per the weekly rota covering Monday to Sunday between the hours of 10:00 am to 10:00 pm."

20. In the event, it appears that the Claimant continued to undertake work at an earlier time in the day than 10:00am, regularly starting at 7:00am or 7:30am.

21. The Claimant consistently worked 37 hours each week, spread over various days, but working to a regular rota.

22. At one point, in 2021 or early 2022, the Claimant's hours were changed to reflect the reduced usage of the Centre following the imposition of Covid restrictions. Whilst the documentation relating to that was not in the hearing bundle, that was done via a process of the Claimant being issued with a formal notice of reduction of hours, which was implemented for a short period, before the Claimant returned to her previous 37 hour week.

23. The Respondent subsequently obtained funding to employ a Centre Manager, and did so from 2021 onwards. The initial Centre Manager stayed in place only for some six months before leaving for personal reasons. He was replaced by Mrs Morris-Collins in Summer 2022. She then became the Claimant's line manager, and, until the events of January 2023, both the Claimant and Mrs Morris-Collins confirmed that they enjoyed a good relationship.

24. Mrs Morris-Collins undertook reviews of the Centre's operations, considering the operation of the swimming pool, the climbing wall and then the café.

25. The café review was undertaken in December 2022. The Centre closed over the Christmas period, as was the usual position, with the Claimant taking leave between 20 December 2022 and 4 January 2023.

26. The closure of the Centre for Christmas and New Year periods allowed a deep clean of the café to be undertaken. The Claimant, together with one or more other staff members or volunteers, would typically undertake this. In relation to the end of 2022, she had arranged to undertake the deep clean on her return to work on 4 January 2023. During her absence however, the deep clean was undertaken by Mrs Morris-Collins, together with another employee and a volunteer.

27. Following the review that Mrs Morris-Collins undertook of the café, she produced a written document dated 3 January 2023, referred to as "*HAL Café Review*". The review document spanned six pages and set out the café's mission statement and core values. It also set out, under a further heading of "*Mission Statement*", a number of bullet points which were to be the areas of focus of the café in the future. It was noted that the document set out a new vision for the café which the Board had agreed, and which would be implemented with immediate effect.

28. The review document also contained an extensive summary of issues that had been identified following the deep clean of the kitchen. Some twenty-two points were identified, spanning some one and a half pages.

29. The review identified that the café needed to be open during Centre opening hours to allow full use of the facilities, and that a reduced menu would be required to prevent the wastage then being experienced. It referred to the "café supervisor", i.e. the Claimant, needing to be booked on to a full health and hygiene course.

30. The document also set out revised opening hours for the café. These were that it would be open between 09:30 and 13:00 on Mondays and Thursdays, between 09:30 and 13:00 on Tuesdays, Wednesdays and Fridays, reopening later on those days, between 16:00 and 19:00 on Tuesdays, 16:00 and 20:00 on Wednesdays, and 17:00 and 22:00 on Fridays. It would then be open between 17:00 and 22:00 on Saturdays and between 12:00 and 15:30 on Sundays.

31. Mrs Morris-Collins did not speak to the Claimant whilst carrying out her review, and therefore the first time that the Claimant became aware of it was when she attended work on 4 January 2023. She was then met by Mrs Morris-Collins together with Mrs Hughes, who had been asked to attend as a director. Notes of the meeting were in the bundle which were agreed by those involved as being accurate.

32. The Claimant was provided with the review document and was given an opportunity to read it. She raised concerns that she was not happy with what she described as "split shifts", and that, whilst she did not mind doing the odd evening, she did not want to work the proposed café hours, with a 10:00pm finish being too late for her.

33. The reference to split shifts referred to the closure of the café at 1:00pm, with its re-opening later in the afternoon. The Claimant lived some twenty miles away from the Centre, and therefore travelling home and back again would be a significant additional cost for her in terms of travel.

34. The notes of the meeting recorded that Mrs Morris-Collins raised concerns that with the hours (I took that to be a reference to the Claimant not working the split shift system or late in the evening) it would mean that the Claimant's hours would be reduced significantly, to 25 hours one week and 32 hours the next.

35. The notes also recorded that the Claimant would need to receive a notice of reduction of hours to allow her to look into it, with an action point being noted that Mrs Morris-Collins was to raise this with the Board to produce a reduction of hours notice, following a conversation with the Respondent's external advisers. No such notice was ever produced.

36. Prior to her return to work in January 2023, the Claimant had received a message from Mrs Morris-Collins, on 29 December 2022, noting that her hours in the following week would be that she would come in for three and a half hours on each of Wednesday and Friday, and for five hours on

Thursday, having been off on leave on the Monday and Tuesday. The Claimant replied, querying where the rest of her hours were, noting that she was only due to work twelve hours, albeit I noted that that was, in reality, some twenty-eight hours, when the two days of holiday were taken into account.

37. Mrs Morris-Collins replied, noting that they were only the hours for the following week and that the shortfall would be set against hours already worked by the Claimant, i.e. would effectively be treated as time off in lieu.

38. Following the meeting on 4 January 2023, the Claimant emailed Mrs Morris-Collins, on 6 January 2023, seeking clarity of her hours for the following week. Mrs Morris-Collins replied, on 8 January 2023, attaching the rota for the following two weeks. That noted that the Claimant would work 35.75 hours in the week commencing 9 January 2023, if she worked a second split shift on one of the days; and that she would work 38.75 hours in the week commencing 16 January 2023, again on the basis that she would work a split shift on one of those days. The calculation of the hours for the second week was however incorrect. The hours allocated to the individual days totalled only 32.75.

39. A rota that the Claimant subsequently received for the three following weeks showed totals of 30.75 hours, 35.75 hours and 31.75 hours respectively, with at least one spilt shift in each week.

40. Following receipt of Mrs Morris-Collins' email of 8 January 2023, the Claimant replied to her, later the same day, noting that she was extremely unhappy about the change to her working hours and about the letter, by that she meant the review document, that she had been given. She commented that, as Mrs Morris-Collins was aware, split shifts, two hours apart, meant an extra twenty mile trip for the Claimant to go home. She also commented that Mrs Morris-Collins was aware that the Claimant could not financially manage on part-time hours, and she would therefore be working under protest.

41. The Claimant asked Mrs Morris-Collins to acknowledge her situation and look again at the proposals going forward regarding working hours, and also to explain why she had chosen to change the Claimant’s role to café supervisor. She mentioned that she had been a loyal and hard-working member of staff with some 39 and a half years’ service. She referred to feeling undervalued and worthless, that there had been no opportunity for a review of her work with Mrs Morris-Collins since she had been appointed, and that none of the issues mentioned had been brought to her attention previously.

42. Mrs Morris-Collins then circulated that email to the Respondent's board members the following morning, noting that she was not responding until they received guidance from their external advisers. The Claimant's email was then discussed at a board meeting on 10 January 2023, where it was noted that Mrs Morris-Collins would be seeking input from the external advisers.

43. The Claimant was in work for the following fortnight, as was Mrs Morris-

Collins. However, no attempt was made by Mrs Morris-Collins to discuss the Claimant's email with her. There was also no direct contact with the Claimant by any of the Respondent's board members to discuss it, other than an informal discussion that Ms Heidi Williams had with her on 17 January 2023. Ms Williams confirmed, in her evidence, that that had been an informal discussion due to her long-standing knowledge of the Claimant. She reported to the Respondent's board that the Claimant had been very upset and crying during their discussion, with her main issue being around the café review document, with the Claimant feeling that there was a lack of communication, that she felt very undervalued, and that the Respondent was trying to get rid of her. The Claimant sent an email to Ms Williams on 18 January, restating those concerns.

44. The Claimant then commenced a period of sickness absence on 20 January 2023, and in fact never returned to work. She provided a Fit Note dated 25 January 2023, which noted "stress at work".

45. Having not received any response to her email of 8 January 2023, the Claimant emailed Mrs Morris-Collins, copying in some of the Respondent's directors, on 2 February 2023. She noted that she was yet to receive any acknowledgement about any of the issues raised, that she felt totally worthless after thirty-nine years of loyal service, and that she had spoken to her GP about how the work-related stress was impacting on her health. She attached a further Fit Note covering the period up to 28 February 2023. She asked Mrs Morris-Collins to confirm in writing whether her concerns were being investigated.

46. Mrs Morris-Collins then replied to the Claimant on 8 February 2023, noting that she could assure her that the issues she had raised were being looked into, but that in order to find a way forward they would need to meet with her to discuss the matters further. She commented that she was more than happy for that to be undertaken via Zoom if that assisted, as they would not want to put any additional pressure on the Claimant as her health was very important to them.

47. Mrs Morris-Collins noted that she wanted to reassure the Claimant that she was a valued member of the team. She commented that, moving forward, she would envisage offering 37 working hours where possible, but that that was dependent on business needs and financial income, and she made reference to a section of the employee handbook which referred to layoffs and short time working. She confirmed that the rotas would reflect that, and that they would look at the split shift situation, but commented that again they would be guided by the needs of the business and that sometimes this, I took that to mean the requirement to work a split shift, was inevitable.

48. Mrs Morris-Collins concluded by commenting that the Respondent was looking at moving away from having duty managers and instead having supervisors on shift in the café, pool and climbing wall, but that that did not change anything in the Claimant's contract and that she would be happy to discuss the matter further when the Claimant returned.

49. No further communication was received by the Claimant from Mrs Morris-Collins or any of the Respondent's directors after 8 February 2023, and

then, on 21 February 2023, the Claimant wrote to the Respondent submitting her resignation. She confirmed that she was resigning in response to what she considered to have been a serious breach of contract, and that she considered herself to have been constructively dismissed with immediate effect. She noted that her mental health had suffered greatly as a result of the following matters.

1. Her contracted hours not being offered to her, with no explanation, no agreement, and no notice.

2. The introduction of unreasonable split shifts, which had not been part of the contractual agreement.

3. Her grievance to her manager and the directors had not been acknowledged or addressed.

4. That she been subjected to bullying due to the lack of advance notice of the meeting on 4 January 2023 and the changes to her work environment without prior consultation.

5. The changes in her job role and job title, noting that purchases for the café were to be made by the Centre Manager, and that she was being referred to as café supervisor and not duty manager.

50. Mrs Morris-Collins replied to the Claimant by letter the following day, suggesting that a grievance meeting take place on 1 March 2023, and asking if resigning was what the Claimant really wished to do. Further communication ensued regarding the location of the meeting, who from the board of directors would be present, whether Mrs Morris-Collins would be present as the minute taker, and requesting accompaniment by someone from Citizens Advice or a family member.

51. Ms Jodie Pritchard, as the board member who had been intended to attend the grievance hearing, also communicated with the Claimant towards the end of February, but arrangements for the meeting could not be confirmed. Ultimately, the Claimant sent an email to Ms Pritchard on 2 March 2023, noting that, while she appreciated the somewhat belated offer of support, she believed that there had been a complete breakdown of trust. Her resignation therefore stood.

Conclusions

52. Applying my findings and the applicable law to the issues I had to decide, my conclusions were as follows.

(i) Were there breaches of contract?

<u>Express terms</u>

53. I noted that the Claimant contended that express terms of her contract regarding her hours were breached by the Respondent. Those related to her total hours not being offered to her, and to her being required to work split shifts. I first needed to be satisfied that provisions relating to the

Claimant's hours and when she worked them were indeed terms of her contract of employment.

54. I noted that, despite the fact that the hours of work clause in the Claimant's contract referred to her working 37 hours "*as per the weekly rota*", the Claimant had worked regular hours for some time. Furthermore, whilst the reference to working to a rota may implicitly have carried with it the possibility of split shifts, the Claimant had not worked split shifts prior to that point.

55. Overall therefore, I was satisfied that a term of the Claimant's contract was that she would work 37 hours each week and would receive a salary reflective of that. I was also satisfied that it was a term of the Claimant's contract that she would work regular hours and would not be required to work split shifts. I was supported in that view by the fact that the Respondent had sought agreement to a previous change to the Claimant's hours and had issued a notice of reduction of hours in respect of it. I was also supported by Mrs Morris-Collins' own reference, in the notes of the meeting on 4 January 2023, to the fact that the Claimant would need a reduction of hours notice "to allow her to look into it". If the changes had been catered for the by the existing contractual position then that would not have been required.

56. I moved to consider whether those terms had been breached and concluded that they had. The travel the Claimant would have had to undertake to and from work if she worked split shifts, which was known to the Respondent, would mean that the imposition of split shifts would have a significant impact on her household income.

57. I noted the Respondent's evidence, specifically that of Mrs Morris-Collins, that it was intended to try to keep the Claimant at 37 hours, notwithstanding the changes to the opening hours of the café. I also noted the Claimant was paid in full for January and February 2023, albeit that her salary was reduced in February to reflect her sickness absence.

58. However, I also noted the clear indication from Mrs Morris-Collins in the 4 January 2023 meeting that, unless the Claimant worked the split shifts and the evening shifts, her hours would reduce, in Mrs Morris-Collins' words "*significantly*". Whilst no change was implemented to the Claimant's salary in January or February, it was clear to me that the future intention of the Respondent was that, if the Claimant worked fewer than 37.5 hours, she would be paid a lower salary.

59. I also noted Mrs Morris-Collins' evidence that the café review document amounted only to proposals. However, it expressly referred to the changes taking effect "*immediately*" and the café's opening hours were changed in early January, such that it was closed for at least two hours in the early afternoons. Furthermore, the Claimant's rota throughout January and into February showed her working fewer than 37 hours and with split shifts.

60. I was therefore satisfied that there had been an actual, or at least an anticipatory (on the basis that the Claimant's salary did not immediately reduce), breach of contract, due to the changes to the Claimant's hours and

the requirement that she work split shifts.

Trust and confidence

61. The Claimant also contended that there had been breaches of the mutual duty of trust and confidence arising from the failure to acknowledge or address her grievance, from what the Claimant contended to have been bullying, and from the reference to her as the café supervisor rather than duty manager.

62. I noted the EAT decision of *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516, which confirmed that an employer's failure to provide a proper procedure for dealing with work-related grievances would be a breach of the implied term of trust and confidence. In this case, whilst I noted that the Respondent's board is made up of volunteers who have their own other responsibilities, I did not think that the Respondent collectively had adequately dealt with the Claimant's grievance.

63. Mrs Morris-Collins was a full-time manager and the Respondent had a source of external advice. In my view, even recognising the other burdens on the Respondent's directors, not to provide even an acknowledgement for approximately a month, and then only when the Claimant prompted a response, was a failure to apply a proper grievance process. Even then, the reply that Mrs Morris-Collins did provide gave the Claimant little comfort that her concerns would be considered, reiterating that her hours and working times would be "*dependent on business need*".

64. Whilst the Respondent may well have been ultimately able to make changes to the Claimant's contract on notice, or have been able to make the Claimant redundant if she was unable reasonably to fit in with the proposed changes, that would have been after a process of discussion and consultation. However, for a period of seven weeks the Claimant was effectively left in limbo. I therefore considered that the Respondent's failure to properly deal with the Claimant's grievance for a significant period of time amounted to a breach of the implied duty of trust and confidence. The Respondent's failures were, in my view, likely to seriously damage the relationship of confidence and trust between the parties.

65. For completeness, I did not think that the Claimant's other concerns amounted to breaches of trust and confidence. Whilst the Claimant would have been taken by surprise by the meeting on 4 January 2023, I did not consider that arranging it without notice could reasonably be described as bullying. Also, whilst there was a reference to the Claimant in the review document as the "café supervisor", I did not think that that was anything more than a shorthand reference within that document to that element of her role.

(ii) Were the breaches fundamental?

66. As I have noted at paragraph 12 above, it is clear that any breach of the implied term of mutual trust and confidence is, by definition, fundamental.

67. I also considered that the breaches relating to the Claimant's hours were

fundamental. They were bound to cause particular difficulties for the Claimant and to impact on her pay and her work-related expenses.

(iii) Did the Claimant resign in response to the breaches?

68. it was clear to me that the Claimant resigned in response to the breaches. No other reason was apparent.

(iv) Did the Claimant affirm the breaches?

69. I did not consider that the Claimant, in any sense, affirmed the breaches. She confirmed she was working under protest, she raised a grievance, gave time for it to be addressed, chased progress after a month had elapsed, and was then dissatisfied with the response received. Whilst some seven weeks elapsed in total, I did not consider that that amounted to affirmation.

70. Overall, therefore I considered that the Claimant was constructively unfairly dismissed by the Respondent.

71. In terms of compensation, the Claimant's age, length of service and salary, led to a basic award calculated at £10,683.75, and the Respondent was ordered to pay the Claimant that sum.

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Employment Judge S Jenkins
Date: 6 November 2023

REASONS SENT TO THE PARTIES ON 7 November 2023

FOR THE TRIBUNAL OFFICE Mr N Roche