

**CYNGOR SIR POWYS COUNTY COUNCIL**

**Employment and Appeals Committee  
13<sup>th</sup> November 2014**

**REPORT AUTHOR: Solicitor to the Council**

**SUBJECT: Employment Tribunals**

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**REPORT FOR: Information**

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Summary

1. Since the Employment Committee last met the Council has been engaged in two Employment Tribunals, and I am pleased to inform the Committee that the Council was successful in both.
2. The purpose of this report is to provide the Employment Committee with the basic facts of each case, the outcome and of any learning derived from dealing with those cases. For obvious reasons, the following sections of this report have been anonymised so that the identity of the ex-employee in each case is protected. It is for this reason that I have deliberately not named the officers involved in those cases, nor the service areas involved.

Case 1

3. In September 2013, the employee resigned from the Council and gave contractual notice. The resignation letter indicated that he/she had found an alternative job. Shortly thereafter, but before the termination date, the employee submitted a grievance alleging that he/she had been bullied by his/her line manager and implying (without saying so explicitly) that this had been one of the reasons for the resignation. The grievance was investigated by HR after the employee had left the Council's employment and the conclusion was that there was no merit in any of the grievances that had been raised. The ex-employee did not appeal to the Employment Committee.
4. In the time gap between the grievance letter and the outcome, the employee submitted a claim to the Employment Tribunal claiming that he/she had been constructively dismissed, i.e. the employee had resigned directly as a result of a serious breach of contract on the part of the employer, namely (a) a breach of the Fairness and Dignity policy by failing to take the bullying allegations seriously; (b) a breach of the Sickness Absence policy by failing to make a referral to Occupational Health immediately and (c) a breach of the Grievance Procedure by failing to follow through after the failure of mediation.
5. At the Tribunal, the ex-employee argued that he/she had raised the issue of the conduct of the line manager with a senior manager in November 2012 but that nothing had been done and that the alleged bullying had continued until July

2013 at which point the employee had gone off work on stress and had not returned to work prior to the resignation.

6. The Tribunal found as a fact that issues had been raised with the line manager in November 2012 but at that stage the employee had explicitly indicated that the matter was not to be taken forward in any formal or informal process. The Tribunal did criticise the senior manager for not keeping an eye on the situation, particularly after March 2013 when certain issues were raised with the senior manager in an e-mail. The Tribunal suggested that it would have been sensible for the senior manager to have set a date for a review meeting after the November 2013 meeting. However, the Tribunal concluded that this failure did not amount to a serious breach of contract on the part of the Council so as to warrant the employee resigning and claiming constructive dismissal. In coming to this conclusion, the Employment Judge relied heavily upon the fact that within days of the employee going on sick with stress action had been taken, in consultation with HR to arrange mediation between the employee and his/her line manager via the Health Board.
7. The Employment Judge indicated in the Judgment that even if he was wrong in concluding that there was not a serious breach of contract, the Judge took the view that the breach of contract had been waived by the employee in continuing to work for Powys until September 2013, and in particular in agreeing to participate in the mediation sessions referred to above.
8. At the Tribunal it was part of the employee's case that the Council had breached its own absence Sickness Absence policy in failing to refer the employee to Occupational Health upon receipt of a sick note indicating that the reason for absence was stress. The Employment Judge concluded that there was no breach of the Sickness Absence policy because the policy merely indicates in these circumstances a referral "should be" made to Occupational Health and not "must be" made and, in any event, the Judge found that the referral to mediation was a reasonable alternative to a referral to Occupational Health.
9. Para 5.7 of the Grievance Policy states that where one party refuses to continue to participate in mediation or where mediation is not concluded, the mediator will inform the referring manager who will then put forward their final decisions and actions for resolution. No such referral was made by the mediator but the Tribunal considered that this was not a serious breach.
10. I believe no purpose would be served in setting out in this report details of the allegations of bullying that were made, save to advise the Committee that the Tribunal either found that the allegations were unproved or were of such a nature as to not amount to a serious breach of contract on the part of Powys County Council.

#### Learning Points

11. The following learning points have been ascertained from this case and the following issues are being addressed :-

- HR to consider if the Grievance policy needs revising to consider providing for a review meeting following receipt of an informal grievance;
- Remind HR staff and mediators of the need to refer the matter to the line manager if mediation fails for any reason.

## Case 2

The second Employment Tribunal case which we have successfully defended involved an employee with 30 years service with the Council who, in the 3 year period between 2010-2012, had almost one year on sick leave and subsequently went on long term sick leave again as from 1<sup>st</sup> January 2012 and remained on long term sick leave until his/her contract of employment was terminated on grounds of incapacity in August 2012.

The medical evidence from the Council's Occupational Health Advisers and from the employee's consultant clearly indicated that in the period between January and September 2012 the employee was not fit to attend work. In this period three types of medication had been unsuccessful and at the time of dismissal, a fourth pioneering and unlicensed type of medication was to be given.

At the date of dismissal and at the date of Appeal before Members, the medical experts had agreed it was hoped that the employee's medical condition would respond to treatment such that the employee would be able to return to work. However, none of the medical experts was able to give a time line in which the return to work would take place, and because of the pioneering nature of the new type of medication that was to be utilised, there was some reasonable doubt as to whether or not the new treatment would in fact work, bearing in mind that three types of medication had already failed.

The employee was dismissed for incapability on the basis that it was no longer sustainable for the service area to continue to employ the employee, bearing in the impact of the Sickness Absence on the service area, and taking into account the previous record of Sickness Absence.

At the Employment Tribunal, the employee raised the following arguments :-

- (a) Breach of procedure – the employee argued that there had been a number of alleged breaches of the Sickness Absence policy which included writing invitation letters to welfare meetings before we were supposed to do so in accordance with the policy, notwithstanding that the actual welfare meeting was held in accordance with the policy. Not surprisingly, the Tribunal was not concerned with this. In addition, it was argued that the short term absence policy and the long term policy were considered and acted upon by the Council at the same time when there was nothing in the policy to say that this was possible. Once again, the Tribunal was happy that the short term absence part of the policy could naturally progress to involve the long term absence part of the policy. The employee further alleged that we had failed to undertake review meetings as required by the long term absence part of the policy, but the Tribunal was persuaded that the welfare meetings which had been undertaken effectively discussed the same items that would have been

discussed at a formal review meeting. Accordingly, the Tribunal did not feel that undertaking welfare meetings instead of review meetings was unfair.

- (b) Lack of medical evidence – at the Tribunal hearing, the employee argued that the Council had acted unreasonably in dismissing the employee when the medical evidence was unclear as to when the employee should have been able to return to work. It was argued that a reasonable employer should have sought additional information from the employee’s GP and from his Consultant on this point. The Tribunal took the view that this was the wrong question to ask, and that the Tribunal had to ask itself whether the actions of the Council, in dismissing the employee in these circumstances, was itself unreasonable, i.e. was dismissal within the band of reasonable responses of a reasonable employer acting upon the information before it. The Tribunal concluded that in the light of the effect upon the service area and the employee’s past Sickness Absence, that a reasonable employer could have dismissed the employee in these circumstances.

Learning Points from the Case

- (1) HR will consider amending the Sickness Absence policy if they consider it is required to specify within policy that the short term absence part of the policy and the long term absence part of the policy can run in parallel or consecutively and to resolve the issue about whether meetings with employees are called welfare meetings and/or review meetings.
- (2) HR will consider whether letters dealing with sickness should make reference whether meetings are held under the short term absence part of the policy or the long term absence part of the policy or both.
- (3) Legal and HR will discuss improved communications so as to secure the availability of witnesses for Tribunals. Difficulties had been encountered due to the fact that the line manager was absent due to sickness and was not available to give evidence. This had not been communicated to the legal team until a short time before the ET Hearing and resulted in an application to postpone the hearing.

<b>Recommendation:</b>	<b>Reason for Recommendation:</b>
<b>To note the report and learning points.</b>	

<b>Relevant Policy (ies):</b>			
<b>Within Policy:</b>	<b>Y</b>	<b>Within Budget:</b>	<b>Y</b>
<b>Relevant Local Member(s):</b>			
<b>Person(s) To Implement Decision:</b>			
<b>Date By When Decision To Be Implemented:</b>		As soon as possible	
Contact Officer Name:	Tel:	Fax:	Email:
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