CASE NO: 2602588/2018(V)

EMPLOYMENT TRIBUNALS

Claimant: Ms K Miller

Respondent: Earl Shilton Town Council

Heard at: Leicester Tribunal Hearing Centre

On: 9, 10, 11 and 12 March 2020

and

Heard: Remotely, by Cloud Video Platform

On: 21 October and (in chambers) 22 October 2020

Before: Employment Judge Faulkner
Mrs J Morrish
Mr A Wood

Representation
Claimant: Miss S King (Counsel)
Respondent: Mr D Brown (Counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. In contravention of section 40 of the Equality Act 2010, the Respondent harassed the Claimant by the conduct of Mark Jackson on 16 January, 8 May and 15 May 2018.

2. In contravention of section 39 of the Act, the Respondent discriminated against the Claimant because of her sex in relation to the provision of toilet facilities from August 2016 until 18 June 2018.

3. In further contravention of section 39 of the Act, the Respondent victimised the Claimant by dismissing her.

4. The Claimant's remaining complaints are dismissed.

5. The Tribunal will determine the question of remedy at a further Hearing, details of which have been provided to the parties.

REASONS

Complaints

1. By a Claim Form submitted to the Tribunal on 15 November 2018 (after ACAS Early Conciliation from 17 September to 17 October 2018), the Claimant pursues complaints of harassment on the ground of sex and direct sex discrimination. By way of an amendment permitted on the first day of this Hearing, she also pursues a complaint of victimisation. Her complaint of unfair dismissal was previously dismissed on withdrawal.

Issues

2. It was agreed at the outset that the Tribunal should deal with liability first. Apart from some disagreement raised by Mr Brown on day 5 of the Hearing in relation to the complaint of victimisation, to which we will return, the issues to be decided were agreed to be as now follows.

Harassment

3. Did the Respondent, in the person of Mr Mark Jackson, engage in all or any of the following conduct:

3.1. On 15 January 2018, telling the Claimant to go away when she raised with him the receipt of a request for a reference?

3.2. On 16 January 2018, stating to the Claimant when she raised the possibility of delay in returning to work following attendance in a professional capacity at a funeral, "No you won't, I don't want you coming back as a gibbering wreck"?

3.3. On 16 April 2018, being dismissive of the Claimant in relation to a risk assessment?

3.4. On 8 May 2018, after the Claimant raised questions about arrangements for a burial plot, telling her, "I don't give a flying fuck what you have been told"?

3.5. On 15 May 2018, telling the Claimant and her colleague, Mrs Angela Burton, that he wanted to "hear more typing and less talking"?

4. In addition, did the Respondent between August 2016 and 18 June 2018 make inadequate arrangements for the Claimant to share male toilet facilities and/or otherwise provide inadequate toilet facilities for the Claimant?

5. If the Respondent engaged in any of the above conduct, was it unwanted?

6. If so, did it relate to the protected characteristic of sex?

7. If so, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Discrimination

8. If the Claimant was not harassed in relation to any or all of the matters set out above, she complains alternatively that she was directly discriminated against because of sex. She also says that her dismissal was an act of direct sex discrimination. The issues for the Tribunal to decide were as follows:

8.1. It being admitted that the Claimant was dismissed, did the Respondent by the alleged conduct referred to at paragraphs 3.1 to 4 above subject her to a detriment or detriments?

8.2. If it did, did it treat the Claimant less favourably than it treated or would have treated a hypothetical male comparator in materially similar circumstances?

8.3. If so, was that treatment because of sex?

Victimisation

9. The Claimant's alternative case in relation to her dismissal is that it was an act of victimisation. The issues to be decided were as now follows.

10. The first is whether the Respondent believed that the Claimant may do a protected act. The Claimant says the Respondent believed she would make a formal allegation of a breach of the Equality Act 2010 ("the Act") to her trade union and/or then bring a claim to the employment tribunal pursuant to the Act.

11. As indicated above, there was some dispute at the start of day 5 of this Hearing as to whether Miss King had on day 3, more than seven months previously, narrowed the Claimant's case in this regard to the effect that what the Respondent believed was that the Claimant would complain about Mr Jackson's pre-dismissal conduct. In our view, that is a dispute of no material significance, regrettably symptomatic of the numerous disputes between the parties in the conduct of this case. Employment Judge Faulkner's notes of day 3 of the Hearing record Miss King responding to Mr Brown's question about what the Respondent believed the Claimant would do, as follows:

"*That C would make formal allegation of Equality Act breach to union [there is then a reference to an email of 3 June 2018 which we will come to below]. Then likely to bring ET*".

12. That is precisely what is stated above. The same notes then record Mr Brown asking whether the Respondent is said to have believed that the Claimant would make global or specific allegations of discrimination. Miss King replied by reference to an e-mail of 4 June 2018 sent to the Respondent by its adviser, which we will also come to below, which referred to sex discrimination and harassment. She went on to say that this is what the Respondent believed, related to the behaviour of Mr Jackson.

13. We are therefore amply satisfied that the issues we have to decide in relation to the Respondent's belief about a protected act are as set out above. It is plain that Miss King's second comment, namely that the Claimant relied on a belief that she

would "complain about Mr Jackson's conduct", was supplementary to and very obviously broad enough to include, her clear statement that the belief was the Claimant would make a formal allegation of a breach of the Act to the Claimant's trade union and bring a claim to the Tribunal about that conduct.

14. Accordingly, if the Respondent did have the belief in question the second issue is whether the Claimant was dismissed wholly or partly because of the Respondent's belief.

Time limits

15. The Tribunal is also required to consider time limit issues in relation to the complaints of harassment, alternatively direct discrimination, relating to the matters set out at paragraphs 3.1 to 4 above to the extent that they were brought after the end of the period of three months (plus any additional time as a result of ACAS Early Conciliation) starting with the date of the acts to which the complaints relate. It is accepted the complaints in relation to the dismissal were brought in time (see further below our decision on the amendment application). The issues to be decided were therefore:

15.1. Whether any such complaints which the Tribunal determines in the Claimant's favour related to conduct extending over the period ending with the Claimant's dismissal, so as to be treated as done at the end of that period.

15.2. If not, whether the complaints were brought within such other period as the Tribunal thinks just and equitable.

Procedural matters

Amendment application

16. Much of the first day of this Hearing was taken up with an application by the Claimant to amend her claim.

17. In short, the parties had agreed a list of issues, following a Case Management Hearing in April 2019. That list set out the Claimant's case that her dismissal was an act of direct sex discrimination. Two working days before the start of this Hearing the Claimant's solicitors made an application to amend the Claim so as to argue in the alternative that the dismissal was an act of victimisation.

18. We heard the representations of both counsel and considered the Presidential Guidance on Case Management and the requirements of the overriding objective referred to in rule 2 of the Tribunal Rules of Procedure. We also considered the decisions in **Cocking v Sandhurst Stationers Ltd [1974] ICR 650** and **Selkent Bus Co Ltd v Moore [1996] ICR 836**. Having done so, we unanimously decided to grant the Claimant's application for the following reasons:

18.1. The amendment was clear, so that the Tribunal was in no doubt about the case which the Claimant wished to make. As Mr Brown submitted, a complaint relying on section 27(1)(b) of the Act, namely that the Respondent believed the Claimant would do a protected act, is much less common than a complaint of victimisation relying on an actual protected act. That did not seem to us in any sense however, a matter that we should take into account in deciding the application.

18.2. A complaint of victimisation is clearly a different cause of action to one of direct discrimination. Nevertheless, the fundamental question in both types of complaint, where the act of discrimination/victimisation is said to be dismissal, is what was in the minds of the decision-makers. It was not said by either party and did not seem likely to us – nor in fact nor did it turn out to be the case – that substantial new documentary evidence or factual issues would have to be addressed.

18.3. Crucially, it is plain that the complaints to the Respondent about her treatment, which form part of what the Claimant relies on as having given rise to the Respondent's belief that she would do a protected act, namely her email of 8 May and her fiancé's email of 15 May 2018, were clearly referenced in her Claim Form. Moreover, at paragraph 11 of the Particulars of Claim, the Claimant contended that the reason for dismissal was her raising concerns about the conduct of Mr Jackson and about the Respondent's working practices. Accordingly, the substance and indeed the relevant detail of the victimisation complaint was plainly set out.

18.4. The timing of the amendment was of course against the Claimant, coming so close to the start of this Hearing. She was legally advised throughout. Nevertheless, on the crucial subject of the balance of prejudice between the parties, we were not persuaded that there was any substantial prejudice to the Respondent created by the lateness of the application. The question of dismissal and the reasons for dismissal were already in play. Those who decided to dismiss the Claimant, and who therefore must be taken to have known the reasons for their actions, were already present to give evidence. As already stated, no new documents, or at least no substantial number of new documents, were to be relied upon by either party. Mr Brown sought to contend that the Respondent's HR Adviser, Mr Moses, or possibly other councillors, who were not present at this Hearing, might have relevant evidence to give which the Respondent should be able to call. We were not persuaded however that any of them could say anything which those councillors already present could not say themselves and simply having additional witnesses to say the same thing did not seem to us something which would substantially assist the Respondent. As it happens, in the circumstances referred to below, no additional witness was in fact called by the Respondent, even though it had several months to collate and seek to adduce any further evidence it thought relevant in a long adjournment.

18.5. On the other hand, as Miss King pointed out, there was the potential for substantial prejudice to the Claimant if we were to find that the real reason for her dismissal was the belief that she would do a protected act in circumstances where she would be left without the opportunity to argue that as part of her case.

18.6. In conclusion, we were satisfied that the amendment sought was really the re-labelling of facts already pleaded by the Claimant and that the balance of prejudice plainly favoured allowing the amendment. No time limit issues therefore arose, as Mr Brown conceded. The amendment application was granted.

Documents

19. There were regrettably a number of disputes between the parties about documents which it was also necessary for the Tribunal to resolve, even when after the amendment application had been decided we made clear to the parties that such matters should be agreed if at all possible. Even on the fourth day of the Hearing, there was a further dispute about documents. A number of items were admitted by

agreement, including extracts from the Claimant's diary and text messages between the Claimant and Mrs Coe on the one hand and between the Claimant and Mrs Burton on the other, together with a flowchart referred to by the Claimant at a meeting on 8 May 2018.

20. Particularly in view of the loss of a whole day to dealing with the amendment application and document disputes, it was plain that we would not get to issues of remedy (if relevant). Accordingly, there was no discussion of the large number of mitigation documents which the Claimant seeks to introduce. As to the remainder of the documents in dispute, in no particular order, our decisions were as follows, all such documents having been produced on the first morning of this Hearing:

20.1. The Respondent sought to introduce a recently taken photograph of the outside of its toilet facilities which, as noted above, is the basis of one of the Claimant's complaints of discrimination. It is accepted that one of the signs on the door was not used when the Claimant was employed. Miss King objected to the introduction of the photograph because it did not clearly show what was beyond the door in question, namely a trough urinal. In our judgment, there was no prejudice to the Claimant in this document being included in the bundle. Any dispute that the photograph does not show the complete picture could be dealt with in oral evidence.

20.2. The Claimant sought to introduce a reference from her current employer, with whom she obtained employment relatively quickly after dismissal by the Respondent. This was apparently to rebut the criticisms of her performance which the Respondent says, in part, led it to dismiss her. Whilst we acknowledged that we may not attach much weight to the document given that, as the Respondent points out, it was her performance with the Respondent that matters, we accepted the Claimant's argument that it may have some probative value. There was no prejudice to the Respondent in it being admitted, as any issues arising from it could be dealt with in cross-examination and submissions. Somewhat frustratingly, neither party referenced the document in evidence or submissions.

20.3. We took a different view of the medical letters the Claimant sought to introduce relating to her gynaecological problems. Miss King wanted them included in the bundle to show the Claimant took the problems with the toilet facilities very seriously, which it is said the Respondent did not appear to accept. In our judgment, it was right to exclude this material on relevance grounds. Whether the Claimant disclosed medical issues of this nature could be dealt with – and, as it turned out, was – in oral evidence; we did not see how our considering medical accounts of the Claimant's condition would add to the understanding needed to help us decide the issues.

20.4. Still further documents were introduced on day 5, namely diary extracts produced by Mr Jackson. His evidence having been completed, we made clear we would attach no weight to them. As things turned out, they were not referred to in evidence or submissions.

Postponement application

21. Mr Brown applied for this Hearing to be postponed principally on the basis of the amendment application having been granted. For the reasons given above, we did not think the Respondent had been prejudiced in that regard and Mr Brown's further submissions on prejudice did not add a great deal to the matters we had already taken into account. Although emphasising the collective nature of the Respondent's decision-making processes, he accepted that Councillors Coe and Phelps, who were

present at this Hearing, could give evidence on the reasons for dismissal. He also conceded that having to deal with issues arising from the new documents referred to above did not add much weight to his application. To the extent new issues might arise from them, there was in our view time for him to consider them and put them to his own witnesses or to the Claimant as required.

22. Both Counsel were concerned about the case not being completed in the allotted four days – or three days by the time all preliminary matters had been determined. Miss King was more ambivalent about postponement but she preferred that to the matter being part-heard. We were also concerned about that, and in the end that is what happened, not least because of the time lost to the disputes described above.

23. We nevertheless considered that proceeding as far as we could, with the possibility that the case might be completed, was to be preferred to rearranging the Hearing altogether. At that point, the earliest dates that could be offered for the four days that were clearly required were 1 to 4 September 2020. One of the Respondent's witnesses is undergoing cancer treatment and we were told that surgery was a distinct possibility. Whilst that witness was as helpful as the Tribunal could have expected in indicating their availability, naturally they could not say for sure whether they would be available in September. On that basis, we considered it better to proceed, including ensuring that person's evidence was heard in the March hearing slot, and to add a further day if needed. As it happens, at the time it was possible for the further day to be accommodated relatively quickly, on 18 May 2020. The parties were not ready to proceed on that day. In part because of that and in part because of the general delays caused by the COVID-19 pandemic, the Hearing eventually resumed therefore on 21 October by Cloud Video Platform, when we heard the final witness and submissions. The Tribunal panel met on the following day to deliberate.

24. As a final preliminary point in this long list, we note that during the course of their extensive disputes about documents, and the amendment application, both parties referred to possible applications for costs. As we made clear at the time, that was plainly a matter to be reserved to a later date should either party continue to regard it as relevant.

Facts

25. As set out above, we eventually reached the position of having an agreed bundle and supplementary bundle. Page numbers below refer to the bundle unless prefixed with SB, which is a reference to the supplementary bundle. We made clear it was for the parties to draw our attention to documents in either bundle if they wanted us to take them into account in reaching our decision.

26. We read statements and heard evidence from the Claimant; Mr R Phelps, Councillor and Chair of the Respondent's Staffing Committee from May 2017 to April 2019 (he also produced a supplementary statement); Mrs C Coe, who is the Respondent's Mayor and Chair of the Council; Mr M Jackson who is employed by the Respondent as Town Clerk; and Mrs A Burton who was previously employed as an Office Assistant and is now a councillor.

27. Based on this material, we make the findings of fact which now follow, confining those findings to matters relevant to the issues we have to determine. Much of the

factual context is uncontentious, though of course still important to set out. Where there were important disputes between the parties, we make our findings on the balance of probabilities.

Background

28. The Respondent is a town council, with volunteer elected councillors, including at the relevant dates for this case Mrs Coe and Mr Phelps. It has a very small number of employees. Mr Jackson is and was at the relevant times employed as Town Clerk, in effect the main executive officer of the Council who is expected to ensure that its instructions are implemented and that its resources and employees are effectively managed. Mrs Burton was employed as an Office Assistant until she retired in September 2018.

29. The Claimant was employed from 30 August 2016 as an Office Clerk. Mr Jackson was line manager for both the Claimant and Mrs Burton. The Claimant says that she took the role on the understanding she would be promoted to the role of Deputy Town Clerk after completing certain qualifications. In the end this did not seem to us to be materially relevant to the issues to be decided, although because it cropped up in relevant exchanges between the parties, we mention it briefly.

30. Within the Claimant's contract of employment – see page 62 – it was provided that if she was not CiLCA (Certificate in Local Council Administration) qualified when appointed, for success in obtaining one of the relevant qualifications her salary scale point would be increased. It is agreed the contract did not guarantee a change of job title. The Claimant completed the CiLCA qualification in February 2018. Although she was given a salary rise on obtaining the qualification, she was not promoted, a decision taken by Council members at the Staffing Committee meeting on 13 March 2018 – see pages 82a and 82b. The Claimant says this was deeply disappointing to her and that she asked for guidance in meetings as to how she might be promoted, including with Mr Phelps, but received no feedback.

31. We now turn to the Claimant's allegations of harassment, alternatively discrimination, related to the alleged conduct of Mr Jackson, who she describes as very dismissive of, and having a verbally aggressive approach towards, female members of staff. She says she first raised concerns about Mr Jackson with Mr Phelps and another Councillor in January 2018, but there was no meaningful response. Mr Phelps does not recall a complaint before May 2018 – see below. There was no documentary record of any complaint before that date.

Reference request (15 January 2018)

32. The Claimant's first allegation is that on 15 January 2018 she approached Mr Jackson about a reference request the Respondent had received and that he responded by telling her to "go away".

33. This was a particularly busy time, partly because the Respondent did not have a full staff complement in the office, but principally because Mr Jackson was preparing for a full Council meeting the next day which would decide the budget for the next financial year. He says that his workload at such times means it would not be unusual for him to tell an employee, or indeed councillors, that certain items of work would have to wait their turn. He denies however that he told the Claimant to "go away". He says that he said he was "too busy now, you will have to go away for

now". The Claimant's case is that she cannot imagine Mr Jackson speaking to a male member of staff in the same way.

"Gibbering wreck" comment (16 January 2018)

34. The second allegation is that on 16 January 2018 the Claimant was due to attend a funeral for a young person, as part of her duties to the Respondent, and advised Mr Jackson that she might be away from the office for longer than usual because checking the relevant formalities might take longer than normal in the circumstances (this seems to have included the likelihood of a larger than normal gathering). She alleges that Mr Jackson responding by saying, "No you won't, I don't want you coming back a gibbering wreck, it's business".

35. Mr Jackson says the Claimant had a habit of becoming "immersed" in the work of funeral directors and the personal grief of bereaved families. According to his oral evidence, he bases this on two things, first, conversations involving the Claimant in the Respondent's office and secondly on the time that she took to attend funerals. On the day in question, he says that she indicated in some way that the funeral was going to affect her. He says he directed her that her role was simply to check that the nameplate on the casket matched the relevant paperwork, though he accepts that the nature of the role required a balancing act between administrative practicalities and sensitivity to the public.

36. Mr Jackson admits (paragraph 24(c) of his statement) he "may have" said that he did not want the Claimant to come back to the office a gibbering wreck and in his oral evidence essentially agreed that he had. He said in his statement that if he did, it was out of concern for her wellbeing, though in oral evidence he said it was more a common-sense direction for someone who had a job to do and who was in an emotional state before she left the office.

37. He says a similar comment would have been made to any member of staff, as he was emphasising the need to be professional. When asked to provide an example of using the phrase "gibbering wreck" with a male colleague at any point during his career, Mr Jackson gave the example of a colleague in the army who had encountered a very serious incident which could have killed him. He could not recall using the phrase to him, but may have used it about him.

Risk assessment (16 April 2018)

38. The third allegation is that on 16 April 2018 the Claimant passed an e-mail regarding a risk assessment to Mr Jackson and was told that he did not have time to look at it, in a dismissive manner.

39. Mr Jackson says he cannot recall the risk assessment. Mrs Burton was away and he had to leave the office at 2.00 pm for a dental appointment, so that it is agreed that it was a pressurised day. His view is that the Claimant had sufficient experience and qualifications to deal with the matter unsupervised. The Claimant accepts that the comment was not related to sex, but does not think that Mr Jackson would have responded to a man in the same unhelpful way.

40. It appears that the Claimant did not raise with the Respondent any of the three matters summarised above until after her dismissal.

Use of foul language (8 May 2018)

41. The fourth allegation concerns the use of foul language by Mr Jackson on 8 May 2018. The Claimant had attended a course, and based on what she had learned raised questions with Mr Jackson about the correct procedures relating to the deeds for a burial plot. She wanted to write to solicitors to the effect that they should take responsibility for an unexpired deed. She produced a Power-point presentation and flowchart from her course (page SB21) in an attempt to explain her approach. Mr Jackson responded to the effect, "I don't give a flying fuck what you have been told, a solicitor cannot be a deed holder".

42. The Claimant raised a complaint by e-mail to Mr Phelps on 8 May 2018 – pages 89 and 90. This was the first time she raised concerns in writing about Mr Jackson's conduct. As well as the comment, she also raised concerns about the Respondent's lone working policy, risk assessments and similar matters. She did not suggest that she was being treated differently to how Mr Jackson would treat a man. We return to her complaint below.

43. Mr Jackson says he cannot excuse the comment, which he accepts was wholly unacceptable. It is agreed that he had a heavy workload on this particular occasion and that there had been some dialogue about the matter the Claimant was raising before the comment was made. He says that he told the Claimant that he disagreed with her assessment of the legalities, reminding her he had an important planning committee meeting to prepare for which was due to commence that evening.

44. He says that it was when she continued to talk to him, wave her course notes in front of him and say that the matter was urgent, that he made the comment. He accepts that advice subsequently obtained by the Respondent was consistent with the Claimant's flowchart, though he also says the Claimant did not explain the options to him. She persisted, he says, even when he explained that from a practical point of view, he needed a lever to try to engage solicitors in a discussion about taking on the deeds.

45. The Claimant says that regardless of the context a man would not have been spoken to by Mr Jackson in the same way. He says that the comment was not directed at her, in other words it was a less offensive comment than "fuck you" or similar. He does not agree that he was trying to put her back in her place. He is unable to recall swearing at a male colleague. The closest parallel he could recall was that a male member of staff reporting to him in a previous role was "reprimanded" for spending money improperly.

46. No action was taken against Mr Jackson in respect of this conduct; Mrs Coe could not recall that possibility being discussed by the Staffing Committee, though as will appear below it was later raised by two councillors, which Mr Phelps says would have been embarrassing for Mr Jackson.

Toilet facilities

47. The Claimant's email of 8 May 2018 referred to above also raised her concern at having to share male toilets.

48. It is agreed that the Respondent operates from a building owned by the Methodist Church and that the building also hosts a children's nursery or playgroup, which uses the female toilets for the children. The Claimant says that the female

toilets were therefore often off limits during pretty much all of her working hours during term time, unless she could get permission from a member of the playgroup staff to use them. The playgroup manager asked that the Claimant and Mrs Burton be DBS checked, at its expense, for this purpose. Mr Jackson says there were no objections to this arrangement from either the Claimant or Mrs Burton, but accepts that they did have to attract the attention of playgroup staff in order to use the toilet.

49. The arrangement for use of the male toilets – which were not used by the children – applied from around May 2017 following a discussion involving Mr Jackson, Mrs Burton and the Claimant. Mr Jackson says he offered it as a common-sense arrangement. As a general rule, from this point onwards the male toilet facilities were used by Mr Jackson, Mrs Burton and the Claimant, and sometimes by a male employee of the playgroup.

50. It is accepted that the male toilet facilities consisted of a single cubicle and a trough urinal. There was a sign that was to be placed on the entrance door when the toilet was "In use by a female" (something akin to that shown at page SB20), though it does not appear to have always remained in place. It did mean that if a female was using the male toilet, Mr Jackson had no toilet facility himself. The cubicle, which of course was the only facility suitable for women, could only be accessed by passing the urinal. It is accepted that there was no lock on the entrance door until June 2018 and Mr Jackson also accepted that there was, as a result, a risk of a man entering the facility regardless of the sign on the door. This meant that a woman might see a man using the urinal if she came out of the cubicle without knowing that he was there. Mr Jackson accepted that a man would not see a woman in similar circumstances.

51. The Claimant says that she tried to use the female toilets if she could, as her preferred option, but often had no choice but to use the male facilities, if the toilet was needed urgently. She also says that the male toilets had no sanitary bin, no hot water (it was turned off in the building because of the children) and sometimes no soap.

52. The Claimant raised her concerns about the toilet facilities with Mr Jackson in January 2018 when, after gynaecological surgery, her menstrual cycle restarted. She says that nothing was done however, and so she raised it again in her 8 May email. Mr Jackson says he spoke to the playgroup about direct access for the Claimant in January 2018 and told her following that conversation that from then on, she did not need permission to use the female toilet. Accordingly he does not know why the Claimant complained about the toilet facilities in her e-mail of 8 May and nor could he explain his e-mail to Mr Moses of 27 June 2018 (after the Claimant's dismissal), at page 138, in which he referred to a requirement for female staff to inform the play group of the need to use the facilities so that they could double-check that no child was in there. He could only say that his email was "an incomplete precis".

53. Mrs Burton says that the female toilet was available to use but it was more convenient to use the male toilet because they were required to ask permission from a member of the playgroup staff otherwise, which was not always possible given that the staff were very busy with the children – she says at paragraph 10 of her statement, "*It was not always easy to attract their attention*". She did not herself have a problem using the male toilet.

54. Mrs Coe contacted a representative of the Methodist church on 20 May 2018 (page 94), asking that the church provide a sanitary bin in the male toilet and a bolt to be fitted to the door to prevent access to the toilet area when it was in use. She also raised the question of ensuring that there was a clean towel and soap available at all times. Again, the Respondent has not explained why this was necessary if Mr Jackson had made an arrangement for use of the female toilet without playgroup permission back in January.

55. Mrs Coe confirmed that she had contacted the church in an e-mail to Mr Jackson on 20 May 2018 which was forwarded to the Claimant and Mrs Burton – pages 94 to 95. Mrs Coe chased the church representative on 4 June 2018 (page 119) to check when a bolt would be fitted. It appears that this had been sorted out, together with provision of a bin of some description for disposal of sanitary products, by the time the Claimant returned from sick leave on 11 June 2018. The Claimant was told by Mr Jackson to tell the caretaker for the building when she had used the bin so that it could be emptied. She felt that this was an invasion of her privacy.

Comments to Claimant and Mrs Burton (15 May 2018)

56. The final allegation related to Mr Jackson's conduct is that on 15 May 2018 Ms Burton and the Claimant were told that he "*wanted to hear more typing and less talking*". The Claimant says that as a result of this incident Mrs Burton ended up going home early because she felt too upset to work.

57. Later that same day, the Claimant's fiancé, David Howkins, emailed Mr Phelps – see page 92. The Claimant did not know that he would send the e-mail nor did she discuss its contents with Mr Howkins. The email said:

"*Good evening Rob. We haven't met but I have heard a lot of good things about you from my partner Karen Miller. I feel I need to contact you regarding the continued bullying in the Parish Council office towards various members of staff by the acting manager Mark. It would seem another member of staff walked from the office today unable to deal with the regimented way they are spoken to. Angela left in tears today regarding a comment directed at her and Karen. This is not now a safe and stress-free environment to continue to work for female members of staff. Toilet welfare facilities and protection under your current working practices for lone working do not safeguard staff. Could you please inform either myself or Karen how improvements are going to be implemented over the next few days to stop the current way staff are spoken to under your equality and diversity established protocols as this will need to be taken to the tribunal if it continues*".

58. Mr Phelps replied later the same night (page 92) saying that the email would be discussed at a Staffing Committee meeting on 22 May. He forwarded Mr Howkins' email to Mrs Coe and the other members of the Committee. Mrs Coe forwarded it to Mr Moses. Mr Moses replied (page 91) stating that Mr Phelps should inform Mr Howkins that if the Claimant wanted to complain she should do so by talking to members of the Committee herself. Mr Moses' email was forwarded to Mr Jackson. Mr Howkins was not made aware that this is what the Claimant should do.

59. Mrs Burton agrees the comment about "more typing and less talking" was made, but says that Mr Jackson was simply doing his job as there had been a lot of talking that day when there was a lot of work that needed to be completed. She says that she did not go home because she was upset, but because she had a headache. She says in her statement that on returning to work she spoke to one of the

councillors because of problems resulting from how the Claimant was behaving, but accepts that her text message sent to the Claimant that evening (page SB4), saying, "*I can't talk to Mark for fear of crying*", rather suggests that her difficulty was with Mr Jackson's conduct.

60. Her oral evidence was that it was true in part that she was having difficulty with Mr Jackson – his high standards meant he was sometimes abrupt in manner – but that her concerns were about the tensions in the office generally. Mr Jackson essentially agreed with Mrs Burton's evidence, being surprised that the Claimant was upset and saying that it was the only occasion on which he had ever admonished her. He says his comment may have been cold in manner, but was not untoward. The annual meeting of the full council was to be held later that day and therefore much work needed to be done. He says that he would have made the same request to any employee under his management, male or female, and indeed would have spoken more plainly with male colleagues. The Claimant said that she could have been asked to get on with her work, rather than being told to do so in this particular way, and does not think that men would have been spoken to similarly.

61. The relevant text messages between the Claimant and Mrs Burton are at pages SB3 to SB12. They record Mrs Burton making the following comments about Mr Jackson: "*You wouldn't believe how Mark spoke to me yesterday xxx*"; "*I can't talk to Mark for fear of crying xxx"*; a discussion of her options including resigning; "*That office could & should be a lovely place to work with only 3 of us. I think he's got a massive problem*"; "*I haven't documented all the times he's pissed me off & been nasty to you*"; "*You're the only shining light in that miserable place"; "I'm desperately unhappy there*"; "*Do we have a grievance policy?*"; "*So sorry for leaving you my lovely but I couldn't stay there another minute. I wasn't going to cry in front of him. Actually, I have got a headache now – not for the first time from things he's said*"; "*I was trembling when I got home, I was so upset*".

62. Although she initiated the text conversation with the Claimant, Mrs Burton's evidence is that she cannot explain them, describing Mr Jackson as someone who always goes the extra mile to do his work and who always treated her with respect and kindness. Mrs Coe gave similar evidence. Mr Phelps in his supplementary statement refers to the fact that there are two women working in the office now and there are no difficulties; he adds that a third of Council members are women.

63. Mrs Burton says that the Claimant drew her into her "stupid, childish games" and that she wholeheartedly regrets sending the messages. She nevertheless accepts that her texts do not portray that she held the view that Mr Jackson was respectful and kind. She says that things changed when the Claimant was employed when, as she puts it, she was "stupidly taken in" by the Claimant. She agreed in oral evidence however that she had a very good relationship with the Claimant, in one text message at page 152, describing herself as the Claimant's "*work mummy*".

64. The Claimant did not herself raise any complaint about what happened on 15 May 2018 until after her dismissal. In giving an example of speaking to a male colleague in similar terms, Mr Jackson referred to one of the Respondent's groundsman who saw on Mr Jackson's desk the terms and conditions of employment of Mr Jackson's predecessor and referred to them in discussions outside of the office during an informal gathering of employees and former employees. He was given a "stern verbal warning" and told that further conduct of a similar nature could lead to his dismissal.

Conduct of the Claimant's complaint

65. Although how the Respondent dealt with her email complaint of 8 May 2018 is not itself the subject of an allegation of harassment or discrimination, it is relevant for us to say something about it.

66. The Claimant ended that email by saying, "*I can no longer deal with the situation or working environment [she was evidently referring to the alleged behaviour of Mr Jackson] as it goes against my professional beliefs*". She sent a further email later the same evening (page 87) asking for Mr Phelps' advice on the "*preferred action should I encounter a repeat of today's incident and bullying*" and pointing out that only she and Mr Jackson would be in the office the following day. Mr Phelps replied – also page 87 – advising the Claimant to keep a record of events and suggesting she may also want to stay away from work if she considered it necessary. He says at paragraph 16 of his statement that he was not endorsing her complaints, but wanted to give her the power to decide what she felt was best for her.

67. The Respondent's grievance procedure is at pages 58 to 60. It provides that the hearing panel may ask the employee what they want as an outcome, which will be borne in mind when preparing a response to the grievance. It also provides that the employee will receive a written outcome, with an action plan where appropriate, to assist with resolution of the problem, and be given the right to appeal the decision if unhappy with it. In relation to complaints of bullying and harassment there appears to be the possibility of a third level of discussion if matters remain unresolved as far as the employee is concerned. In the Claimant's contract (page 66) it is said that a process of mediation will be entered into before formal grievance processes are undertaken, and that "*where necessary*" the Respondent will seek the help of an external mediator.

68. On 10 May 2018 (page 89) Mr Phelps emailed the Claimant asking "*How are things now Karen?*". She replied to the effect that she had decided not to ask Mr Jackson about the deeds again and so had sent out a letter, trusting her judgment and training. She concluded, "*I trust appropriate action is being taken*". Mr Phelps replied on 11 May 2018 (pages 88 to 89) saying "*Staffing [Committee] are meeting this morning. I have been asked, is this a formal grievance you are putting in?*" The Claimant replied in an e-mail of the same day that she wished to raise a formal grievance – page 88: "*I don't feel I have any other option but to log it formally as this is not the first time and other staff are having problems too. //I also would like it formally noted regarding risk assessment, health and safety and welfare facilities. //I am sorry*". The Respondent's Staffing Committee, comprising Mr Phelps, Mrs Coe and two other councillors, then met to discuss the best course of action. There are no notes of that meeting. Mr Phelps and Mrs Coe then met with Mr Jackson, whilst the other councillors met with the Claimant, and then everyone gathered together for a discussion. There are no notes of those discussions either. Mr Jackson apologised for swearing, saying that the swearing was not directed at the Claimant herself. Mr Phelps says he asked the Claimant whether she was happy that this closed the matter and that she said she was; Mr Jackson and Mrs Coe both say the same. The Claimant says she accepted the apology, but not that the matter was dealt with; she says she still expected a proper investigation and did not say she was happy with the outcome or regard the matter as closed. She left the meeting early.

69. The Staffing Committee met again on 22 May 2018, without Mr Jackson. The minutes are at pages 96 to 97. They discussed the Claimant's complaint in respect

both of Mr Jackson's conduct and the staff toilets, stating that she "*had agreed for this matter to be investigated as an informal complaint*" and that both she and Mr Jackson were satisfied with the outcome after the interviews referred to above. Mrs Coe agrees that it was not correct that the Claimant was content for the matter to be dealt with informally in the light of what the Claimant had said in her email of 11 May (page 88). Indeed, Mr Phelps says in his statement (paragraph 19) that the Claimant told him she did not want the matter dealt with informally. It appears from the outcome of that meeting (see below) that the Committee members also discussed the Claimant's concerns about her job title and position.

70. Mr Phelps then drafted a letter to the Claimant, on 23 May 2018, regarding what had been discussed – see page 100 – but it was never passed on. He said in the draft letter that the Committee concluded that the Claimant did not yet have the experience to become Deputy Town Clerk, though this would be revisited in a year's time. Salary and lone working arrangements were touched on, and then in relation to toilet facilities the email said that the landlord would "*provide a sanitary bin in the 'Gents' toilet [quotation marks original], [and] a bolt on the internal door before the urinals, and [would] endeavour to provide a towel and soap at all times*". Mr Phelps had hoped to communicate the outcome in person, but the Claimant's sickness absence and the voluntary nature of his role meant that their paths did not cross.

71. There was then a meeting on 24 May 2018, between Mrs Coe, the Claimant, Mrs Burton and Mr Jackson. Mrs Coe later produced a note of that meeting, which is at page 101. The note records that staff in the office should talk things through before "*things fester*" and lead to a formal complaint and should "*always treat one another with respect*". As to the Deputy Town Clerk Role, the Staffing Committee's decision was confirmed. Mrs Coe is also recorded as asking the Claimant whether she needed more time off following a family bereavement.

72. The Claimant was off work because of sickness from 29 May until 11 June 2018. She emailed Mr Phelps on 30 May 2018 – page 106 – asking for confirmation of what action had been taken regarding Mr Jackson's behaviour on 8 May 2018, and how this would be monitored. She also stated she had been told Mr Phelps had prepared a letter regarding other matters, including the Deputy Clerk role.

73. Mr Phelps replied on 1 June – pages 104 to 106. As to the Deputy Clerk role, he stated briefly that there was no contractual obligation to create the post. Other issues were addressed. On the question of toilet facilities, he said, "*You have previously raised an issue regarding provision of female toilets, which I understand was resolved on the 20th May* [it is not clear to the Tribunal how that could be the case given the draft letter promising these arrangements had only been prepared on 23 May]*, and of which you are now fully aware. The Council is providing for toilet and sanitary facilities for female and male staff*". As to Mr Jackson's conduct on 8 May, he wrote, "*As you are aware, this matter was fully investigated at a meeting with all parties, including yourself, on 11 May. The clerk accepted that his conduct had been unacceptable, although not directed at any individual, and apologised for any distress it may have caused. In response, you accepted his explanation and apology, and informed the meeting that you were happy with that outcome. Consequently, it would be reasonable to conclude that the matter had been addressed to your satisfaction unless you now wish to inform me otherwise*".

74. The Claimant said in an email reply on 3 June (page 104) "*Thank you for your official response to my complaint and concerns regarding the running of the Town*

Council and the clarification of my role as Office Clerk". She stated that she had accepted the apology but that this did not excuse "*the aggressive and regimented attitude to office staff*", and so added "*I am addressing these concerns with my union representative*". The email did not mention sex discrimination, though Mr Phelps accepts it shows the Claimant did not think the outcome of her complaint satisfactory. He also accepts the Respondent knew the Claimant's comment in this email about Mr Jackson's attitude was a reference to Mr Howkins' email of 15 May.

Claimant attending work during sickness absence

75. Departing briefly from our generally chronological account, both the Claimant and Mrs Coe referred in their evidence to an incident which took place on or around 23 March 2018, when it is alleged that Mrs Coe required the Claimant to attend work to sign a document even though the Claimant was recovering from surgery. It seems appropriate to mention it at this point, after dealing with pre-dismissal matters and before coming on to the Claimant's dismissal, not least because it is relevant to Mr Brown's submissions on witness credibility.

76. The Claimant contacted Mr Phelps to complain about this in April 2018. Mrs Coe produced a statement (page 83), strongly rebutting the complaint and stating that the Claimant had volunteered to come into work to sign the document. She received an email from Mr Phelps about the matter whilst subsequently on holiday and emailed Mr Phelps and others in response (pages 84 – 85). Her note at page 83 was evidently a response to that. She says that she was very upset by the accusation, as is clear from a subsequent email sent to Mr Jackson on 19 April 2018 at page 85.

77. It was Mrs Burton who first called the Claimant on the day in question because she did not know what to do about the matter. The Claimant asked whether Mrs Burton wanted her to call Mrs Coe, which she did. The contemporaneous text exchanges between the Claimant and Mrs Coe about the signing of the document, at pages SB1 to SB2, suggest that the Claimant raised the point that the document needed to be dealt with on that day, Mrs Coe replying, "*Please don't worry…*". The Claimant says she felt under pressure to go in because the document needed signing and there was no one else available to do so apart from her. She says that Mrs Coe stated that the document had to go out that day (Mrs Coe denies saying it was urgent) and that when the Claimant said her friend would drive her into the office (the Claimant herself was unable to drive), Mrs Coe did not disagree.

Dismissal

78. On 4 June 2018, Mrs Coe exchanged emails with Mr Moses – pages 115 – 117. There had evidently been discussions with Mr Moses beforehand, but we heard no evidence about those. The email exchange began with Mrs Coe asking a question regarding the Claimant's union membership, following on from the Claimant's statement in her email of 3 June to Mr Phelps that she would be contacting the union. Mr Phelps accepts (supplementary statement paragraph 10) that as of 3 June the Respondent suspected the Claimant might bring a claim and/or seek advice on the claims she might bring, though he flatly denied this could include a claim of sex discrimination.

79. Mr Moses' reply of 4 June 2018 (pages 116 to 117) stated that the Claimant was "*unhappy at not being given the title of deputy clerk*", which Mr Phelps says was his view, and about her working relationship with Mr Jackson. He advised that as covered in previous emails (which were not in the bundle) she had "*no entitlement*"

to the title of Deputy Clerk and that Mr Jackson had "*not committed any acts of harassment or discrimination*". Mr Phelps accepts that this indicates the Respondent had discussed harassment and discrimination issues more than once.

80. Mr Moses went on to say that "*the overall picture is one of unhappiness on the employee's part, and one which you may feel is unlikely to improve. Consequently, a short service dismissal is an option the Council may wish to consider, which would have to be executed in either June or July. //The only potential risk with that option would be a claim for whistle blowing protection, if the issues regarding the Council's health and safety management procedures could be treated as a protected disclosure … //I would suggest that the staffing committee investigate whether or not this is a likelihood by conducting an informal grievance meeting with her*".

81. Mrs Coe replied on the same day asking what the position would be if the Claimant did not return to work because of sickness. She went on to state that the Staffing Committee had "*concerns about her work, for instance, although she has had training to do the wages … from virtually the beginning, she is still not competent to do the job alone, and in fact there have been mistakes made in payments more than once…*". She also raised that the Claimant was unhappy about not being made Deputy Clerk. Mr Phelps joined the email conversation, stating that he liked the idea of a meeting with the Claimant because it would be an opportunity for the Respondent to show that it cared and to "*sort this out before it goes 'too far'*". He said the "*whole situation [had] exploded*", which he confirmed in evidence related to the Claimant referring the matter to her union.

82. There was no evidence before the Tribunal of any email or other correspondence between 4 June and 11 June 2018, which was when the Claimant returned to work. On the same day there was a meeting of the Staffing Committee, in which her dismissal was discussed – pages 121 to 122 – as was a sensitive matter about another employee. Mr Phelps and Mrs Coe were present at that meeting, and Mr Jackson was in attendance though apparently not during discussion of the Claimant's employment. The note of the discussion reads:

"*Resolved: following formal professional HR advice [referring to that on 4 June at page 116], to recommend to Full Council to pursue on disciplinary and performance grounds the dismissal of the Office Clerk from Council service as soon as due process allows starting forthwith. The Office Clerk will be informed by personal interview and in writing with full explanations of how the resolutions were arrived at and the procedures that will follow, particularly of any method of appeal and severance remuneration*".

83. Mr Phelps rejects the notion that the indication of the possibility of a claim by the Claimant, via Mr Howkins' email, was the trigger for this decision. He does accept however that the Respondent had not followed its disciplinary policy, or complied with the Claimant's contract of employment, for example by carrying out a formal investigation, notifying her of potential grounds for disciplinary action in writing (page 67, paragraph 20.3.1 of the contract), or calling her before a disciplinary panel.

84. There was a full Council meeting the next day, the relevant minute of which is at page 127. Mrs Coe says that it was at these meetings that it was resolved to take steps to terminate the Claimant's employment. Mr Howkins' email and the Claimant's intention to raise matters with her union were discussed. The minute records that the full Council delegated the matter back to the Staffing Committee

giving it "*full delegated authority to follow the processes and decisions through to a conclusion*". Mr Phelps says (paragraph 30 of his statement) that, "*At no time was the Claimant's sex taken into account when considering her future employment; it was simply evident that because of the [job] title issue, the working relationship between her, the Town Clerk and Council had been irretrievably damaged and also, her performance was not to the required standard*".

85. On 15 June 2018, while logging some minutes in a file, the Claimant looked at the minutes of the Staffing Committee meeting which had taken place on 11 June 2018. The document was kept on a shared file and was not encrypted or password-protected, though the Claimant accepts that several clicks were required to access it. She agreed in oral evidence there was no reason for her to do so at the time, though she also said she was updating herself as to what had happened in her absence, expecting feedback from Mr Jackson so that she could provide cover if he was unavailable, though it was not his routine practice to update her after every meeting. At some point after she had seen them, the Claimant asked Mr Jackson whether certain files on a shared drive were open to the public. Mr Jackson replied that some of them, such as personal medical records, were confidential, in response to which the Claimant told him she had accessed the minutes and asked whether and why she was going to be dismissed.

86. Mr Jackson says that the Claimant should not have been reading Committee minutes when her own employment had been discussed; if she wanted to know what had taken place at the meeting, she could have contacted Mr Phelps, Mrs Coe or another member of the Committee. He nevertheless accepted that she used the information only to ask the question of why the Respondent was going to dismiss her and for no other purpose. The Claimant accepts that she was aware the Committee would in all likelihood talk about confidential matters related to the Respondent's employees, of which there were seven in total, though she was sometimes told about sensitive matters, such as disciplinary action, and sometimes not. Pages 70 and 71 set out the Claimant's job description. It included assisting Mr Jackson with day to day management of the Respondent's contractors and ensuring that agendas and minutes were prepared. It also required that the postholder "*ensure the confidentiality of those Council matters which are not in the public domain; to ensure compliance with the Data Protection and Freedom of Information Acts*". At point 15, it states, "*In the absence of the Town Clerk [the postholder will] exercise management responsibility of staff in keeping with the policies of the Council and to undertake all necessary activities in connection with the management of all salaries, conditions of employment and work of other staff*".

87. Mr Jackson's note of the conversation on 15 June is at pages 129 and 130. It summarised what is stated above, and said that in answer to the question of whether she was to be dismissed he said that he did not know. He did record telling the Claimant however that the Full Council meeting on 12 June had been informed of the Committee's discussion and had delegated to it the authority to deal with matters "*through to what the Committee saw as the best conclusion*". His note also records that the Committee "*had taken a dim view*" of Mr Howkins' email of 15 May 2018, which he says was because the Committee did not like that the Claimant had not raised her concerns personally. The note added, "*I also stated that I'd only been made aware latterly of her submission to SLCC's 'Advisory Service' … of a 'protective statement' supposedly through her membership of the ALCC (union*

representatives). I thought this at odds with what I understood to be still a process of 'mediation'".

88. Mrs Coe accepted that Mr Howkins' email, and in particular the reference to the Claimant's union in her email of 3 June 2018, made it more likely than not that she would pursue a complaint, whether of discrimination or otherwise, about the conduct of Mr Jackson, specifically on 8 May. She rejects however the notion that she and her colleagues took umbrage at the Claimant raising a complaint of discrimination. She says if an employee raises a problem, the Respondent must follow its procedure. What she did not like was a problem being raised by a third party. She confirmed in evidence what she said in her statement at paragraph 26, namely that first by her comments about being called in during sickness absence and then by Mr Howkins' email, the Claimant had undermined council members and Mr Jackson. She also says that she was told when she sought advice from Mr Moses that the complaint (set out in Mr Howkins' email) looked vexatious.

89. Mr Jackson told the Claimant before she left work on 15 June that he would have to report the matter of her accessing the minutes to Councillors Coe and Phelps. He also told her that she needed to think very carefully about whether she wanted to keep her job because the Respondent might view her actions as gross misconduct. The decision to dismiss the Claimant, according to Mrs Coe taken on 11 and 12 June, was of course made before the Claimant informed Mr Jackson that she had accessed the Staffing Committee minutes. Mr Jackson nevertheless insisted in his evidence that there was still an opportunity for the Claimant to argue her case at that point but in his view her actions on 15 June overrode that possibility. The Claimant says that Mr Jackson also said he was unaware that she had contacted her union and did not seem happy about that, which Mr Jackson's note tends to confirm.

90. On 17 June 2018 Mr Phelps emailed Mr Moses and Mrs Coe (page 130a), asking Mr Moses for advice on the Respondent's options in relation to the Claimant, and suggesting that these were to suspend her "*whilst we 'investigate' in reality just finalise her sacking [and] stop her coming in or let her come in …*". Mr Moses replied on 18 June saying, "*Yes if the Council has made its decision it now needs to get moving. //I suspect the employee may go on sick leave following her discovery last week …*". Mr Phelps confirms that there was no intention to investigate; the Respondent was going through the motions.

91. Mr Phelps emailed colleagues again on 20 June 2018 outlining advice from Mr Moses given by telephone that morning (page 130b). He wrote that there were two options:

"*We can follow the process we discussed last night – write to [the Claimant] with the allegations and invite her in to answer the questions [or] Write her a letter of dismissal. //The only reason to do option 1 is: //if we have not yet made a decision whether or not to sack her //to 'prevent' her taking us to tribunal … //However, as she has been with us less than two years, she cannot take us to tribunal … //For speed and efficiency for all parties I recommend that we follow Chris Moses' advice and simply write her a letter of dismissal*".

92. Mr Phelps says in his supplementary statement that he thought the Claimant likely to issue a claim – he anticipated of unfair or constructive dismissal – but the Respondent was advised this was not possible because of her length of service. He says he was shocked by the allegations of discrimination in this case, describing

them as "*fictitious*" in the light of all of the support he believed the Respondent had given to the Claimant.

93. At a meeting with Mrs Coe and Mr Phelps on 18 June 2018, the Claimant was told that she had acted in breach of the Respondent's IT policy by accessing confidential information relating to herself and another employee. The Claimant says the policy was never provided to her. She was told she was suspended.

94. Mr Phelps commissioned Mr Jackson to produce of a "*list of gross misconduct citations*" which is at page 132. They were: "*Gross incompetence in the conduct of work regarding payroll duties*"; "*serious breach of duty to keep information of the Council confidential*", referring to the "*strongly worded*" email from Mr Howkins "*threatening legal action*" which was said to demonstrate that "*privileged information from an ongoing staffing matter, subject to amicable mediation, had selectively been given to a third party …*" – Mr Phelps accepts that this was not a breach of confidence given Mr Howkins' relationship with the Claimant; "*unauthorised entry into computer records*", namely access to the Committee minutes on 15 June; and "*Other aggregated misconduct judged to be deemed gross misconduct*", which referred to "*failure to respect and carry out the final decision*" of Mr Jackson regarding the deeds for the grave plot, and "*subverting the relationship of Council members and its officers*" which referred to her statement that Mrs Coe had forced her to return to work while off sick. Mr Phelps says the list was produced because the Staffing Committee wanted to assess whether the Claimant could improve or whether her employment should be terminated. They accepted Mr Jackson's statement of events.

95. The first issue noted above concerned errors in the Claimant's payroll duties. Examples of the Claimant writing to employees in relation to payroll errors, though not it must be said documentary evidence that the Claimant was responsible for the errors, appear at pages 86 and 93. Mr Jackson says the Claimant never became proficient in operating the payroll, and that she made a series of mistakes in the first few months of 2018, though he at no point admonished her about it. The Claimant accepts she did not have a complete grasp of the payroll system and seems to accept – see paragraph 27 of her statement, though she did not accept the point in oral evidence – that there were accounting errors, but says that these came from a file designed by a Mr Bacon, an external contractor who assisted the Respondent one day a month with payroll, the Claimant working alongside him.

96. Mr Bacon appears to have inputted data that the Claimant provided to him. Mr Phelps accepts that the Claimant's main duty in this regard was to collect the relevant data. In her PDR in March 2017(page 76) it was stated that this was taking up about half a day of the Claimant's time per month, and acknowledged that this resulted in "*skill fade*" which meant that the more complex issues "*cannot be pre-empted*". Minutes of a Council meeting in November 2017, at page 80, say that her time would be better spent on "*her main roles*".

97. The Claimant had another PDR meeting on 1 March 2018 (pages 81 to 82). There is no account of any specific concerns about her performance, other than "*website administration remains weak*". There is also a general comment by Mr Jackson that "*This has been a challenging year for Karen both professionally and personally. Several challenges remain and we have discussed them, the outcome being, that the year ahead is [to] be utilised by Karen to concentrate on core tasks now that current CiLCA studies are successfully concluded*". She was given a pay

increase (page 69), which Mr Jackson says was because she had passed her CiLCA exam.

98. The decision to dismiss the Claimant was made by the Staffing Committee at its meeting held on 19 June 2018, subject to advice from Mr Moses. The Committee members decided to proceed with the dismissal on the following morning, having obtained that advice.

99. Mr Phelps wrote the letter of dismissal dated 20 June 2018 – pages 133 to 134. He wrote:

"*Following your recruitment to the post of Office Clerk in August 2016, it has become increasingly clear that you are unhappy with your job.*

One of your chief concerns appears to be not having been given the title of Deputy Clerk, as a result of your CiLCA qualification. As you are aware, the Council was never committed to giving you this title …

Unfortunately, having been informed of [the Council's] decision, your demeanour and attitude in the office has clearly reflected your unhappiness.

In addition, the Staffing Committee are (sic) also concerned about a number of performance issues. As you are aware, your job requires you to be able to conduct payroll for the Council's staff. Unfortunately, despite having been in post for over 20 months you are still unable to do this fundamental requirement of your job unsupported.

In addition, it is also clear that you do not enjoy a good working relationship with your line manager, the Clerk. [The letter then briefly rehearses the Claimant's complaint about Mr Jackson on 8 May 2018 and how it was dealt with]. However, you have continued to raise this incident in your emails and office-based conversations, despite the Council's attempt to resolve the problem, and your apparent acceptance.

Clearly, despite the best efforts of the Council, your unhappiness at work is not resolved. Unfortunately, this is having a knock-on effect on other staff and is creating a difficult office environment.

Finally, as you are aware, the Council is also currently investigating an allegation that on 15 June you gained unauthorised access to a confidential file which contained personal information regarding other employees. [The letter then says the Claimant had referred to the file being shared but that she also agreed that she was not authorised to open it]. [U]nauthorised access to Council computer files, or any such breach of confidentiality, are potential acts of gross misconduct which can result in dismissal without notice pay.

Consequently, the Council could pursue this allegation as one of gross misconduct. However due to your relatively short service with the Council we have taken the decision to terminate your employment as of 20 June, 2018".

100. Mr Phelps concedes that as the accessing of the minutes was being investigated, this was not something that was relied upon to dismiss the Claimant, though he also says that until this point it would have been possible to recover the relationship.

101. Both the Claimant and Mr Jackson accept that the working environment and the relationship between the two of them had become difficult, the Claimant says

because of how she had been spoken to. The Claimant nevertheless says that the dismissal letter is not an accurate description of events at all – she says that although she had repeatedly asked about her job title, she was not unhappy in her work. Both in her Claim Form and in her witness statement, the Claimant says she believes there was no justifiable reason for dismissing her and that the real reason was that she had raised concerns about the conduct of Mr Jackson.

102. Mrs Coe says that the Claimant was dismissed because of her general inability to work as part of a team and because the Respondent's trust in her had been broken. She says that the deciding factor was that the Claimant had accessed the Staffing Committee minutes without permission, which was an act of gross misconduct under the Respondent's disciplinary procedure. Mr Jackson described this as "*the catalyst*" to making a final decision about the Claimant's employment. The relevant page of the disciplinary procedure can be seen at page 53, which includes in examples of gross misconduct, "*serious breach of duty to keep information of the Council, its service providers and its clients confidential*", "*unauthorised entry to computer records*", and "*serious breach of the Council's security policy, health and safety policy, confidentiality or email and internet policy*". The disciplinary procedure describes performance issues as misconduct (page 52), not gross misconduct, providing for escalating sanctions to be applied in such cases.

103. In its Response (pages 33 to 34) the Respondent sets out a list of the reasons for dismissal, namely payroll errors, not keeping information confidential, unauthorised entry into computer records, failing to carry out the final decision of her line manager, and "*subverting the relationship of the Council and its officers*" by saying she had been forced to attend work when sick. Mrs Coe says that the failure to carry out Mr Jackson's final decision refers to sending a letter to solicitors about the burial deeds when he had said not to. She confirms that this was part of the reasons for dismissal, though it was not mentioned in the dismissal letter.

104. In his supplementary statement Mr Phelps cites five reasons for the Claimant's dismissal – first, expressing the wish to have a councillor banned from the office, even though required to work with him as part of her duties (he accepts this is the only time in the Respondent's evidence this point is raised and the Tribunal also notes it was not mentioned in the dismissal letter which he signed); secondly, "*falsely accusing*" Mrs Coe of forcing her to attend work when sick (this too is omitted from the dismissal letter); thirdly, payroll errors; fourthly, going against Mr Jackson's direction regarding writing to solicitors about the grave deed; and fifthly, accessing the Staffing Committee minutes. In addition, he says, her demeanour changed when she was not appointed Deputy Clerk after securing her CiLCA qualification. He says "*This was kind of a last straw, as there were already cracks in her abilities; payroll, failing to keep her emotions more in check with regards to funerals, way too much chit chat in the office, failing to remember simple details to give to public walk-ins to the Council office*". The Tribunal notes that the last of these additional points had not been raised previously anywhere in the Respondent's evidence. Mr Phelps concludes that she "*withdrew her goodwill*". He accepts that the first, second and fourth points were not raised with the Claimant at the time they occurred as potential grounds for future action against her.

105. In explaining the differences between the Claimant accessing confidential information and the groundsman doing so as described above, Mr Jackson said that the Claimant should have known better. He says that whereas the groundsman

casually wandered over to Mr Jackson's desk, the Claimant was an officer of the Council and training to be Deputy Clerk, though Mr Jackson did say that what the groundsman did could be construed as gross misconduct and necessitated reporting to the Staffing Committee. No further action was taken. Mrs Coe says the Claimant's conduct was more serious because whereas the groundsman looked at the employment terms of the previous Town Clerk, the Claimant looked at her own information and that relating to other staff; she says that the Claimant's position and training make her circumstances incomparable to his. Mr Phelps describes the groundsman as a naïve young man.

106. We can deal with events post-dismissal very briefly. At pages 138-9 is an email from Mr Phelps to Mr Jackson dated 26 June asking for more information about the accessing of confidential files. Towards the end of the email, Mr Phelps summarised the current situation, including the note, "*She is claiming sexism (toilets)?*". The reference to "sexism" appears to have arisen during post-dismissal discussions with the Claimant or someone acting on her behalf. Mr Phelps says that the issue with the toilet facilities was the only thing he could think the Claimant might mean in this regard. After receiving a letter from the Claimant's solicitors complaining of various incidents of sex discrimination, Mrs Coe and another councillor met with Mrs Burton on 16 August 2018. Mrs Burton produced a statement at page144 and Mr Jackson produced a statement at page 145. Although they both rebutted the Claimant's allegations, neither party took us to either statement in evidence and so we say no more about them.

Time limits

107. The Claimant was clearly aware from 15 June 2018 onwards of the possibility of dismissal and had in fact contacted her trade union by 3 June 2018 and possibly earlier, and again after her dismissal, though she says the union was not helpful. She saw solicitors on or before 13 August 2018, when they wrote to the Respondent. ACAS Early Conciliation began on 17 September 2018. She says that she did not seek to bring legal action about the pre-dismissal incidents because she had not been dismissed at that point, though she accepts that she could have done so.

<u>Law</u>

Harassment

108. Section 40 of the Act renders harassment of an employee unlawful. Section 212(1) provides that, as far as relevant for the purposes of this case, "detriment" (see below under direct discrimination) does not include conduct which amounts to harassment. Section 26 defines harassment as follows:

"*(1) A person (A) harasses another (B) if - //(a) A engages in unwanted conduct related to a relevant protected characteristic [here, sex], and //(b) the conduct has the purpose or effect of //(i) violating B's dignity, or //(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …*

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account - //(a) the perception of B; //(b) the other circumstances of the case; //(c) whether it is reasonable for the conduct to have that effect".

The Tribunal is thus required to reach conclusions on whether the conduct complained of was unwanted, if so whether it had the requisite purpose or effect and, if it did, whether it was related to sex.

109. As to whether conduct was unwanted, this is to be assessed from the Claimant's perspective, though the conduct does have to have been directed at her. Unwanted conduct may also be constituted by a series of events and does not necessarily have to be a single event.

110. It is clear that the requirement for the conduct to be "related to" sex entails a broader enquiry than whether conduct is because of sex as in direct discrimination. What is needed is a link between the treatment and the protected characteristic, sex in this case, though comparisons with how men were or would have been treated may still be instructive. In assessing whether it was related to sex, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it. In this case, the words used and the overall context fall to be considered.

111. As to whether the conduct had the requisite effect, which is what is relied on in this case rather than purpose, there are clearly subjective considerations – the Claimant's perception of the impact on her – but also objective considerations including whether it was reasonable for it to have the effect. That much is clear from section 26 and was confirmed by the Employment Appeal Tribunal in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724**. The words of section 26(1)(b) must be carefully considered; conduct which is trivial or transitory is unlikely to be sufficient.

112. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof – see further below. If she does, then it is plain that the Respondent can have harassed her even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c).

Direct discrimination

113. Section 39 of the Act provides, so far as relevant:

"*(2) An employer (A) must not discriminate against an employee of A's (B)— … (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; //(c) by dismissing B; //(d) by subjecting B to any other detriment*". Section 13 of the Act provides, again so far as relevant, "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". The protected characteristic relied upon in this case is sex. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

The Tribunal must therefore consider whether one of the sub-paragraphs of section 39(2) is satisfied, whether there has been less favourable treatment than a (in this case, hypothetical) comparator, and whether this was because of the Claimant's sex.

114. In determining whether the Claimant has been subjected to a detriment, "one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment? An unjustified sense of grievance cannot amount to 'detriment'" (**Shamoon v Chief Constable of the RUC [2003] UKHL 11**).

115. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as she was. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Sex being part of the circumstances or context leading up to the alleged act of discrimination is, as Mr Brown pointed out, insufficient. That said, as recognised in **Nagarajan** and by the EAT in **Amnesty International v Ahmed [2009] IRLR 884,** where what is done is inherently discriminatory, the mental processes of the alleged discriminator are not relevant, and indeed therefore the burden of proof provisions (see below) need not be applied. The classic case of such discrimination is found in **James v Eastleigh Borough Council [1990] ICR 554**, where women were able to enter a swimming facility for free at age 60 but men were not. This was because of the differing State pension ages at the time. That context and explanation notwithstanding, it was a decision and set of circumstances that was inherently discriminatory because of sex. **Amnesty** was a case decided on the same basis, but in relation to race and of course on very different facts.

116. In other cases – such as **Nagarajan** – the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes (conscious or otherwise) which led the alleged discriminator to act as they did. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. In determining why the alleged discriminator acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan** and **Wong v Igen Ltd [2005] ICR 931**).

Victimisation

117. Section 39(4) of the Act says that:

"*An employer (A) must not victimise an employee of A's (B): … (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service; //(c) by dismissing B; (d) by subjecting B to any other detriment*".

118. Section 27 defines victimisation as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because - //(a) B does a protected act, or //(b) A believes that B has done, or may do, a protected act.*

(2) Each of the following is a protected act - //(a) bringing proceedings under this Act; //(b) giving evidence or information in connection with proceedings under this Act; //(c) doing any other thing for the purposes of or in connection with this Act; (d)

making an allegation (whether or not express) that A or another person has contravened this Act".

As far as relevant to this case, the heart of the issue is whether the dismissal was because the Respondent believed the Claimant may do a protected act.

119. There is case law to suggest that a protected act need not be an act of the Claimant herself – see **Thompson v London Central Bus Company [2016] IRLR 9.** As to whether a complainant may do "any other thing for the purposes of or in connection with [the Act]" (section 27(2)(c)) this is to be given a broad interpretation – **Aziz v Trinity Street Taxis Ltd [1998] IRLR 204** and does not require the Claimant to focus her mind specifically on any provision of the Act**.** Section 27(2)(d) is to be similarly interpreted though the asserted facts must, if verified, be capable of amounting to a breach of the Act. Furthermore, where a claimant does not rely on having done a protected act (section 27(1)(a)) but on a respondent's belief that she has done, or may do, a protected act (section 27(1)(b)), this is not a question of establishing the Respondent's knowledge of a fact (as in **Scott v London Borough of Hillingdon [2001] EWCA Civ. 2005**) but of establishing the respondent's decision-makers' belief.

120. No comparator is required for the purposes of a victimisation complaint, but the protected act must be the reason or part of the reason why the Claimant was treated as she was – **Greater Manchester Police v Bailey [2017] EWCA Civ. 425.** Again, this requires consideration of the mental processes of the decision-makers and again the belief that the Claimant may do a protected act need not be the primary reason for dismissal, though it must be more than a trivial influence on that decision – see above.

Burden of proof

121. Section 136 of the Act provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment tribunals] *could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

122. Direct evidence, certainly of direct discrimination or victimisation, is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Igen,** updating and modifying the guidance that had been given by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.** The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a Claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a

prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage".

123. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all and, in a direct discrimination case, evidence related to comparators. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

124. As Mr Brown submitted, unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

125. In a direct discrimination context, it is important for the Tribunal to bear in mind that it was also said in **Madarassy** that "the bare facts of a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which an employment tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination". The something "more" which **Madarassy** says is needed may not be especially significant, and may emerge for example from the context considered by the Tribunal in making its findings of fact.

126. In a harassment case, the first stage of the burden of proof is particularly relevant to establishing that the unwanted conduct was related to the protected characteristic. In respect of victimisation, the Claimant in this case must first prove that something was done of which the Respondent was aware that could have led it to believe she would commit a protected act. Secondly, she must prove facts from which the Tribunal could conclude that the reason for her dismissal was that belief of the Respondent. Again however, something more than simply the belief that she may do a protected act and the fact of her dismissal must be established at the first stage.

127. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex or the protected act as the case may be. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

128. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination or victimisation, then it need not go through the exercise

of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

Time limits

129. Section 123(1) of the Equality Act 2010 provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Section 123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decided on it. Section 123(4) says that in the absence of evidence to the contrary a person is to be taken to decide on failure to do something, (a) when they do an act inconsistent with doing it or otherwise (b) "*on the expiry of the period in which [they] might reasonably have been expected to do it*".

130. A continuing effect on an employee is not of itself sufficient to establish a continuing act. In **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96** it was said that the question is whether there is an ongoing situation or continuing state of affairs in which the Claimant was less favourably treated and for which the Respondent is responsible. The Court of Appeal acknowledged that the burden is on a Claimant to prove a continuing act, and noted at paragraph 49 that a Claimant may not succeed in proving the alleged incidents actually occurred or that, if they did, that they add up to more than isolated and unconnected acts.

131. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that it will be – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of the tribunal granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

132. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** (Mr Brown's submissions referred to the decision at EAT level), Leggatt LJ in the Court of Appeal said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a Respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. At paragraph 25 he said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone

that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, he said, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard.

Analysis

133. We begin with a brief reference to witness credibility, given that both Counsel drew attention to it in their closing submissions.

134. It is correct, as Mr Brown submitted, that the Claimant's evidence in relation to being required to go into work by Mrs Coe when off sick cannot be regarded as reliable. Our conclusion is that she overstated the effect of her exchanges with Mrs Coe on that occasion. It is correct that Mrs Coe did not say that she should not go in, when the Claimant offered the option of being driven by her friend, but it seems to us that is as far as it went. Mr Brown also made reference to the Claimant's evidence about whether towels and other facilities were available in the workplace toilets. The parties' evidence overall on that point did not create a clear picture – after all as late as May 2018 Mrs Coe was herself raising in email correspondence the need to ensure towels and hot water were available (see for example page 95) – and so we draw no adverse conclusion against the Claimant in this regard.

135. Those points being noted, there are several aspects of the evidence of the Respondent's witnesses which gave rise to more material concerns. We will draw attention to those matters below. The main point we wish to make at this point however is that we do not find it helpful, or possible, in this case to reach general conclusions on witness credibility and then utilise those conclusions as a guide to determining the issues. Rather, our approach has been to deal with the relevant evidence on its merits in relation to each issue in turn.

136. We will deal with the Claimant's allegations following the order of the list of issues above. We do so, recognising that in respect of each complaint the initial burden of proof is on her in the way described in our summary of the law. We also do so, noting that discrimination is rarely obvious, admitted or conscious, and that all forms of discrimination can be subconscious, unconscious, or based on assumptions. A contravention of the Act does not require the Tribunal to impute to the alleged discriminator a discriminatory motive, intention or purpose, nor of course that they discriminated against the Claimant in all of their dealings with her.

The conduct of Mark Jackson

137. We turn first to the conduct of Mark Jackson, and deal with the allegations of harassment first, noting the effect of section 212(1) of the Act, namely that an act of harassment cannot also be a detriment for direct discrimination purposes, though a claimant is not prevented from pleading her case on the basis of either alternative.

138. The Claimant's case referred to five incidents, between 15 January and 15 May 2018. She alleges that the Respondent's failure to provide adequate toilet facilities also amounted to an act of harassment. We will deal with that separately, and indeed with each of the five incidents in turn, though we recognise that where a number of allegations of harassment are before the Tribunal, particularly where they are similar in nature, it is instructive to assess them cumulatively rather than taking each in isolation, not least to determine whether the requisite environment was

created. That does not mean however that the Tribunal must adopt an all or nothing approach and find that the Claimant has either established that all of the acts complained of constituted harassment, or that none of them do. Each allegation must also be considered on its own merits.

139. We deal first with whether the conduct in question was unwanted, and in doing so deal with any remaining conflicts of evidence. There is no material conflict of evidence as to what was said on 8 and 15 May 2018 respectively, namely the "flying fuck" and "less talking, more typing" comments. Equally, Mr Jackson did not strongly resist the Claimant's account of what he said on 16 January 2018, which we conclude therefore was as the Claimant alleges, namely, "No you don't, I don't want you coming back as a gibbering wreck". There is a small conflict of evidence as to what was said on 15 January 2018 (telling the Claimant to "go away"), and very little for us to go on in respect of what took place on 16 April (being dismissive of the Claimant in respect of a risk assessment). On balance, given the other comments made by Mr Jackson and our conclusions that the Claimant's account in those respects is to be preferred, we find that the events of 15 January and 16 April were also as she describes them.

140. Whether conduct is unwanted is to be considered from the Claimant's perspective and is not an especially high hurdle to surmount. In respect of Mr Jackson's conduct on 8 and 15 May, it is clear that the conduct was unwanted from the fact of the Claimant's complaint about the former and Mr Howson's complaint about the latter which had self-evidently arisen from the Claimant relaying the matter to him. It is not necessary however for a claimant to have raised a complaint in order for conduct to be unwanted. It is wholly unsurprising that the Claimant would have found the comment on 16 January unwelcome, something we will return to. We are also satisfied that Mr Jackson's conduct on each of the other two occasions was unwanted from the Claimant's perspective. There was no evidence that would suggest she condoned Mr Jackson's behaviour in any of these respects. Although he made passing reference in his evidence to the Claimant also using foul language at work (which she denies), that was nowhere near sufficient in our view to reach a conclusion that the incident on 8 May 2018 was not unwanted.

141. The next question is whether the conduct, or any of it, was related to sex. We agree with Miss King's submission that the Claimant's evidence in this respect, namely that she could not say how it was, is not determinative. As Miss King put it, the Claimant can only describe her experiences and how they felt for her. She certainly cannot be expected to appreciate the requirements of each stage of the legal test for harassment. Whether conduct related to sex is a matter for the Tribunal.

142. The Claimant must nevertheless establish a prima case that there was some connection or association between the conduct and sex in order for the Tribunal to require the Respondent to prove that the conduct was in no sense whatsoever related to sex. That said, the conduct does not have to be overtly related to sex for a prima facie case to be made out. The context in which the conduct took place can be important in determining whether what might appear neutral is in fact related to sex as required.

143. As indicated above, this is not an all or nothing assessment. We find in this case that some, but not all, of the conduct was related to sex. We deal first with the conduct that was so related, thus taking matters out of chronological order.

144. The “gibbering wreck” comment on 16 January 2018 cannot be said to have been an overtly sex-based comment. The Claimant’s case is that the comment stereotyped women, as being likely to have an over-emotional reaction to the circumstances of a difficult funeral. Whilst it is, sadly, possible to think of worse stereotypes of women, the Tribunal accepts the obvious point that it is a stereotype that women will be over-emotional, either generally or in certain circumstances. The question is whether the Claimant has established facts from which the Tribunal could reasonably conclude that this stereotype was subconsciously or unconsciously at play in this instance.

145. We find that she has. Whilst a comparator is not required in a harassment case, evidence in relation to a comparator can be instructive in this regard. Mr Jackson could not think of any instance of using the phrase to a man. Moreover, the one instance he was able to recall when he used it about a man was not only, as Miss King pointed out, use of the term as a physical rather than an emotional descriptor, but more pertinently in our judgment it related to a situation of extreme stress in which the life of the man in question was in danger. This clearly shows that Mr Jackson would not have used the phrase in relation to a man in the same circumstances, and amply suggests an association with sex where it was used of a woman in far less serious circumstances. We return to the requirement for “something more” below.

146. A similar analysis applies to the comment made on 15 May 2018. Again, the comment was not overtly sex-based, but again the Claimant says that it stereotyped women in the sense that it was made on the assumption that their role is to type. We accept that this too is a not uncommon, albeit dated, stereotype of women’s work, and find that the Claimant has again established facts from which the Tribunal could reasonably conclude that it was unconsciously at play in Mr Jackson’s conduct. Again, the question of how Mr Jackson would have treated a man in similar circumstances is instructive. He could not recall ever using that phrase in those circumstances. Again, we will return to the requirement for “something more” below.

147. Turning to Mr Jackson’s admitted conduct on 8 May 2018, again it was not overtly related to sex, and in this instance, unlike the comments of 16 January and 15 May cannot be said to have been a stereotyping of women either. The case put by Miss King, both in cross-examination and closing submissions, is that Mr Jackson’s comment was nevertheless a reflection of his subconscious belief that the Claimant, as a woman, was in a subordinate position to him.

148. It is fair to Mr Jackson to note that he was subordinate to a woman officer for part of his military career, and of course that Mrs Coe was in effect senior to him at the Respondent as a councillor and mayor. We have no doubt that he would not have used such language with them. That cannot resolve the matter however, given that it is quite obvious why he would not have done so, and not behaving in this way towards other women does not necessarily mean that his behaviour towards the Claimant was not related to sex. Given his long and largely military career, it is very noteworthy that Mr Jackson could not think of a single example of using similar foul language with a man. Accordingly, in the context of the comments made on 16 January and in particular that of 15 May, it can reasonably be inferred in our judgment that this was a means of putting the Claimant in her place as Mr Jackson saw it, in effect a place where her views on a matter of legal and technical substance could be peremptorily dismissed, his unconscious assumption being that it was not

her role as a woman to engage in such issues. The Claimant has therefore established a prima facie case in this regard also.

149. We turn next to the comments on 15 January and 16 April 2018 respectively. Whilst they might be said to be of one piece with the other occasions on which Mr Jackson was dismissive of the Claimant as explored above, they were plainly of a far milder nature. Further, whilst we note the Claimant's evidence that she does not believe a man would have been treated in the same way, neither instance can be said to be stereotyping of women on the face of the comments made, and we do not have the assistance of any evidence of comparable circumstances either. We note again that just because an individual has made some comments which were related to sex, this does not mean that every unwelcome comment made by that person must also be thus related. We are not satisfied that the Claimant has proved facts in these instances from which we could reasonably reach that conclusion.

150. As to whether there is something more, in the overall evidence before the Tribunal, that can properly mean that the burden of proof is passed to the Respondent, we have noted above that this does not have to be very much. In this particular case, we conclude that there is more than sufficient in the overall evidence and context to satisfy this requirement.

151. We note the inconsistency in the explanations given by Mr Jackson for the "gibbering wreck" comment. In his witness statement he said it was made out of concern for the Claimant's wellbeing, but changed the explanation in his oral evidence to say that he was simply providing a common-sense direction, though adding that he does not like to see anyone upset. It could also reasonably be said that there was some evasion in Mr Jackson's explanation for the "flying fuck" comment, which he gave at the follow up meeting held on 11 May 2018 and repeated in evidence at the Tribunal. Mr Jackson expressed regret for his conduct, but he was also careful to say that the comment was less serious than using the word "fuck" directly to the Claimant. Whilst it is possible to discern a difference between the two, particularly in a workplace context it is a difference of little significance and seems to us to be a regrettable attempt to minimise the seriousness of the conduct in question. Miss King also drew attention to the Respondent's failure to take any action against Mr Jackson, which is to be contrasted with the action later taken against the Claimant for very arguably less serious conduct.

152. If it were needed, we also note the text messages sent by Mrs Burton which refer to what happened on 15 May 2018 as not the only occasion Mr Jackson had spoken to her in that way. That may be properly characterised however as evidence relating to the environment created by Mr Jackson's conduct and so we return to it below.

153. The burden has clearly passed to the Respondent. The next question is whether it has established that Mr Jackson's conduct was in no sense whatsoever related to sex. We conclude that it has not:

153.1. In relation to 16 January 2018, the explanation for the comment related to how the Claimant had allegedly conducted herself in respect of other funerals and the Respondent's wish that she should fulfil her duties professionally. Mr Brown also referred in his written submissions to the work pressures on Mr Jackson on that particular day. Those are not in our judgment satisfactory explanations discharging the burden on the Respondent, for three reasons. First, the evidence given by the

Respondent as to the Claimant's previous conduct in connection with funerals was very general in nature, asserting the Respondent's case without any specific supporting evidence, documentary or oral. Secondly, any work pressure was the context of, but not the reason for, the particular comment. Related to that and in any event, thirdly, the Respondent has provided no satisfactory explanation of why the particular phrase was selected and why it was necessary and appropriate to use it in order to make any point the Respondent wished to make about the importance of professional conduct. It clearly was not necessary to that end; rather, doing so betrayed the stereotype we have referred to.

153.2. The Respondent's explanation for Mr Jackson's conduct on 8 May 2018 focused on the particular work pressures of that day and the Claimant's insistence on discussing the matter of the deeds. We have accepted the day was particularly busy and it may well be the Claimant should have left the matter alone, but again in our judgment, whilst this provides the context for the comment it does not address the reason for the words used. Accordingly, and in circumstances where Mr Jackson is unable to recall any instance of having used any similar words in conversation with a man, the burden of proof on the Respondent is not discharged.

153.3. The explanation of the comment on 15 May 2018 is principally that Mr Jackson was entitled to require his colleagues to get on with their work, on another busy day in the office. We accept that getting on with work is what Mr Jackson wanted and that he was entitled to require it, but again that does not provide an explanation for the words used, namely why a reference was made to "more typing". The Respondent has not explained why those words were necessary, as opposed to a statement that there was work to be done or that the Claimant and Mrs Burton should get on with their work, particularly where, for the Claimant at least, typing was not an adequate description of her role. In his written submissions, Mr Brown says that Mr Jackson was entitled to ask the Claimant to "focus on her work". That is perfectly true, but what he referred to was "more typing".

154. We turn finally therefore to whether the unwanted conduct, related to sex, had the requisite purpose or effect. It is in fact only the latter that is relied on as Miss King confirmed in her written submissions (paragraph 73). Specifically (paragraph 76) the Claimant's focus is on the creation of a hostile, intimidating or offensive environment. This requires us to consider whether subjectively there was evidence of the requisite effect for the Claimant, and if so secondly whether it was objectively reasonable for the conduct to have had that effect on her. We note that the creation of an environment requires lasting effects of some description, though of course that does not mean that the effects must have been sustained over some minimum extended period.

155. We are in no doubt that subjectively speaking the conduct in question had the effect that the Claimant perceived herself as working in a hostile, intimidating and offensive environment. Her complaint of 8 May 2018 is clear evidence of that ("*I can no longer deal with the situation or working environment*"), as is Mr Howkins' email of 15 May 2018 ("*this is not now a safe and stress free environment … for female members of staff*") which, though the Claimant did not know that he would send it, obviously came from her expressing to him what had happened on that day. There was no complaint prior to May 2018, that is regarding Mr Jackson's conduct on 16 January, but the absence of complaint about each specific incident is not

determinative and it is the Claimant's subjective perception of the environment created by Mr Jackson's conduct overall that we have to assess.

156. Was it reasonable for the conduct to have the claimed effect, also taking into account the other circumstances of the case? We have taken into account the following:

156.1. The offending comments were infrequent, although made over a relatively short period of time.

156.2. It was the Claimant's manager, and the most senior employee in the (admittedly small) organisation, who made the comments. That is objectively more likely to create an environment which is felt to be hostile and intimidating than would be the case if the comments had been made by a more junior member of staff.

156.3. The language used on 8 May 2018 was highly offensive in the context of this workplace. As noted above, Mr Jackson asserted briefly in evidence that the Claimant used similar language herself, which she denies, but there was no specific evidence to support that assertion.

156.4. The connection between each of the comments was their direct relation to the Claimant's duties. It can fairly be said that in each instance they objectively betrayed a disrespectful view of her professional position, as Miss King submitted.

156.5 It is also relevant to take into account the evidence of Mrs Burton. We regret to say that we do not believe the account put forward in her witness statement and oral evidence that her text exchanges with the Claimant painted a false picture of her view of Mr Jackson and that she had been "stupid" to engage in the Claimant's "childish games". In fact, the text exchanges do not seem to us to show the Claimant seeking to elicit Mrs Burton's comments at all. We understand that there may well have been various personal reasons why Mrs Burton sought to backtrack on the content of the messages, but we conclude that they are an accurate record of her reaction at the time. They are also therefore powerful evidence of how another woman in the office felt not only about Mr Jackson's comments on 15 May but of other occasions when he behaved in a similar way.

157. For these reasons we are satisfied that the Claimant has established that Mr Jackson's conduct had the requisite effect. The Respondent does not suggest that Mr Jackson did not act in the course of his employment, nor does it rely on the statutory defence, and accordingly the Claimant's complaints regarding that conduct on 16 January, 8 May and 15 May 2018 succeed. Her complaints of harassment relating to 15 January and 16 April 2018 do not.

158. Given the provisions of section 212(1) of the Act, it is unnecessary for us to go on to consider the Claimant's complaints of direct sex discrimination in relation to Mr Jackson's conduct on 16 January, 8 May and 15 May. We make clear however, though it is doubtless clear already, that we would have concluded that the Respondent had directly discriminated against the Claimant because of sex had we, for whatever reason, found that the complaints of harassment were not made out.

159. First, for the reasons already given, the conduct on each occasion could properly have been said to amount to a detriment, that is something that could reasonably have been viewed by the Claimant as such. Secondly, we have set out above the conclusions that it is reasonable to draw from the evidence in respect of

how Mr Jackson would have behaved towards a man in similar circumstances, namely that none of the comments would have been made using the words he employed in relation to the Claimant. Thirdly, on the question of whether the treatment was because of sex, the conclusions we reached as to the stereotyping nature of two of the comments and the broader context in which the comments were made, together with the issues we have identified in relation to the evidence of something more than the difference in treatment and difference in sex, we would have concluded that the burden of proof would have passed to the Respondent. Fourthly, we have set out why the explanations provided by the Respondent would not have been adequate to discharge the burden of showing that the treatment of the Claimant was in no sense whatsoever on the ground of sex. Subconsciously, or unconsciously, on Mr Jackson's part, we would have concluded that it clearly was.

160. We do not find however that the Claimant has proved facts from which, in the absence of an adequate explanation, we could reasonably conclude that she was discriminated against because of her sex by Mr Jackson's conduct on 15 January and 16 April 2018. In both instances we would accept that the Claimant was subjected to a detriment, given the wide interpretation of that term. As already highlighted however, there was no gender stereotyping in the comments on those occasions and we had no specific evidence that a man would have been treated differently in these respects.

161. The Claimant's complaints of direct sex discrimination in relation to Mr Jackson's conduct are accordingly dismissed.

Toilet facilities

162. Though of course of no less importance, we can deal with this issue a little more briefly.

163. The essential relevant facts, which we are amply satisfied the Claimant has established on the balance of probabilities, are as follows:

163.1. From the commencement of her employment in August 2016 until May 2017 (see below in respect of the latter date), the only toilet facilities available to women employees of the Respondent, including the Claimant, were the toilets used by the children attending the playgroup in the same building.

163.2. For safeguarding reasons, a woman wanting to use the facilities had to attract the attention of one of the playgroup staff, explain that she wished to use the toilet and wait until the toilets had been checked to see if a child was present. As Mrs Burton says, it was not always easy to attract the attention in this way.

163.3. Accordingly, a woman could only use the toilet facilities with permission, following delay, and only if a child was not already using them.

163.4. Whilst we accept that the Claimant was never told she could not use the playgroup toilet, it is plain that there was no immediately or easily accessible toilet facility for women, whereas there was for men.

163.5. There is some confusion over whether it was in May 2017 or May 2018, but as set out in our findings of fact it appears to have been in May 2017 that Mr Jackson offered the Claimant and Mrs Burton the opportunity to use the male toilet. What is agreed is that it was easier for women to access this toilet because no permission or delay was entailed in doing so from this point onwards.

163.6. We do not entirely accept Miss King's written submissions about the facts (paragraph 16). Men could not always choose whether to use the toilet cubicle or the trough urinal, for obvious biological reasons. Furthermore, from May 2017, if a woman was using it, in principle a man could not do so because of the sign that could be placed on the door.

163.7. Nevertheless, what was put in place was plainly an inadequate arrangement as far as women using the facilities were concerned.

163.8. First, it is not contested that the sign a woman could put on the door was not a reliable means of ensuring a man did not enter whilst she was using the facilities, partly because it sometimes fell off and partly because, as Mr Jackson accepted, a man going to use the facilities might unwittingly miss the sign in any event.

163.9. For that reason and because, secondly, there was no lock on the entrance door, there was a risk of a woman exiting the toilet cubicle and seeing a man using the trough urinal. There was no realistic possibility of a man seeing a woman using the toilet facilities.

163.10. Thirdly, there was no bin within which a woman could dispose of used sanitary products.

163.11. These arrangements became particularly serious for the Claimant when, after medical treatment, her periods restarted in January 2018.

163.12. There had been no complaint about the facilities until then, when the Claimant raised the matter with Mr Jackson. We accept the Claimant's case that nothing was done about her concerns until June 2018, her having raised the matter again in May 2018. Mr Jackson has been unable to explain why he says he immediately arranged direct access to the playgroup toilet when his email of 27June 2018 (page 138) clearly indicates otherwise and when steps were being taken by the Respondent as late as June 2018 to arrange more adequate arrangements for use of the male toilet. We reject Mr Jackson's evidence in this respect and conclude that there was at no point an arrangement for direct access to the playgroup toilet.

163.13. In early June 2018, the church had arranged for a lock to be fitted to the external door and for a bin to be provided for the disposal of sanitary items. The Claimant was informed that she should tell the church caretaker when the bin needed to be emptied.

164. The Claimant complains that the above state of affairs amounted to harassment, alternatively direct discrimination. In truth, Miss King in her closing submissions essentially pursued the complaint as one of direct discrimination only. That seems to us to be the more appropriate way to assess the matter. Whilst the situation could plainly be said to have been unwanted by the Claimant, particularly from January 2018, and for reasons we will come on to could readily fit the other requirements of the definition of harassment, we are inclined to accept Mr Brown's submission that what we have described was not "conduct" as is envisaged by that definition. Mr Brown referred to the Equality and Human Rights Commission Code of Practice on Employment (2011), which at paragraph 7.7 defines what unwanted conduct includes. It is said to cover a "wide range of behaviour", and the closest example to these facts is "acts affecting a person's surroundings". We have not found this easy to decide, but conclude that not providing adequate toilet facilities

might more properly be said to be an omission or series of omissions, rather than conduct, and so is not what this phrase is intended to refer to.

165. It is not necessary in any event for us to agonise over-long on that issue, given that the complaint can properly be assessed as one of direct discrimination. Although it is recognised that conduct “related to sex”, for harassment purposes, is wider than a detriment “because of sex” for direct discrimination purposes, it plainly does not follow that because a particular complaint is not established as harassment, it must also fail when analysed as a complaint of direct discrimination. We therefore turn to assess the matter on that basis.

166. We are in no doubt that the arrangements we have summarised above subjected the Claimant to a detriment. We firmly reject Mr Brown’s submission that the use of the male toilet not being a requirement for female employees or the fact that failure to provide a bin was an oversight, means that there was no detriment as interpreted in **Shamoon.** Any reasonable person could reasonably consider not having immediate direct access to toilet facilities, the risk of seeing a person of the opposite sex using toilet facilities (the risk need not have materialised to be a detriment in our judgment) and not having a bin in which to dispose of sanitary products as a series of detriments. They were all matters of practical impact on a daily basis and we note that Mrs Coe’s email to Mr Jackson of 20 May 2018 (pages 94 to 95) expressly referred to the need to put a bolt on the door to prevent male access to the urinal whilst the toilet cubicle was in use. The same reasonable person could also reasonably consider that having to tell a caretaker of the opposite sex that the bin needed emptying of sanitary products was similarly a detriment, being both demeaning and (as the Claimant described it) an invasion of privacy. We do not think that Mrs Burton’s being more comfortable with the arrangements detracts from those conclusions. She agreed that there was no immediate access to facilities until May 2017. As for the other matters, the test is whether a reasonable worker would or might take the view that in all the circumstances the situation was to her detriment, not whether every person in the same circumstances would take the same view.

167. It is also plain that the Claimant was less favourably treated in these respects than a man. At no point until May 2017 was Mr Jackson, or indeed any other man working for the Respondent, in the position of not having immediate access to toilet facilities. Thereafter, at no point was he at risk of seeing a member of the opposite sex using toilet facilities nor did he experience any disadvantage by the absence of a bin within those facilities. (It might be argued that a man was at risk of being seen using the toilet facilities and a woman was not, but that was not an argument pursued by the Respondent and in any event would not detract from the less favourable treatment of women in respect of the risk of what they might experience). The bin was provided in June 2018, but at no point did Mr Jackson have to inform a caretaker, still less one of the opposite sex, that the bin needed emptying of intimate waste.

168. The remaining question therefore is whether the less favourable treatment was because of sex. It is clear in our judgment that this is a case of inherent discrimination, referred to in **Nagarajan** and **Amnesty** and exemplified in **James**. The absence of and subsequent arrangements with the bin make this particularly clear; they simply did not arise as an issue as far as men were concerned. It is not difficult to see that the same is the case in relation to the immediate access to

facilities prior to May 2017 and the risk for women of seeing a man using the facilities thereafter. Sex was more than part of the context or circumstances in which these issues arose. Where, as here, all women are in a less favourable situation than all men, sex being the reason for the treatment is in the nature of the arrangements.

169. As a result, the question of the reason for the treatment in the usual sense of exploring the mental processes of the alleged discriminator (which in his written submissions Mr Brown summarised as safeguarding children or, in relation to the bin, an oversight on the Respondent's part) does not arise. Nor therefore does the application of the burden of proof provisions as would be required in a mental processes case.

170. We will however deal briefly with one submission made by Mr Brown. He argued that short of carrying out building work, which was not within the Respondent's control, there were limits to what it could do to rectify the situation, his implicit point being that it would be unfair to find against the Respondent in these circumstances. Cases of this nature can on some occasions seem unfair – **Amnesty** seems a good example of this where essentially the employer was seeking to protect the employee from the safety implications of travel to a certain country because of her particular nationality. It was still direct discrimination. In this case however, in June 2018 the Respondent essentially found a straightforward solution to most of the issues on which the complaint depends. We have been told of no reason why those arrangements could not have been made before, nor indeed why the Respondent could not have arranged for the bin to be emptied regularly thereafter without the Claimant having to request it.

171. The Claimant's complaint of sex discrimination in respect of toilet facilities for the duration of her employment therefore succeeds.

Dismissal

172. Turning to the question of the Claimant's dismissal, we accept Mr Brown's submission that the focus of the Claimant's case was very much that this was an act of victimisation, not an act of direct sex discrimination. We agree with him also that the latter case was at no point put to Mr Phelps, who was the signatory of the dismissal letter. We therefore find that the Claimant has not established facts from which the Tribunal could reasonably conclude, in the absence of an adequate explanation, that she was directly discriminated against in this respect. That complaint is dismissed. We therefore turn to the Claimant's principal case, namely that of victimisation.

173. The first point to make is that this is not a case where it is possible to move straight to the question of the reason why the Claimant was dismissed in the sense suggested by **Hewage**, that is effectively bypassing the burden of proof provisions in section 136 of the Act. This is because although the Respondent has put forward a case that there were a number of reasons for dismissal, there are considerable difficulties with it, as will become evident. It is necessary and appropriate therefore to approach the matter on the basis of a careful application of the burden of proof provisions, as interpreted by the case law referred to above.

174. We begin by summarising the key facts to which we have had regard in reaching our decision:

174.1. On 8 May 2018, Mr Jackson made the “flying fuck” comment. The Claimant emailed Mr Phelps (pages 89 and 87) about what had happened and about other things including the toilet facilities. Mr Phelps sent a supportive reply.

174.2. On 11 May 2018 the Claimant confirmed that she wished her email complaint to be treated as a formal grievance. The Staffing Committee met later that day, Committee members then met separately with Mr Jackson and the Claimant, and there was then the joint meeting at which Mr Jackson offered his apology. The Claimant communicated that she accepted the apology, though it is clear to us – even if not at that moment to the Respondent – that she was not content, expecting some action to be taken against Mr Jackson.

174.3. The Respondent accepts that it did not follow its grievance procedure in dealing with the Claimant’s complaint.

174.4. On 15 May 2018, Mr Howkins sent his email to Mr Phelps (page 92), which: included an assertion that Mr Jackson’s conduct meant the Respondent’s workplace was not a safe environment for female members of staff; raised concerns about the toilet facilities; asked that he or the Claimant be told how things would be improved, specifically in relation to how staff were spoken to; referenced the Respondent’s equality and diversity “*established protocols*”; and stated that the matter would need to be “*taken to a tribunal if it continues*”. Mr Phelps replied that the matter would be discussed by the Staffing Committee, three of the Committee members having been made aware of the email.

174.5. On 16 May 2018 Mrs Coe forwarded Mr Howkins’ email to Chris Moses. His advice (page 91) was that the Respondent should inform Mr Howkins that the Claimant should raise any concerns herself. Mr Howkins was not given that information at any stage, nor indeed was the Claimant.

174.6 On 20 May 2018 Mr Moses forwarded the emails of 15 and 16 May to Mr Jackson (page 91) and Mrs Coe also emailed Mr Jackson to say she had contacted the church about the toilet facilities.

174.7. On 22 May 2018 the Staffing Committee met again. The Respondent accepts that the Committee was wrong to say (page 97) that the Claimant had agreed the matter of Mr Jackson’s conduct on 8 May could be dealt with informally. Mr Phelps’ draft letter of 23 May 2018 (page 100), addressing the question of the Claimant’s job title and pay and stating that requests had been made of the landlord to deal with the toilet facilities, was not sent.

174.8. On 24 May 2018, there was a meeting between Mrs Coe, Mr Jackson, Mrs Burton and the Claimant (page 101). Mrs Coe encouraged those present to talk things through between themselves before any matters of concern got to the stage of a formal complaint. Accordingly, she did not act on Chris Moses’ advice to inform the Claimant that she could approach Council members to raise any concerns.

174.9. On 29 May 2018 the Claimant went off sick.

174.10. On 30 May 2018 she emailed Mr Phelps (page 106), asking what action had been taken against Mr Jackson arising out of the incident on 8 May. Mr Phelps replied on 1 June 2018 (pages 104 – 105). He erroneously stated that the issues with the toilet facilities had been resolved on 20 May. As to matters with Mr Jackson,

he said that it was reasonable to conclude from the meeting on 11 May that this had been dealt with unless the Claimant was saying otherwise.

174.11. On 3 June 2018 the Claimant emailed Mr Phelps (page 104). She stated that whilst the apology was accepted, "*this does not excuse the aggressive and regimented attitude towards office staff*", which Mr Phelps accepts was a reference to Mr Howkins' email of 15 May; she added that she was "*addressing these concerns with [her] union representative*". Mrs Coe forwarded the Claimant's email to Mr Moses on the same day (page 117).

174.12. Mr Moses' email reply on 4 June 2018 (page 116) stated that Mr Jackson had "*not committed any acts of harassment or discrimination*", as dealt with in previous emails which the Tribunal has not seen. The option of a "*short-service dismissal*" was raised, and mention made of the risk of a claim associated with whistleblowing. Mr Moses suggested an informal meeting with the Claimant.

174.13. It was after this exchange that Mrs Coe made reference to concerns about the Claimant's performance (page 115), the first record in the evidence before the Tribunal of any such concerns being raised. Mr Phelps replied, referring positively to the idea of a meeting "*before things go too far*" and describing the Claimant's taking the matter to her union as "*the whole situation*" having "*exploded*".

174.14. There is then an unexplained gap of a whole week in the evidential material.

174.15. On 11 June 2018 the Claimant returned to work. On the same day the Staffing Committee met and decided that she should be dismissed "*on disciplinary and performance grounds*" (pages 121-122). On 12 June, a meeting of the full Council agreed to give authority to the Committee to follow that decision through to a conclusion (page 127).

174.16. On 15 June 2018, the Claimant saw the minutes of the Staffing Committee meeting. The Claimant's conduct in this respect is not in our judgment relevant to the issues we have to decide, as it is plain that the decision to dismiss her had already been made. The Respondent's witnesses, including Mr Phelps who signed the dismissal letter, say that the Respondent could have pulled back from dismissal at this stage, but that is wholly inconsistent with Mr Phelps' own express admission that the Claimant having seen the minutes was not something the Respondent took into account.

174.17. Also, on 15 June, Mr Jackson made a note of his discussion with the Claimant when she raised with him the content of the Staffing Committee minutes (pages 129 – 130). He referred to the Committee taking a "*dim view*" of Mr Howkins' email and said that the Claimant's taking the matter to her union representatives, and beyond that to the SLCC, was at odds with what he believed to be ongoing mediation.

174.18. On 17 June 2018, Mr Phelps emailed Mr Moses (page 130a) asking about the Respondent's options, which he anticipated included "*suspend[ing] her whilst we 'investigate' in reality just finalise her sacking*".

174.19 On 20 June 2018 (page 130b) Mr Phelps advised the members of the Staffing Committee that the Respondent should proceed with dismissing the Claimant. The Respondent accepts that it did not follow its disciplinary procedure.

174.20 Mr Phelps asked Mr Jackson to draw up a "list of gross misconduct citations" (page 132). These were the payroll issues, a breach of confidence demonstrated by Mr Howkins' "*strongly worded*" email threatening legal action (though Mr Phelps agrees there was no such breach), accessing the Committee minutes, not carrying out Mr Jackson's instructions regarding the grave deeds, and the issue about coming into work when off sick.

174.21. Mr Phelps then prepared the dismissal letter (pages 133 to 134).

175. The first issue we have to decide in the light of the material facts just summarised is whether the Claimant has proved facts from which the Tribunal could reasonably conclude, absent any adequate explanation from the Respondent, that by the time it decided to dismiss the Claimant on 11 June 2018 it believed that she may do a protected act.

176. The key documents are Mr Howkins' email of 15 May 2018 expressly setting out the possibility that the Claimant would take the question of Mr Jackson's conduct to the employment tribunal, and the Claimant's own email of 3 June 2018 in which, again by reference to Mr Jackson's conduct, she said that she was addressing matters with her union. As we have already noted, Mr Phelps accepts that the Claimant was referring back to Mr Howkins' email. Taking these two emails together therefore, there was every reason for the Respondent to believe the Claimant might bring discrimination proceedings or at the very least make an allegation of a contravention of the Act, doubtless via her union in view of her email of 3 June. Alternatively, more generally, the Respondent had every reason to believe that she may seek her union's advice and assistance in respect of a potential claim, which would fall within the broad auspices of "*doing any other thing for the purposes of or in connection with this Act*" (section 27(2)(c)).

177. What must be considered however is whether the Claimant has established a prima facie case that the Respondent did in fact believe that the Claimant may do a protected act along these lines. The case law recognises that respondents will rarely admit such matters and that it is not straightforward for a claimant to show what was in the minds of the decision-makers, something which of course a tribunal will rarely be able to know with certainty either. This is the purpose of the burden of proof provisions. When we apply those provisions, in our judgment there are a number of facts which can reasonably lead to the conclusion that the Respondent's decision makers had the requisite belief:

177.1. Mrs Coe accepts that the combination of Mr Howkins' email of 15 May and the Claimant's reference to her union in her email of 3 June made it more likely than not that she would pursue a claim, whether of discrimination or otherwise.

177.2. Mr Phelps accepts that as of 3 June the Respondent suspected the Claimant might bring a claim and/or seek advice from her union on the claims she might bring.

177.3. Although in his evidence to the Tribunal he denied that this could have included a claim of discrimination, it is abundantly clear that by 4 June, Mr Phelps and Mrs Coe – and possibly other members of the Staffing Committee – had engaged in discussions with Mr Moses specifically on the subject of allegations of discrimination and harassment made, or which might be made, by the Claimant against Mr Jackson. That very much suggests that the possibility of complaints of that nature were expressly in the Respondent's contemplation by that point.

177.4. Of course, Mr Moses advised that Mr Jackson had not harassed or discriminated against the Claimant, but it is no part of the legislation that the Respondent must believe the Claimant might make a well-founded allegation or bring a meritorious claim. It is sufficient that it believes she may make an allegation or bring a claim, whatever their merits.

177.4. Mr Moses' email in which that reference was made (page 116) also said that the Claimant was clearly unhappy. This was expressly said in the context of the Claimant's reference to discussions with her union. Mr Moses was not a decision-maker, but his comment is a further intimation that those who were decision-makers were aware of the possibility of the Claimant taking steps beyond those which she had taken internally in relation to Mr Jackson's conduct.

177.5. It is also plain from Mr Jackson's note of 15 June 2018 that at its meeting on 11 June 2018 the Staffing Committee had considered Mr Howkins' email, which is later described by Mr Jackson as a strongly worded threat of legal action. Although Mr Jackson was not, ostensibly at least, party to the decision to dismiss the Claimant either, he was fully involved in the process of putting together the case against her on which the Committee relied. The threat to which he referred was solely related to equality matters.

178. For all of these reasons, we reject Mr Brown's submission that the Respondent's decision-makers had no thought that the Claimant would pursue a discrimination allegation or bring a claim under the Act. We find instead that the Claimant has proved facts from which it can be reasonably concluded that the Respondent had the requisite belief. The relevant burden therefore shifts to the Respondent.

179. Mr Brown in his closing submissions referred to two relevant matters. The first was Mr Moses' reference to whistleblowing, which it is suggested shows that whilst the Respondent believed there might be a whistleblowing claim, it did not believe there would be a discrimination claim or intimation thereof. That overlooks the fact of Mr Moses' express reference to discrimination and harassment having previously been discussed with the Staffing Committee. Mr Brown secondly highlighted Mr Phelps' comment in his email of 26 June (page 139) in which he said to Mr Jackson, "*She is claiming sexism (toilets?)*". This was post-dismissal. Mr Brown's submission was that the email shows Mr Phelps' belief that this was the only basis on which the Claimant might be aggrieved, so that there was no belief that she may do the protected act she now relies on. We are not satisfied that this single tentatively expressed word is anything like cogent evidence sufficient to discharge the burden on the Respondent to show that it did not have the requisite belief that the Claimant may also do one or more protected acts on the basis of Mr Jackson's conduct.

180. We therefore turn to the crucial question of whether that belief was a more than trivial influence in the Respondent's decision to dismiss the Claimant. We are very conscious that we are not deciding an unfair dismissal case, so that unreasonable conduct on the Respondent's part is not of itself evidence of victimisation, though it may be evidence that enables an adverse inference to be drawn if there is no other explanation for it.

181. We also note again that tribunals will rarely, if ever, know for certain what was consciously in the minds of the decision-makers at the time of dismissal, let alone what was subconsciously influencing the decision being made. The first question is

therefore what inferences the Tribunal can reasonably draw from its findings of primary fact on the evidence that has been presented to it. Can it reasonably conclude that there has been a contravention of the Act as the Claimant alleges? It is sufficient for the Claimant to prove facts from which it could be concluded that she was dismissed in part because of the Respondent's belief that she may do a protected act; the belief does not have to be the sole reason, and it does not have to be the Respondent's conscious reason or motive for dismissal either.

182. We have had regard to the following:

182.1. Mr Phelps initially said to Mr Howkins that the concerns he had raised would be taken to the Staffing Committee, which was not on the face of it a negative response to an indication of the possibility of allegations or a claim under the Act. It is clear however that by the time of the decision to dismiss the Claimant less than a month later, the collective attitude of the members of the Committee was that it took a "dim view" of the email. Whilst this is said by the Respondent's witnesses to have been because it came from the Claimant's fiancé, the Respondent at no point addressed that by informing Mr Howkins or the Claimant, as Mr Moses had advised, that any complaint should be made by the Claimant directly. Moreover, Mr Phelps conceded that the Respondent's formal categorisation of this email as a breach of confidence by the Claimant did not make sense, which clearly indicates that the Committee took a dim view of it for other reasons. It is reasonable in our judgment to conclude that the real reason was that later set out by Mr Jackson in his list of gross misconduct citations, requested by Mr Phelps before he wrote the dismissal letter, namely that the email was a strongly worded threat of legal action.

182.2. Mrs Coe's evidence was that she was told by Mr Moses that the complaints set out in Mr Howkins' email – which included references to the working environment for female employees, the Respondent's "equality protocols", and a tribunal claim – looked vexatious. That too is suggestive of it being part of the explanation for why the Respondent's decision-makers behaved as they did thereafter, particularly when considered together with the fact that the Claimant's unhappiness at work is expressly referred to in the dismissal letter.

182.3 Mr Howkins' email and the Claimant's addressing with her union the matters raised in it were discussed by the Staffing Committee at the meeting on 11 May 2018 at which it was decided she should be dismissed.

182.4. The evidence as a whole makes clear that there had been various indications of other matters about which the Claimant was unhappy at work before she made her formal complaint about Mr Jackson on 8 May 2018, in particular associated with the question of her job title and her coming into work whilst off sick. There is no evidence that the Respondent had any thought that she should be dismissed as a result of those complaints, even when Mrs Coe felt so strongly about the second one. Even more telling is that even after the Claimant raised the formal complaint about Mr Jackson on 8 May – an email which made no mention of discrimination or equality issues – there is no evidence that her dismissal came under consideration; in fact, the opposite was the case – the Respondent sought, albeit outside of its own procedures, to resolve matters. Dismissal came under consideration for the first time

after the Claimant's email of 3 June, with its connection back to Mr Howkins' email. That timing is particularly revealing.

182.5. Allied to that, it is also particularly revealing that the evidence before the Tribunal shows that the Claimant did nothing of any note between the meeting with Mrs Coe on 24 May when everyone was encouraged to resolve matters without formal complaint, and 11 June when the Staffing Committee decided she should be dismissed – she was on sick leave for most of that period – apart from to ask Mr Phelps on 30 May what action was being taken against Mr Jackson and to inform him on 3 June that she was addressing matters, implicitly including those raised by Mr Howkins, with her union.

182.6. The decision to dismiss the Claimant was therefore out of all proportion to anything she had done or raised in that period which might have given rise to a concern about a continuing employment relationship, and completely out of kilter with how the Respondent had dealt with complaints from her before. This alone would be sufficient to give rise to an inference that the belief she may do a protected act played a part in the Respondent's decision.

182.7. That analysis is entirely consistent with and confirmed by Mr Phelps' comment that the Claimant taking up matters with her union meant that the situation had "exploded". It is reasonable to infer from that comment that he was of the view that her having done so put what the Respondent had previously managed into a potentially different sphere.

182.8. It is also particularly noteworthy, as Miss King said, that there was no change in the Claimant's ability to do her job in the period between Mr Howkins' email of 15 May and the Claimant's email of 3 June, when compared to the period before. It was after the Claimant notified the Respondent that she was taking up matters with her union (which, it should be recalled again, Mr Phelps accepts was a reference back to Mr Howkins' email as well as to the events of 8 May) that we see the first evidence of the Respondent raising concerns about her performance. In fact, it came immediately after, in the form of Mrs Coe's email of 4 June at page 115.

182.9. There is in addition the wholly unreasonable conduct of the Respondent in constructing a case for dismissal against the Claimant after it had made the decision to dismiss. By itself this would not have been a sufficient basis on which adverse inferences could be drawn – as we have noted, this is not an unfair dismissal case. It nevertheless completes the picture we have just outlined of a material change in the Respondent's behaviour after it received the indication that the Claimant may do a protected act.

183. There is a clear set of secondary facts therefore which draws a line between the decision to dismiss and the Respondent's belief that the Claimant may do a protected act. The proximity of the decision to dismiss to the formation of the Respondent's belief would of itself amount to "something more", sufficient to pass the burden of proof to the Respondent. If anything is needed beyond that, it is amply supplied by the marked inconsistencies in the reasons which the Respondent has put forward to explain its decision to dismiss. We have highlighted these in our findings of fact, but in summary note the following:

183.1. Mrs Coe says that the Claimant's conduct on 15 June was a decisive factor, but Mr Phelps says it was not taken into account.

183.2. Mrs Coe says that the Claimant sending a letter to solicitors about burial deeds was part of the reasons for dismissal and yet this was not mentioned in the dismissal letter.

183.3. Mr Phelps says in his supplementary statement that the Claimant's "false accusation" against Mrs Coe related to coming into the office whilst off sick was one of the reasons, but this is not mentioned in the dismissal letter either.

183.4. Mr Phelps says that the Claimant wanting a councillor banned from the Respondent's office was one of the reasons for dismissal, and yet it appears in the Respondent's evidence for the first time in his supplementary statement, produced many months after the start of this Hearing.

183.5. Mr Phelps mentions a number of additional points taken into account in the decision such as how the Claimant dealt with members of the public walking into the office. Again, these appeared for the first time in his supplementary statement.

184. For all of the reasons given above, we are amply satisfied that the Claimant has proven facts from which the Tribunal could reasonably conclude that the dismissal was an act of victimisation.

185. We therefore turn to consider whether the Respondent has discharged the burden of proving that its belief that the Claimant may do a protected act was in no sense whatsoever a reason for her dismissal. It does not have to have been the only factor in the decision.

186. The Respondent's case is that this was simply a short-service dismissal, as advised by Mr Moses. Whilst it is not at all unusual for employers to take decisions on this basis, the simple fact of short service does not answer the question of why the Claimant was dismissed at the point that she was. Even if it could be said to do so, particularly where as in this case we have concluded that the question of dismissal arose in the minds of the decision-makers only after they became aware that she may do a protected act, it would be nowhere near enough to discharge the Respondent's burden.

187. We therefore turn to the reasons given by the Respondent in the dismissal letter, and note:

187.1. For the reasons already given, we discount the reliance placed on the Claimant seeing the Staffing Committee minutes of 11 June. We would nevertheless say that given the nature of her role, we find it unsurprising that she would think it appropriate to review the minutes; her freedom to do so is confirmed by the fact that it was not a protected document. Moreover, having seen them, her only action was to raise with Mr Jackson a question about her own dismissal, in other words taking what she had seen to her employer. She did see information in relation to another employee as well, but her job description suggests this was not out of the ordinary either, and we have heard no evidence of any previous concerns about her not keeping confidences. The groundsman who saw equally sensitive information may

have been engaged in a role requiring less confidentiality and trust, but in his case, he told several others what he had seen, and did so outside of the Respondent's premises. On the face of it, that would seem at least as serious, if not a more serious offence. For all of these reasons, this is not a satisfactory explanation of the Respondent's conduct.

187.2. In respect of the Claimant's performance in her role, it is true that the Respondent did not appoint her as Deputy Clerk, which may be taken as an indication of its view that she was not yet capable of fulfilling that role. The fact is however that this was not the role she was employed in or dismissed from and it was very specifically the issues with payroll that the Respondent relied upon as one of the grounds for dismissal. There was nothing in the Claimant's 2017 or 2018 reviews which indicated any criticism of her in this respect. In 2018 the only reference to payroll was that it was to be contracted out, and in 2017 it referred to it being a half day per month task, which it was said resulted in "*skill fade*". This was confirmed by the Council meeting on 21 November 2017 (page 80). Payroll was therefore not a fundamental part of her role as the dismissal letter stated.

187.3. We need say no more about the Claimant's unhappiness with her job title than that this had not been previously thought to be grounds for dismissal. In fact, the Claimant's email of 3 June thanked Mr Phelps for clarifying her role, which could fairly be read as being the end of the matter from her point of view; she did not raise it thereafter.

187.4. The remaining issue was the Claimant continuing to raise the question of Mr Jackson's comment. That is capable of only one interpretation, namely that she had done so by a combination of Mr Howkins' email of 15 May and her own of 3 June.

188. It is unnecessary for us to deal with all of the other reasons for dismissal given by the Respondent at various points in the evidence. We have already noted that they were not in the dismissal letter and that several of them were raised for the first time in Mr Phelps' supplementary statement, without any evidence of them previously having been raised with the Claimant as a basis for action against her. In that context, those reasons could not in our view discharge the burden on the Respondent either. We will however mention one other matter. The Respondent's own evidence is that the "serious breach of confidentiality" in the Claimant telling Mr Howson of what had taken place at work was in fact nothing of the sort. It could hardly be said otherwise. We have to say that the incoherence of this reason for dismissal in particular is indicative of an attempt, subconsciously or otherwise, to conceal the real reason operating on the minds of the decision-makers.

189. The Respondent has therefore failed to discharge the burden of proving that its belief that the Claimant may do a protected act was not part of its reasons for dismissing her. In fact, for the reasons we have given, we conclude that, subconsciously or otherwise, this belief was a significant reason in every sense of that word. The Claimant's complaint of victimisation succeeds.

Time limits

190. We turn finally to the question of time limits. The parties were agreed that there was no time limit issue with the complaint relating to dismissal. Given the basis on which we allowed the Claimant's amendment of her complaint, we agree. It was a re-labelling of facts already pleaded.

191. On the complaint relating to the toilet facilities, as made clear above, the detriments changed at various points throughout the Claimant's employment. We are satisfied of two matters in relation to each detriment – the unavailability of immediate access to facilities, the risk of seeing men using the facilities, the absence of a bin for sanitary products and the need to inform the caretaker to empty the bin. First, we are clear that until it was resolved, each detriment was an ongoing situation or continuing state of affairs in which the Claimant was less favourably treated and for which the Respondent was responsible. This is not a case where the Claimant complains about a single decision or action which had ongoing consequences. Her complaint was about the ongoing state of affairs, which is how the situation can be fairly characterised. Secondly and in any event, it is abundantly clear that each aspect of this complaint is connected. The final detriment was the requirement to inform the caretaker when the bin needed to be emptied of sanitary products. That detriment was not resolved by the time the Claimant was suspended on 18 June 2018, which would have been the last date on which she was affected by that arrangement.

192. With ACAS Early Conciliation having commenced on 17 September 2018, the complaint in relation to this matter was therefore brought in time. Given our conclusions about the connections between them, the complaints about the other matters were also brought in time as a result of section 123(3). Even had that not been the case, we would have extended time to allow the complaints to proceed. Applying **Morgan**, even in the absence of a clear explanation from the Claimant as to why the complaint was brought late, because the various detriments were clearly connected and on the basis of what was therefore a very short delay in presenting the complaints, but particularly because of the evident lack of any prejudice to the Respondent in its ability to marshal its defence against them, it would have been just and equitable to do so.

193. Finally, we turn to the proven complaints about the conduct of Mr Jackson. The complaint related to 15 May 2018 is very obviously connected to the Claimant's dismissal, in that Mr Howkins' email about that day was a feature of the Respondent's decision to dismiss. The other complaints too – arising from events on 16 January and 8 May 2018 – also related to Mr Jackson's conduct. It was his conduct which the Claimant was addressing with her union and about which the Respondent believed she would complain and/or bring a tribunal claim. The threads both of Mr Jackson as the discriminator and of his conduct towards the Claimant therefore run very clearly from 16 January through to the Respondent's decision to dismiss.

194. This in our judgment properly constitutes a continuing discriminatory state of affairs for which the Respondent was responsible. We do not accept Mr Brown's

submission that there needed to be a more regular occurrence of discriminatory conduct in a context in which the discriminator and the person discriminated against were in regular contact, particularly where there was only a short period between the first act of harassment and the last. The complaints of harassment were therefore brought in time by reason of section 123(3).

195. In any event, we would have extended time in relation to these complaints also. Contrary to Mr Brown's submission, the fact that the Claimant did not complain about what happened on 16 January does not in our view go to the question of whether time should be extended, or at least it is not a material factor to be put in the balance. Again, accepting that we were not offered a convincing explanation from the Claimant (that she had not been dismissed), applying the guidance in **Morgan** it is just and equitable to extend time. The delay in each case was not substantial, allied to which we are in no doubt that the Respondent was able to respond to each of the complaints more than adequately, there being as it turned out little dispute on those key facts which formed the basis on which we have decided that the complaints should succeed.

196. All of those complaints resolved in the Claimant's favour are therefore within the Tribunal's jurisdiction.

197. The parties have already agreed a date for the remedy hearing in this case and a Case Management Order was made by consent. Formal confirmation of that Order will follow separately.

Note: This was in part a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

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Employment Judge Faulkner

Date: 25 November 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

27 November 2020

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