EMPLOYMENT TRIBUNALS

Claimant: Jane Woodward

Respondent: Barnard Castle Town Council

RESERVED JUDGMENT

Heard: Remotely by Cloud Video Platform **On: 02, 03, 04, 05, 06 and 09 November 2020**
(deliberations 10 and 25 November 2020)

Before: Employment Judge Sweeney

Members: Claire Hunter and Stuart Moules

Representation:

For the Claimant: Paul Clark, solicitor
For the Respondent: Amy Rumble, counsel

The unanimous Judgment of the Tribunal is as follows:

1. **The complaint of unfair dismissal is well founded and succeeds**.

2. **The complaint of disability discrimination by way of failure to make reasonable adjustment is well founded and succeeds.**

3. **The complaint of disability discrimination by way of unfavourable treatment because of something arising in consequence of disability is not well founded and is dismissed.**

4. **The complaint of harassment related to disability is not well founded and is dismissed.**

Covid-19 statement:
This was 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.

REASONS

The Claimant's claims

1. By a Claim Form presented on 19 November 2019, the Claimant brought claims of unfair dismissal and disability discrimination for contravention of sections 15, 20 and 26 Equality Act 2010. The Respondent denied the claims. It contended that it fairly dismissed the Claimant for a substantial reason such as to justify dismissal of an employee holding the position the Claimant held (section 98(1)(b) Employment Rights Act 1996, on the basis that there had been an irretrievable breakdown in relationships between the Claimant and her co-workers and local councillors. Although it conceded that the Claimant was as disabled person within the meaning of section 6 Equality Act 2010, it denied discriminating against her.

The Hearing

2. The Final Hearing took place remotely over 6 days. The Tribunal reserved its judgment and deliberated on 10 and 25 November 2020.

3. Evidence for the Claimant was given by:

   (1) The Claimant, Mrs Woodward,
   (2) Gill Chapple,
   (3) Nicky Cooke
   (4) Roger Peat,
   (5) Barry Piercy

4. A witness statement was served on behalf of an additional witness, PC Marsh but he was not called to give evidence.

5. The Respondent called the following witnesses:

   (1) Michael King,
   (2) Councillor Sandra Moorhouse,
   (3) Councillor John Blissett,
   (4) Claire Atkinson,
   (5) Yvette Farren

6. The parties had prepared an electronic bundle. On the first morning of the hearing the Respondent emailed the Tribunal a number of transcripts of recordings of council and committee meetings. Attempts to insert and paginate

the transcripts into the electronic bundle proved cumbersome. In these written reasons some pages are identified by the internal pagination of the relevant transcript ('for example '*page x of x of the transcript*'). The dates of meetings for which transcripts were provided late are:

- 04 March 2019
- 18 March 2019
- 01 April 2019
- 13 May 2019
- 03 June 2019
- 24 June 2019
- 15 July 2019
- 18 August 2019

The issues

7. The parties had agreed a list of issues, a chronology and a cast list prior to the start of the hearing. The issues are attached as an appendix to these reasons.

Findings of fact

8. Having considered all the evidence before it (written and oral) and the submissions made by the representatives on behalf of the parties, the Tribunal finds the following facts.

The Claimant's working environment

9. The Claimant was employed by the Respondent, a local authority, as Deputy Town Clerk. Although a local authority, the Respondent is a small organisation. In the period relevant to these proceedings, the council office consisted of four employees, namely:

    a. Michael King, the Town Clerk: he was employed in this position from September 2012 to March 2020;
    b. The Claimant, Mrs Woodward, the Deputy Town Clerk: she was employed in this position from 20 November 2014 to 06 August 2019.
    c. Claire Atkinson, Service Officer (Finance): she commenced employment in this position on 08 August 2016.
    d. Yvette Farren, Service Officer: she commenced this employment in this position on 05 April 2005.

10. There were 12 local councillors. For present purposes the key councillors in these proceedings were/are:

    a. Councillor Moorhouse: she was the Mayor from 15 May 2017 to 13 May 2019 (her second stint as Mayor).
    b. Councillor J Blissett: he is currently the Mayor. At the time of these events he was deputy Mayor and Chair of Resources

c. Councillor R Peat: he is no longer a councillor but was until 13 May 2019 when he resigned. He and the Claimant formed a personal relationship from about December 2017, which is very much at the heart of this case.

11. The office environment was small, as indeed was the community in which the employees and councillors lived and worked We have no doubt that there would have been moments where they had their ups and downs in their relationships but by and large, all the staff got on reasonably well and the office functioned effectively with an air of informality. In keeping with the relative informality, the Claimant enjoyed freedoms which might not be available in other working environments. For example, she was permitted to take her children to the office where they could do their homework on the office computer.

12. The employees were open with each other about their day-to-day lives. They discussed among themselves things that troubled them or caused them stress outside work. They were open with each other in speaking about things like their mental health and general well-being and they helped each other out from time to time. This was in keeping with the generally relaxed informality and friendly atmosphere within the office. Mr King was a supportive manager and the Claimant got on well with him and with her two direct reports, Ms Atkinson and Ms Farren. Local councillors also got on well with the staff in the council office, which they would frequently attend on council business. They too enjoyed familiar and amicable relationships with the staff.

13. Mr King was aware from an early stage in her employment that the Claimant suffered from depression and anxiety. In his evidence to the Tribunal, Mr King accepted that he had been aware for some time of the Claimant's depression and that she had been on medication and that he understood her to meet the definition of a disabled person under the Equality Act. He also accepted that elected members were, at least from the period of her suspension, made aware of her condition in general terms.

14. The friendly atmosphere started to change from about late 2017. Relationships between the Claimant and Ms Farren and Ms Atkinson which we have described above became strained, at least under the surface. We say 'under the surface' because Ms Atkinson and Ms Farren did not speak to the Claimant about what was on their minds, at least until February 2018 when, in Ms Farren's case, she and the Claimant had a direct conversation, which we address in paragraph 22 below. The atmosphere changed after the Claimant's return from holiday in April 2018 and from then remained frosty albeit the office staff continued to work professionally.

The Claimant's relationship with Councillor Peat

15. What led to the souring of the atmosphere was that, sometime in 2017 the Claimant formed a personal relationship with Roger Peat, who was at the time

a respected local councillor. Mr Peat told the Tribunal that the friendship between him and the Claimant started in about November 2017, although we find it had been developing since about summer that year. Initially, the Claimant did not mention to her colleagues how close she and Councillor Peat were becoming and we find that it is likely that knowledge of the developing relationship emerged as word spread that the two had been seen together out of work. As rumours started, in December 2017 Councillor Peat mentioned directly to Mr King that he had begun a personal relationship with the Claimant.

16. It is striking that some of the Respondent's witnesses say that the Claimant's attitude towards them changed from late 2017. For example, in paragraph 3 of her witness statement, Ms Atkinson states that from that point the Claimant took every opportunity to embarrass her in front of Mr Peat and indeed other men (albeit no examples of this were ever given). In paragraph 4 of her statement, Ms Farren places the 'change' in the Claimant from June 2017 onwards and goes as far as to say that she admitted to using her sexuality to her advantage, which Ms Farren says was evident in her dealings with men (albeit no context was given to this conversation nor were examples of such alleged behaviour provided). Ms Farren describes a change in the Claimant's treatment of Ms Atkinson in front of men. There is no suggestion from either Ms Atkinson or Ms Farren (or anyone else) that the Clamant behaved in this way prior to striking up a relationship with Councillor Peat. Given the Tribunal's limited function, the issue is not whether the Claimant did or did not in fact behave as Ms Atkinson or Ms Farren allege. We emphasise that no examples of the alleged behaviour were proffered. The issue relevant to these proceedings is how Ms Atkinson and Ms Farren came to perceive the Claimant. We find that Ms Farren and Ms Atkinson came to see the Claimant in the way described by them in their statements – something which the Claimant says is unjustified and unfair to her.

17. It is also striking that, in these proceedings, everyone has referred to the relationship between the Claimant and Councillor Peat as a friendship. Yet Ms Atkinson and Ms Farren put the word in inverted commas in paragraphs 3 and 8 of their witness statements respectively. The Tribunal was given few details of the nature of the relationship. Again, the important thing for the purposes of these proceedings is how that relationship was perceived by the employees and members of the council. We find that it was perceived by others as being more than a friendship and that they were perceived to be in an intimate relationship. We find that the Claimant's colleagues, Ms Farren and Ms Atkinson and some councillors, in particular Councillor Moorhouse and Councillor John Blissett, did not approve of this relationship primarily from a moral standpoint and that their attitude towards the Claimant changed as a consequence. What led to their moral disapproval was that Councillor Peat was married and his wife, who was known to and liked by all concerned, was seriously unwell at the time. Sadly, Mrs Peat passed away in October 2020, very shortly before the commencement of this hearing. She had been suffering from Alzheimers disease for some time and since about December 2017 had

been residing permanently in a Care Home. We find that Ms Farren and Ms Atkinson found the relationship distasteful on a personal level and thought worse of the Claimant, whom they regarded as having manipulated Councillor Peat at a difficult time in his life. Whereas Ms Farren and Ms Atkinson say that the Claimant's attitude towards them changed in 2017, they fail to recognise – or admit - that it was their attitude towards the Claimant that had changed. The Claimant, for her part, seemed insensitive to the fact that her colleagues and local councillors, working and living in a small community such as this, might feel uncomfortable with the fact that she was developing a close relationship with Councillor Peat.

18. Councillor Moorhouse, who became aware of the Claimant's relationship with Councillor Peat certainly from December 2017, did not approve of the relationship either. In her evidence to the Tribunal she accepted she was never comfortable with it but hoped that it 'would pan out and things would get back to normal'. She, too, we find regarded it as distasteful and also problematic from a councillor/officer perspective. She was unable to express open moral disapproval. However, she was able to and did raise the issue of working relationships and boundaries between council staff and elected members.

2. Therefore, following Mr Peat raising the issue directly with Mr King in December 2017, it was arranged that Mr King and Councillor Moorhouse would meet with him and the Claimant that month to discuss the ramifications from a professional view point.

19. Mr King, for his part, did not consider the relationship to be a significant issue. His only concern was that it might be problematic if it strayed over into their professional and elected positions respectively. The specific concern was the potential for exchange of information between the deputy Town Clerk and Councillor Peat to which he, as an individual councillor, might not be entitled - whether that would be about another councillor or about matters not necessary relevant to his role. Mr King's concern was that anything that passes into the hands of an individual councillor as opposed to the group of councillors could be regarded as a breach of privilege. This was the only issue Mr King had and it was one that he was always content to manage.

20. It was agreed at the meeting that it was necessary for all councillors to be made aware on a confidential basis of the status of the relationship. Councillor Moorhouse and Mr King said that provided there was a clear separation between their friendship and Mr Peat's position on the council, the situation could be managed but that they would monitor the position over time. Things started to take a turn for the worse from February the following year.

February 2018: the first anonymous letter

21. In February 2018 (we were never given the precise date) an anonymous letter was sent to the council [**pages 932-933].** It is clear from the content that the author of the letter strongly disapproved of the relationship on a moral and professional level.

22. Mr Clark asked Ms Farren in cross examination whether she had raised any issues or objections to her relationship with councillor Peat directly with the Claimant. Ms Farren said '*not that it is recorded but [the Claimant] will recall a very heated conversation we had on 20 February when I made my feelings perfectly clear*.' We find that on 20 February 2018 the Claimant and Ms Farren did indeed have a difficult conversation. The Claimant disclosed to Ms Farren details of her private life and certainly more about her relationship with Councillor Peat than Ms Farren had hitherto understood. What else she revealed to her we do not know and are unable to make any findings on. The parties seemed reluctant to explore this in any detail in evidence. Ms Farren said she was told information by the Claimant that she would rather not have known. This was not challenged or explored by Mr Clarke. He did not probe and Ms Farren did not tell us much else about what was revealed.

23. We find on the balance of probabilities that Ms Farren made clear to the Claimant her disapproval of the relationship and that she regarded councillor Peat to be in a vulnerable position. The essence of her concern was that she believed the Claimant was manipulating him. We emphasise that we do not find, and it is entirely unnecessary for us to consider whether Ms Farren was correct. However, we do find that her views were made clear to the Claimant. We note that the Claimant texted Ms Farren on 20 February 2018 at 17:26 to say '*are you ok? Sorry if I upset you: xx'* [**page 937**]. We conclude this is a reference to the discussion they had and that the Claimant recognised that Ms Farren was upset by what she had disclosed regarding her relationship with Councillor Peat.

24. The Claimant and her children and Councillor Peat went on holiday in April 2018. The Claimant made Mr King aware she was going with Councillor Peat in advance.

25. She returned to work on 16 April 2018. Mr King emailed asking to meet with her in order to update her on an issue that had arisen in her absence [**page 94**]. Mr King explained that rumours had started to spread regarding the whereabouts of Councillor Peat. He said that Councillor Moorhouse had interviewed Ms Farren and Ms Atkinson. He explained that Ms Farren no longer wanted the Claimant to be her line manager. The reasons for Ms Farren's request were never given to the Claimant. The Claimant accepted the decision but said she did not understand it. We find that she must have and did realise that Ms Farren's request was because of what had been discussed between them on 20 February 2018, namely her developing relationship with Councillor Peat and Ms Farren's expressed disapproval of it. Ms Farren was unlikely to tell Mr King

the reason for the request but the Claimant must have understood the real reason for the request and we find that she did. From here, the atmosphere in the office became strained, albeit the staff continued to work effectively.

26. On 17 April 2018 Councillor Moorhouse and Councillor John Blissett met with Councillor Peat to discuss his relationship with the Claimant. Cllr Blissett suggested that Councillor Peat resign. Councillor Peat asked Mr King for his view, which was that that councillor Peat need not resign as he could monitor and manage the situation. Councillors Moorhouse and Blissett insisted that Councllor Peat brief his fellow councillors on the nature of his relationship with the Claimant.

27. On 23 April 2018, therefore, Councillor Peat informed his fellow councillors at a private briefing of the Resources Committee of his friendship with the Claimant, as he had been asked to by Councillors Moorhouse and Blissett. Mr King emphasised that the information was being given in confidence as it was information relating to a member of staff and was to be treated as confidential.

Second anonymous letter

28. Shortly after this briefing, a second anonymous letter (date-stamped 26 April 2018) was delivered to a former councillor on 27 April 2018 and passed to Mr King on 30 April 2018. Again, the letter was about the relationship between Councillor Peat and the Claimant **[pages 934-935**]. Again, it is clear from the content that the author strongly disapproved of the relationship on a moral and professional level. This second letter referred to information which had not, or at least, should not have been, shared outside the council. This was apparent to Mr King when he read the letter and he shared this concern with Councillor Moorhouse on 01 May 2018 [**page 98**]. She responded defensively to this suggestion on 03 May 2018 and again on 04 May 2018 [**pages 100-102**]. She did so in terms which clearly gave Mr King cause to raise a question to PC Marsh as to whether Councillor Moorhouse may, or at some point may, be seen to be interfering with a police investigation [**page 99**].

29. We pause at this juncture to say that within the council the level of disapproval of the relationship had grown. Some individuals including, we find, Councillor Moorhouse, saw the relationship as being that of a younger woman taking advantage of an older man in difficult circumstances, going on holiday with him while his wife languished in a care home. The gossip and rumours had spread locally and the Claimant was now regarded by some, in particular Councillors Moorhouse and Blissett in a negative light.

30. The consequence of this change in attitude towards the Claimant was damaging for her. The rumour mill had started. Anonymous letters, as described above, were sent raising concerns about the relationship. She was talked about in derogatory terms. Councillor Moorhouse said in evidence that

people were making comments such as '*oh I see the gold digger's got a sugar daddy'*. While that was a comment Councillor Moorhouse said was made to her, we infer that this it was, in fact, a view of the Claimant also shared by her. In paragraph 4 of her witness statement, when referring to the events of 19 February 2019 (which we say more about below) Councillor Moorhouse says: "*I then heard Jane's high heels cross the office floor and go to the outer door before returning at speed and barging into the Dawson Room past Cllr. Peat in the doorway*".

31. Why, we asked ourselves would Councillor Moorhouse refer to the Claimant's 'high heels'? She could simply have said 'I heard Jane walk across the office' but she chose specifically to reference the Claimant's footwear. We conclude that Councillor Moorhouse referred to 'high heels' in a derogatory way. It was meant to say something about the Claimant. We find that Councillor Moorhouse regarded the Claimant as something of a 'femme fatale' as regards her relationship with Mr Peat and that she influenced others, in particular Councillor Blissett, in holding to this view. It was this sense of moral outrage that was to be the Claimant's ultimate undoing. The Claimant said in paragraph 15 of her statement: '*my private and personal relationship with councillor Peat is the crux of this whole case'*. We agree.

32. We must make clear that we recognise that the Claimant's co-workers and local councillors genuinely found the Claimant's relationship with Mr Peat as unsettling and awkward given his personal circumstances. The Claimant, we find, was impervious to her colleagues' feelings of sensitivity with regards the relationship. She did not see that others might be uneasy about her developing a relationship with Mr Peat. Those who knew Mr and Mrs Peat would inevitably have found that a difficult scenario. The Claimant's mind-set was that if no-one mentioned to her that they had a problem with the relationship then there was no problem. To an extent the Claimant, we find, lacked insight into the broader picture and the difficulties others had in raising such a sensitive issue.

33. Mr King remained supportive of the Claimant. He referred the anonymous letters to the police and they were treated as malicious communications. The Claimant was, understandably, very upset by the letters. On 05 May 2018 she emailed councillors expressing her concern that the anonymous letter of 26 April had been sent by, or someone associated with, a person who attended the briefing of the Resources Committee on 23 April 2018.

34. Following her email of 05 May 2018, a meeting was arranged between the Claimant, Mr King, Councillors Moorhouse and Blissett and PC Marsh. We accept the evidence of the Claimant that, at this meeting neither councillor showed concern for her and they were defensive and dismissive of her. Indeed, that was the pattern that, on the whole, Councillors Moorhouse and Blissett followed in 2019 in their dealings with the Claimant. In his evidence to the Tribunal, Councillor Blissett referred to having been 'interrogated by a police-

man' (referring to PC Marsh) and that it felt like he was being accused of sending the letter. However, he had not been accused of sending the anonymous letter. Given his senior position in the council, he ought to have realised the potential for the information to have leaked out from 'a councillor' or someone connected to a councillor. Instead, he had a sense of personal outrage, which he never shook off, and we have no doubt he manifested this to the Claimant at the meeting. We also have no doubt that Councillor Moorhouse manifested her defensive position (consistent with that which she clearly expressed in her previous email communication with Mr King). One thing they did not manifest was any concern for the Claimant's or Councillor Peat's well-being.

35. There is no particular event of any significance from May 2018 until February 2019 relevant to the proceedings. If anything, there is some relevance to the absence of any significant events. The Claimant and Mr Peat continued their relationship. We find that during this period nothing changed in terms of the disapproval of the relationship and how the Claimant was perceived. People kept up appearances but there remained a strained atmosphere in the office which had not existed before the beginning of the Claimant's relationship. That said, the office operated effectively throughout this period.

36. Mr King could see that the atmosphere remained strained. The Claimant could not or refused to see it. Therefore, when, on 07 February 2019, Mr King said to the Claimant that she needed to re-build her relationship with Ms Atkinson and Ms Farren, she was unable to see that there was a problem. Ms Farren had not spoken about her feelings since February 2018, In her evidence the Claimant referred the Tribunal to WhatsApp messages she exchanged with Ms Farren as being friendly and supportive, with a view to demonstrating to the Tribunal that there was no problem. We have seen those messages and they are friendly. However, that is consistent with our conclusion that people were 'keeping up appearances' and had difficulty in broaching head-on an extremely sensitive and, as the Claimant rightly maintained, private issue. Save for the difficult conversation back in February 2018, the relationship had become something of an 'elephant in the room'. It is unwise to rely solely on a few WhatsApp messages to gauge the solidity of human relationships. The strength of relationships is also and more usually gauged by the sense of warmth and meaning picked up through personal interaction.

37. The Claimant, following Mr King's remark about the Claimant needing to rebuild relationships, recognised that relations were strained in the office. However, she was unable to see that the very fact of her relationship with Councillor Peat (given his personal circumstances) was uncomfortable for others. In time, Ms Atkinson asked that the Claimant cease to be her line manager. Mr King, therefore, took over line management of Ms Atkinson from 08 February 2019.

38. On 15 February 2019 the Claimant, responding to Mr King emailed him setting out her thoughts as to how she could be supported by him [**page 107**]. It is, in itself, a perfectly reasonable email. However, aside from the acknowledgement that they need to do something together to 'repair our relationship as a team', the Claimant puts the onus all on Mr King. Despite Mr King saying that she needed to rebuild relations with Ms Atkinson and Ms Farren and despite the seniority of the Claimant, she did not offer any suggestions herself as to what she could do. She recognised that miscommunication or misinterpretation could be very damaging. The Claimant could have proactively addressed this by raising the 'elephant in the room' with Ms Atkinson and Ms Farren directly so as to help dispel any damaging perceptions of her and to rebuild those relationships. The Claimant has insisted that her relationship with Mr Peat was private and personal, We agree with her (subject only to the professional boundaries issue). However, she talked openly about the two of them going out in public together. She did not hide the relationship but she did not discuss with anyone the most important thing: the sensitivity of the relationship.

39. The Claimant referred to the problem in the office being down to miscommunication and misinterpretation and to a very large extent we agree with that and so find. However, communication is a two-way process. It was because the relationship was personal and private that made it difficult for Ms Atkinson and Ms Farren to raise the subject directly with the Claimant.

40. It is notable that the only occasion the relationship was discussed was during a 'heated' discussion on 20 February 2018. What was called for, however, was not a heated discussion but a managed and sensitive one. Only the Claimant, perhaps with the assistance of Councillor Peat, could have initiated such a sensitive discussion with her colleagues. Had she been more insightful and sensitive to the feelings of her colleagues, in her email to Mr King of 15 February 2019, she might well have suggested things she might do to help to rebuild relationships. Had they all discussed things sensitively at an early stage, things might not have turned out as they did. However, there were no such conversations. Equally, had Ms Farren and Ms Atkinson, Councillor Moorhouse and Councillor Blissett been more insightful and sensitive to the needs of the Claimant and Councillor Peat for companionship, recognising that the needs of people in life are varied and complex, things might not have turned out as they did. It was a situation that called for sensitive and frank conversation all round. Regrettably, that did not happen. Instead, gossip and rumour spread and people formed unsubstantiated, subjective and ultimately extremely damaging and unfair assessments of the Claimant's character. Seeing things like the Claimant going on holiday with Councillor Peat while his wife was confined, and learning of gifts purchased for her by Councillor Peat, the view that the Claimant was manipulating him took hold.

19 ebruary 2019: meeting in the Dawson room

41. On 18 February 2019, Mr King asked Councillor Peat if they could have a catch-up meeting the following day. When Mr Peat asked what it was about, Mr King said that it was about Jane (the Claimant). Mr King and Councillor Moorhouse wanted to discuss the relationship with Councillor Peat, in the absence of the Claimant. The three of them met the following day in the Dawson room which is next to the main office where the Claimant works. She was at her desk at the time.

42. On 19 February 2019 Councillor Moorhouse asked Councillor Peat to disclose again to councillors at a meeting the nature and extent of his relationship with the Claimant. Councillor Peat reluctantly agreed – his reluctance being due to the proximity of his briefing to councillors in April 2018 and the sending of the second anonymous letter. He left the room and went to the Claimant's desk a few metres from the Dawson room. He spent about 5 minutes with the Claimant.

43. He told her what the meeting had been about and that he had been asked to speak to councillors again. The Claimant was concerned about this given she believed that it was a councillor or someone associated with a councillor who had sent the second anonymous letter. She was angry that she had not been invited to the meeting as she had been invited to the previous meetings where the relationship was discussed.

44. Councillor Peat went to the Dawson room and said that the Claimant would like to speak to them. Her decision to go to the room was considered and was not an instantaneous reaction. The Claimant entered the room and confronted Mr King and Councillor Moorhouse. We find that the Claimant was angry and combative towards Councillor Moorhouse and Mr King. She raised her voice. She was angered by not having been invited to the meeting in the first place but she was also upset by the thought of a further anonymous letter and felt a sense of injustice by being excluded from the meeting. She said that the meeting 'was about us' (her and Mr Peat). Councillor Moorhouse said that the meeting was only about Councillor Peat's position. The Claimant said that this amounted to bullying and harassment.

45. Mr King explained that the meeting was about the potential impact of the relationship on the role of Councillor Peat as an Elected Member, that meetings with her as an employee were different and had different policies which was for him to manage separately.

46. We pause to resolve a dispute of fact between the parties. Councillor Moorhouse, in her witness statement, gave an account of what she heard from the Dawson room prior to the Claimant joining her and Mr King. We do not accept that the Claimant was wearing high heels in the office or that, in any event, Councillor Moorhouse could pick out the noise of high-heels on the carpeted floor. Nor do we accept that the Claimant walked across the room to put a sign on the office outer door before entering the Dawson Room. The Claimant walked from her desk directly to the meeting room.

47. After she left the Dawson room the Claimant returned to her desk. It is probably fair to describe her as 'storming' out of the room. A few minutes later, allowing for a short cooling off period, Mr King left the office to speak to her. Mr Peat at this point returned to the Dawson room to join Councillor Moorhouse. The Claimant told Mr King that it was unfair not to have included her in the meeting. She told him that he was insensitive to her feelings and said '*how could you do this to me you bastard"*?

48. Councillors Moorhouse and Peat then left the Dawson room and came into the main office. The Claimant was upset and tearful. Seeing this, Councillor Moorhouse asked if there was anything they could do. The Claimant said that Mr King would have told her she suffered from depression. Councillor Moorhouse said that he had not told her this. We accept this evidence. She offered to meet the Claimant informally to discuss any issues but the Claimant did not respond. She suggested the Claimant take some time out of the office at which Councillor Peat said he would take her for lunch, which he did. She left the office at about 12.45pm and returned at 2pm.

49. On her return after lunch she emailed PC Marsh asking for advice regarding the request to ask Councillor Peat to speak to members of the council about the nature of his friendship with her. The Claimant then emailed Mr King at 2.30pm [**pages 111-112**]. In that email she said that she wished Mr King to '*document the fact that I will be restricting my conversations and communication in the office to work related business only. I am happy for you, Claire and Yvette to continue to chat and talk socially. Please relay this information onto Claire and Yvette and if you feel it is necessary, to the councillors too*.' This email makes it clear that she would not be engaging in social chat with anyone in the office.

50. The Claimant did not in the email offer any apology or explanation for her conduct earlier in the day. She offered no apology or explanation for referring to Mr King as a bastard.

51. The Claimant worked the afternoon and left the office at about 4.15pm to commence 3 days annual leave, intending to return the following Monday, 25 February 2019. Mr King did not take any steps to suspend her prior to her leaving.

52. On 20 February 2019 the Claimant emailed Mr King asking for a 20 minute supervision session first thing on Monday. She said she was dreading the return to work and that she was worried and anxious. She said that as a result of her depression she does not find it easy to switch off and relax. She wanted to know if there were any repercussions from yesterday she would appreciate Mr King telling her before she returns to work [**page 115**].

53. The Claimant did not offer any apology or explanation for her conduct on 19 February in that email either. She did not relate her conduct to her depression or anxiety. However, she recognised that there could be repercussions, which is, we find, an acknowledgement that she had to an extent overstepped the mark in what she said.

54. The evening before, at 10.47pm on 19 February 2019, Councillor Moorhouse had emailed Mr King. Councillor Moorhouse took exception to being shouted at by the Claimant and being accused of bullying and harassment. She also took exception to the Claimant's comment to Mr King. She regarded the Claimant's statement regarding non-social chat as being 'totally out of order'. She added: '*we have to get control of this as quickly as possible. I'd very much like to discuss this with you in the cold light of Wednesday'*. There is no reference in the email to any concern regarding breach of confidence (which featured in the suspension letter) [**page 110A**]'.

Meeting on 20 February 2019

55. Councillor Moorhouse and Councillor Blissett then met with Mr King on 20 February. We reject Councillor Moorhouse's evidence that she did not speak of what had taken place on 19 February 2019. That would be entirely out of keeping with the content of her email which she sent very late at night the evening before. It is also highly likely that Councillor Blissett asked what had happened on 19 February 2019. We are satisfied that it was at this meeting that Mr King and Councillor Moorhouse agreed that the Claimant would be suspended. Further, we conclude that Councillor Moorhouse put pressure on Mr King to do so. Councillor Moorhouse said in paragraph 6 of her witness statement that it was agreed that Mr King would meet with the Claimant to address the incident informally and that she would be at the meeting to take notes. If Mr King, as the Claimant's line-manager, was simply going to meet with the Claimant to discuss the incident informally, there would have been no reason for Councillor Moorhouse to be present to take any notes.

56. Councillor Moorhouse said in oral evidence that Mr King did not tell her on 20 February 2019 that he was going to suspend the Claimant when she returned to work and that it was only during the meeting itself (on 25 February) that she learned of Mr King's decision, as he was telling the Claimant. In Mr King's oral evidence to the Tribunal he too said he made the decision to suspend on 25 February when he met with the claimant and he did so was because of her failure to accept responsibility for her actions. However, that is inherently inconsistent with paragraph 35 of his own witness statement where he says by the time he had received the Claimant's email on 20 February 2019 he had already decided to advise her of her suspension on her return to work.

57. In his witness statement Mr King also says he made the decision to suspend in consultation with Councillor Moorhouse, yet she said in oral evidence she did

not know that the Claimant was to be suspended until she heard Mr King do so at the meeting on 25 February. In his statement to NEREO [paragraph 11, **page 775L**] Mr King said that he made the decision to suspend 'with the agreement of' Councillor Moorhouse. Having regard to these inconsistencies, the fact that the Claimant continued to work the afternoon of 19 February without mention of suspension by Mr King, Councillor Moorhouse's email late in the evening of 19 February and Councillor Moorhouse's attendance at the meeting of 20 February 2019 we infer that when Councillor Moorhouse made it clear to Mr King that 'something had to be done' the 'something' was to be suspension. It was clearly understood by all three on 20 February that there was to be disciplinary proceedings beginning with suspension.

58. The Claimant was duly suspended on 25 February 2019. She asked Mr King not to suspend her, saying that she needed to come to work as she finds this is what she needs for her to combat her depression and anxiety. Councillor Moorhouse's note on **page 119** records that the Claimant begged Mr King to change his mind as she needs to work.

59. Mr King said in evidence that with an allegation of gross misconduct, suspension was mandated and that gross insubordination was included in the definition of gross misconduct.

60. The letter of suspension [**page 122**] refers to 'confidential information' and 'gross insubordination'. We could not understand what confidential information was said to have been disclosed by the Claimant. In evidence to the Tribunal, Mr King tried to explain this by saying that she was in possession of information given to her by Councillor Peat when he came out of the Dawson room (i.e. that there had been a meeting to discuss their relationship); that she then received that information qua employee and used it inappropriately by bringing that information into the Dawson room and using it to berate the Mayor and Town Clerk. On any analysis this is stretching things and we conclude was contrived. There was no disclosure of confidential information by the Claimant: the existence of the relationship was not confidential. Speaking to or berating the Mayor and the Town Clerk in private about a subject which was public knowledge is not a breach of confidence.

61. We conclude that Mr King and the councillors were looking for something else in addition to the 'gross insubordination' towards him for justifying the Claimant's suspension. The matters for which the Claimant was suspended on 25 February 2019 have been referred to as 'Investigation 1'.

62. On 26 February 2019 the Claimant emailed Mr King [**page 265**]. She suggested mediation as the way forward and appealed to him to reconsider his decision to suspend her. She reminded Mr King that she had diagnosed anxiety and depression and that the way the issue was being managed was detrimental to her mental wellbeing. She sent another email on 01 March 2019 making the

same point, adding that the Council had a duty to make reasonable adjustments to avoid putting her at a substantial disadvantage in comparison with someone who does not share her disability, including avoiding delay in the period of time she is isolated on suspension and subject to ongoing disciplinary proceedings which was having a detrimental effect on her health [**page 268**].

63. There was a meeting of the resources sub-committee on 04 March 2019. The transcript of the meeting ran to 31 pages (internal pagination). It was agreed that the Claimant be told that her suspension be extended up to and including any potential meeting following Resources on the 8th April but would not exceed a period of 12 weeks (page 25 of 31 of the transcript).

64. This seems an inordinate and unreasonable amount of time to us to conclude an investigation into a single incident on 19 February 2019. It may be that this was a long-stop but it was a very long long-stop.

65. On 02 March 2019 Councillor Moorhouse asked Mr Barry Piercy to undertake the investigation. He was independent to the council. Mr King, confirmed the instructions on 05 March 2019 that the investigation was into gross misconduct. The Claimant emailed Mr King on 08 March 2019 among other things saying that she regarded the timescales for the disciplinary process to be unreasonable given the impact on her mental health [**page 282-283**]. She also expressed concern about Councillor John Blissett being her point of contact during Mr King's annual leave from 19-29 March 2019. This was because of what she considered to be his aggressive approach during the meeting with PC Marsh back in April/May 2018.

66. On 04 March 2019, Mr King updated the Resources subcommittee on the Claimant's suspension (see page 31 of the transcript of that meeting). Mr King explained that he suspended the Claimant pending a decision by the committee that night. He said that there were two reasons: gross insubordination and a breach of confidences in terms of information passing between her and a councillor. He said the former was secondary to the breach of confidences. The committee confirmed Mr Piercy's appointment. Someone (an unidentified female) asked how the Claimant was and Mr King told the members that she was upset. Another unidentified male speaker said that they were under a duty to monitor her welfare. There was some concern expressed that the period of time suggested for the investigation seemed protracted.

67. On 11 March 2019 [**page 284]** the Claimant again requested her suspension be reviewed out of consideration for her health and for a clarification of the basis for the suspension (i.e. whether there was a concern that she would interfere in any investigation). The answer to this particular email was provided by Mr King on 12 March 2019: '*you have been suspended because you are being investigated for gross misconduct. There are no circumstances under which it would be reasonable for you to return to work until that investigation has been*

completed.' He went on to say that it remained unlikely that the process would be completed before 08 April 2019. He did not address or do anything about the concerns she had expressed about her health [**page 285**].

68. For the purposes of his investigation, Mr Piercey was provided with the letter of suspension at **page 122**. He noted that the Claimant was not prohibited from accessing her work e-mails as a condition of her suspension. As part of his investigation, he met with her on 14 March 2019 and asked her to provide him with work e-mails in support of her defence to the allegation regarding the disclosure of confidential information. He specifically asked her for a copy of her work diary for 19 February 2019 and a copy of an e-mail dated 19 February 2019 which she said she had sent to PC Marsh regarding malicious communications. The Claimant provided him with these as requested.

69. On 15 March 2019, the Claimant emailed Mr King to say that she had been prescribed further medication following a debilitating panic attack and was to be reviewed by her GP the following week [**page 296**]. The Claimant had visited her doctor that day [**page 963**]. She visited frequently during the period of her suspension which, we find, was having a deleterious effect on her mental health.

18 March 2019: Mr Piercy's recommendations on investigation 1

70. Mr King spoke to Mr Piercy 18 March 2019 and asked him to attend a 'full council' meeting that evening at 7.00pm to make an oral submission to the council members on his findings. Prior to Mr Piercy joining the meeting to give his presentation, Mr King updated the councillors. He said that the Claimant's suspension had to be kept under review and be as short as was necessary to ensure fairness (see page 39 of the 82 page transcript of the meeting). He advised the members that, following their discussion on Mr Piercy's recommendation and depending on what option they decided on, if the Claimant were to be reinstated to the workplace, this would have to await his return from leave (which was to commence the following day) as he did not consider it would be appropriate to reinstate her in his absence. This would mean that the Claimant could not be re-introduced into the workplace before 02 April 2019. He added that, if the council required mediation to take place, that would have to be made available by 02 April.

71. Mr King advised that, if the council agreed to proceed on option 2 (informal resolution) there was no mechanism for the line manager (i.e. him) to informally resolve the issue without mediation and it would fall to the staffing subcommittee, the earliest date for which was 15 April 2019.

72. Councillor Moorhouse and Mr King withdrew from the meeting before Mr Piercy joined it to give his presentation. Mr Piercy then outlined the three options (internal page 39 of the transcript of the meeting). Those options were:

(1) No case to answer and no further action;

(2) The matter is not serious enough to justify further use of any disciplinary procedure and could be dealt with informally

(3) Disciplinary hearing;

73. His advice to the council was that the conduct was very low level and that if he had been the manager he would not have suspended. He added that Mr King's hands were tied. He recommended option 2 and that the Claimant's suspension should be reviewed without delay. Mr Piercy left the meeting during which time the council members considered and agreed to accept his recommendation (page 76 of 82 transcript). Upon returning to the room, Mr Piercy recommended mediation should take place.

74. The council members recognised the need to formally review the Claimant's suspension and that this should happen without delay but certainly by no later than 15 April 2019 (pages 80 and 81 of 82 of the transcript).

75. While we understand and accept that a reasonable employer would wish to arrange a mediation, especially in light of the Claimant's email of 19 February 2019 regarding work-only communications, we were concerned that the Respondent decided to continue the Claimant's suspension at this point. As we have found, she had by now and on a number of occasions referred to the ongoing suspension and exclusion from work as being detrimental to her mental health. Mr King had recently been notified by her of a recent increase in her medication following a panic attack. Mr King, and by now, the councillors were aware and did not dispute that the Claimant suffered from poor mental health. Mr Piercy said that the council was seized of some medical matters that could be covered by the Equality Act and that the suspension should be reviewed without delay (pages 42 and 46 of 82 of the transcript).

76. We were very concerned about the Claimant's suspension continuing at all given that there was to be no disciplinary action taken against the Claimant in respect of the 19 February incident and she was keen to return to work. We recognise that Mr King was going to be absent from work until 01 April and that relationships in the small office were strained. However, the Claimant was the Deputy Clerk, whose role was to step into his shoes in his absence. Mr King's position that her reinstatement should await his return from leave was simply accepted. However, Mr King had been on leave in the past year and at times had been away from the office on business. During those times the Claimant worked effectively (even in the strained atmosphere). As at 18 March 2019 there was no suggestion that relationships between her and Ms Atkinson and Ms Farren had irretrievably broken down or were anything near breaking point. Her suspension had been solely because of the events of 19 February 2019. She had not line managed Ms Farren since February 2018 but that did not

prevent her working effectively when Mr King was on holiday. She had ceased line managing Ms Atkinson in early February 2019. Even though it was agreed to arrange a mediation, there was no reasonable basis for continuing to suspend or exclude the Claimant from the workplace beyond 18 March 2019 and certainly not to agree to an ongoing period of extension for a further period of four weeks to 15 April 2019.

77. Later the same evening (18 March 2019), Mr King emailed the Claimant a letter saying that following the meeting the Council was to progress to a Staffing Subcommittee meeting on 15 April 2019 and that in the meantime the Claimant remained suspended [**pages 305-307**]. The subcommittee referred to in Mr King's letter to the Claimant was to comprise Councillor Richard Child, Councillor Rima Chatterjee and Councillor Belinda Thompson. The letter confusingly referred in the heading to 'confirmation of a disciplinary meeting'.

78. We infer from the heading of the letter that Mr King had expected the decision to be that the matter would proceed to a 'disciplinary meeting' and that he had prepared a template letter in advance to that effect. Then, given the lateness of the hour, when he finalised the letter at **page 306-307** he omitted to change the heading. The easiest thing to do, in the circumstances, was simply to continue the suspension – as he had expected would happen as a matter of course, had the decision been to proceed to a disciplinary meeting. No consideration was given to the Claimant's well-being.

79. Although Mr Piercy never produced a final investigation report, the following morning, 19 March 2019, he emailed a written summary of his oral submission to Ms Atkinson and Mr King [**pages 309-311**]. He did not prepare a final report because he had been invited suddenly to attend the council meeting on 18 March and by the end of the evening his recommendation had been accepted.

80. On 19 March 2019 at 08:39am Mr Piercy emailed the Claimant to say that the outcome was not to go to disciplinary proceedings [**page 312**]. This was in response to her email of 18 March 2019 at **page 313**. The reason the Claimant contacted him at all was that she found the letter of 18 March 2019 [**page 306]** confusing given its reference to 'disciplinary meeting'. This communication between the Claimant and Mr Piercy was, we find, perfectly reasonable but it was subsequently and unreasonably viewed in a sinister light by the Respondent.

81. On 24 March 2019 the Claimant wrote to Mr King regarding the forthcoming 'disciplinary meeting' on 15 April 2019. She asked whether the investigation was completed as she understood it to be as of 18 March 2019. She wanted to know the purpose of the 15 April meeting given the reference to 'disciplinary'. She wanted to have the basis of her continued suspension clarified and again reminded him of the effect it was having on her health [**pages 323-325**]. These were perfectly reasonable questions.

82. She also wrote to Councillor Blissett on 24 March 2019 [**page 317**] enclosing the letter she had sent to Mr King of the same date [**page 323**] with regards to the forthcoming meeting on 15 April 2019. He responded on 26 March 2019 saying only that her points will be addressed on Mr King's return [**page 318**].

83. During Mr King's absence on holiday further allegations were made about the Claimant accessing emails while she was on suspension. Ms Farren said that she came about some emails innocently when looking for some information on some work she was doing on the Claimant's computer. Her account as to how she came across those emails was unchallenged but we accept it in any event. Ms Farren saw that some emails had been deleted by the Claimant. She thought the Claimant had been up to no good.

84. Meanwhile, the Claimant learned that there was a special council meeting on 01 April 2019 and she was concerned to note a particular agenda item which she suspected was about her. Therefore, she wrote to Councillor Blissett again on 28 March asking whether the item referred to on the agenda for the special council meeting was indeed about her [**page 320**]. The Claimant went to the council offices on 28 March 2019 to hand deliver this letter.

85. On 01 April 2019 she emailed Mr King regarding the special meeting [**page 321-322**] specifically referring among other things to a failure to make reasonable adjustments, namely the failure to minimise the period of time she had been kept on suspension.

86. Mr King responded to that email the same day [**page 326-327**] and also to her letter of 24 March 2019. He told the Claimant that the investigation was indeed completed and that the recommendation was for the council to deal with the matter informally, which was approved by the Council. As it was to be an informal resolution this could not be delegated to a member of staff and had to be achieved by a committee of at least three members. He did not address the issue of suspension.

01 April 2019: the second investigation

87. At the special council meeting on 01 April 2019 it was agreed that a staffing subcommittee would meet on 15 April in the Dawson room and review the Claimant's suspension (internal page 79 of 82 of the transcript).

88. At the same meeting, it decided to launch a disciplinary investigation into a new allegation of gross misconduct against the Claimant. Mr King attended that meeting and asked that he be appointed to investigate the allegations. The substance of the allegations were expressed in a letter drafted by Mr King and emailed to the Claimant the following day on 02 April 2019 [**page 331-333**], namely:

'*on or between 10 March 2019 and 1 April 2019 you accessed work-based email, forwarded emails to a private account and deleted emails without authorisation whilst suspended from work. Further, on Thursday 28 March at 11.50am, you entered the Town Council office in defiance of an explicit instruction issued under the terms of your suspension*.'

89. There was no attempt to understand from the Claimant's perspective or from Mr Piercy's perspective why the Claimant had accessed her emails or arrived at council premises prior to deciding to suspend her. Mr King did not produce the letter of suspension for councillors so that they could examine its terms before they made any decision to suspend.

90. Mr King then interviewed the Claimant about these allegations on 10 April 2019. She explained that, during her suspension, at Mr Piercy's request, she accessed her email account. She forwarded about 6-7 emails and deleted the forwarded emails but not the original ones.

91. Mr King referred to the letters of 25 February 2019 (the suspension letter) and the subsequent letters of 05 and 18 March 2019 (**pages 279** and **306** respectively). He asked the Claimant whether those letters made it clear that her suspension excluded her from council premises. The Claimant said that they did not and she did not interpret them as such. We have considered those letters carefully. There is nothing at all in them that says or even suggests that the Claimant was excluded from council premises. All that they say is that she must not contact any member of staff or elected member '*to discuss this matter*'. Further, in the letter of 18 March 2019, Mr King had written to the Claimant to tell her that there would be no disciplinary action taken against her and that matters would be handled informally. Given that all she was accused of doing on 28 March 2019 was to hand-deliver a letter to the council premises for the attention of Councillor Blissett (her stated point of contact), we find it remarkable that this formed the basis of a disciplinary allegation. We find it all the more remarkable that, following the Claimant's interview on 10 April 2019 the Respondent continued the suspension and decided to pursue a disciplinary allegation in respect of this matter and that she was subsequently given a warning for it.

92. Mr King prepared a report in relation to these allegations. It was dated 15 April 2019. The allegations were set out in paragraph 3 of that report [**page 361**]. At no point during his investigation did he speak to Mr Piercy – despite what the Claimant had told him in interview on 10 April 2019.

93. The staffing committee met on 15 April 2019 and agreed to continue the Claimant's suspension and to notify her of a disciplinary hearing on 29 April 2019.

94. On 15 April 2019 Mr King wrote to the Claimant to notify her of a date for the disciplinary hearing [**pages 404-405**]. He told her that at its meeting on 15 April 2019 the council had considered and reviewed the terms of her suspension and that she was to remain suspended on full pay until, at least, the meeting of the staffing subcommittee on 29 April. He also said that the council had reconsidered its decision of 01 April 2019, in reference to the earlier disciplinary allegation regarding her conduct on 19 February 2019 (investigation 1). He said that evidence had come forward which questioned the conduct of that investigation and that, following legal advice, the council had resolved to reopen its investigation and to seek an independent investigator to re-examine the evidence. He said that this process would he held in abeyance until, at least, the outcome of the next staffing subcommittee meeting. He did not say what this new evidence was.

95. In Mr King's witness statement at paragraph 52, he says that the Claimant's statement and transcripts of emails showed that Mr Piercy was assisting her. We see nothing in those emails that would call Mr Piercy's independence into question, which is clearly the implication. The most that one might say is that perhaps it would have been wise for Mr Piercy to have directed the Claimant's queries to the Respondent. However, all he that he did was to respond factually to what happened and update the Claimant. We would add that he was appointed by the Respondent as an independent investigator. He did not know the Claimant. As an independent investigator we would expect the Respondent to appreciate that he may well 'assist' the Claimant in the sense that he ought to be asking her what she can do or give to him that will assist her response to the allegations. He was not a prosecutor.

29 April 2019: Disciplinary hearing and written warning in respect of the second investigation

96. The Claimant subsequently attended a disciplinary hearing on 29 April 2019, the notes of which are at **pages 427-438**. The panel consisted of Councillors Child, Chatterjeee and Thompson. Mr King was in attendance as the investigating officer and Mr Piercy attended as a witness for the Claimant. She was issued with a written warning on 02 May 2019 [**pages 440-441**]. He explained that the Claimant accessed her emails and calendar at his request. He said that, if someone had spoken to him earlier he would have explained this and also why it was reasonable for her to do so. As for the allegation that the Claimant breached the terms of her suspension by entering the building on 28 March 2019, the Claimant explained that she did so to hand-deliver a letter to Councillor Blissett, as he was her point of contact in Mr King's absence; that she was aware that the 18 March meeting had resulted in a decision to proceed with matters informally.

97. As we have alluded to above, it was not clear to us what the gravamen of this particular charge was. However, her explanation that she did not realise she

was precluded by the suspension letter from doing this was ultimately rejected as her 'interpretation' which was said to be 'not consistent' with that of the Council's and that she should have known she could not enter the council's premises 'for any reason' during her suspension. There is no need for any interpretation of that letter. Its terms are clear. The letter of suspension says nothing whatsoever about being excluded from council premises. There was no suggestion that she did so to speak to anyone about the disciplinary matters (or anything else for that matter). She did not in fact speak to anyone about the matters for which she had been suspended, which in any event were by then agreed not to be taken forward as disciplinary charges. As regards the accessing of emails for which she was disciplined, the Respondent did not ask even to see the emails but issued her with a written warning despite hearing from its own independent investigator that she did so at his request. No reasonable employer would have behaved in this way.

98. The letter of 02 May 2019 in which she was issued with a written warning lifted the Claimant's suspension. However, even at this point the Claimant remained excluded. The Respondent now imposed a condition for her return to work. She was told that '*it is appropriate for you to remain away from the office on paid leave until the mediation can take pl*ace'.

99. The Claimant was always willing to participate in mediation. She had suggested mediation back in February 2019. However, we could not see any reasonable basis for imposing it as a condition for her return to work. The disciplinary process was now complete (save for an appeal). We contrast this with how |Mr King came back after his suspension. He was suspended, having been the subject of a whistleblowing allegation by Ms Farren, whom he line managed – an allegation arguably much more serious than any faced by the Claimant. The aftermath of that allegation would probably require some form of resolution between Mr King and Ms Farren yet there was no suggestion in his case of it being necessary before his return. When the NEREO report was received on 03 April 2019 recommending no case to answer against Mr King, he was back at work on 04 April 2019.

The Claimant's appeal against the written warning

100. The Claimant appealed the decision to issue her with a written warning.

101. On 13 May 2019 [**page 292(g)**] a full council meeting decided that Councillor Moorhouse, and Councillor Blissett (that is Miss Kelly Blissett) should sit on the appeal panel on 29 May 2019. There was, however, significant discussion at that meeting on 13 May about the possibility of a severance agreement with the Claimant. The 'mood music', to coin a phrase, was that this had all gone on too long and that it would be best if the Claimant were to move on with a severance package. Those members present were 'aware of the medical situation' (page 33 of 38 of the transcript).

102. The Claimant prepared her submission for the appeal hearing of 29 May 2019 [**page 695-701**]. It was a very comprehensive document in which she made some compelling points. She was accompanied at the appeal by Ms Gill Chapple, a friend, who also gave evidence to the Tribunal. Her appeal was rejected. The Claimant emphasised again that work was part of her coping mechanism. At the end of the appeal, councillor Moorhouse asked the Claimant whether she really wanted to return to work after all that had happened. We infer from this, and having read the discussions of the members on 13 May 2019 and from the evidence as a whole that the settled intention of Councillor Moorhouse and the other councillors was that the Claimant leave the employment of the Respondent. Councillors believed that they would be able to achieve this at reasonably minimal cost. They did not wish to return the Claimant to work while they stood a chance of securing her exit.

103. By now all disciplinary matters were at an end. Mediation was arranged for the following day on 30 May 2019, facilitated by external mediators, Nancy Radford and Bill Porterfield. It consisted of a meeting between the Claimant and Mr King and telephone calls with Ms Atkinson and Ms Farren. The upshot of this was that there was discussion with regards to paying the Claimant in return for her leaving the employment of the council. An outcome of mediation document was prepared by the mediators which simply identified dates and actions by solicitors of the Claimant and the Respondent [**page 702**].

104. It is unsurprising that the mediation on 30 may did not result in an outcome. The parties came at it with a different focus. The claimant was keen to get back to work. The Respondent's focus, however, was on severance – on persuading the Claimant to leave the Council's employment and not on 'mediating' any differences with a view to securing her return to work. Mr King told the Claimant that councillors did not want her to return to work.

105. We should say at this juncture that we were concerned that many of the minutes to which we were referred mentioned financial offers and settlement figures by both sides. We raised this directly with the representatives and were told that without prejudice privilege had been waived. The transcripts also contained references to legal advice to the Respondent but were told that the minutes were freely disclosed by the Respondent.

106. As it turned out, having set out to persuade the Claimant that the best course of action for all concerned was an exit with a severance and that she should instruct solicitors, when those solicitors contacted the Respondent and put forward sums in excess of a year's salary, the Respondent's councillors took great exception to this and regarded the Claimant as having reneged on an agreement to leave with a settlement. This is perfectly clear from the transcript of the meeting of the Resources committee on 03 June 2019 [**pages 731- 736b**] (internal pagination pages 10-12 of 14 of the transcript). However,

the Claimant had reneged on nothing. She had never wanted to discuss settlement via solicitors or otherwise in the first place. All that she did was agree to engage in the process of settlement discussions which was strongly urged upon her. It so happened that the Respondent's councillors did not like what came back from this process via the Claimant's solicitors.

107. It is again clear from the transcript that the Respondent was aware that the Claimant suffered from depression and anxiety and this amounted to a disability.

108. What stands out from the transcripts of the various meetings after 30 May 2019 is that the Respondent's councillors regarded the Claimant's solicitor's settlement figures as being exorbitant to the extent that they regarded the Claimant as playing games and reneging on an agreement to leave with a severance. They clearly had very different views from those of the Claimant and her solicitor as to what might be an acceptable severance in the circumstances. We emphasise that the Claimant did not want to leave on a severance. She did not initiate the discussions. She wanted to return to work. There was, we find, no reasonable basis on which the Respondent could have regarded her as having reneged on any agreement and she did not do so.

109. At a meeting of the resources committee on 03 June 2019 (page 9 of 14 of the transcript) there was discussion in terms of the Claimant having a disability based on her depression and anxiety. Councillors are made aware of some of the legal issues by Mr King, who refers to the case of **Grossett v York City Council**, including the possibility of a claim that there has been a failure to make a reasonable adjustment in relation to the length of the Claimant's suspension and her request to bring it to an end for the sake of her health.

110. As of 03 June 2019, although the Claimant was not technically 'suspended' – the suspension having been lifted on 02 May 2019 - she remained excluded from work and in all the circumstances the effect was the same. It is a matter of semantics whether she was 'suspended' or on some other unspecified form of leave. The upshot was that it was against the Claimant's will. As an elected member put it during that meeting: "*she's not suspended but she's not coming back into work*" (page 10 of 14 of the transcript).

Mr King's suspension

111. In June 2019, things took an unexpected turn. On 12 June 2019 Councillor Moorhouse telephoned the Claimant, who made a contemporaneous note of the phone call [**page 751**]. Councillor Moorhouse told the Claimant that she had called a meeting of the staffing subcommittee for 13 June and that after this she hoped that the Claimant would be able to return to work. What prompted this call was the decision (yet to be communicated to Mr King) that

Mr King was to be suspended. Councillor Moorhouse had been contacted by Ms Farren on 09 June 2019 who alleged that there had been an inappropriate relationship between Mr King and the Claimant.

112. On 13 June 2019 the Respondent decided that Mr King was to be suspended His letter of suspension was sent on 14 June 2019 [**page 755a**]. On 17 June 2019 Councillor Sutherland, on behalf of Councillor Moorhouse wrote to the Claimant to tell her that Mr King had been suspended, that her wish to return to work was noted and that it would be put to full council on 24 June 2019 that, as a matter of urgency, a phased return to work supported by mediation be agreed.

20 The North East Regional Employer's Organisation ('NEREO') was appointed to investigate Ms Farren's allegation against Mr King, which was treated as a 'whistleblowing' complaint. A report was prepared by Ms Joanne Machers and sent to Councillor Moorhouse on 03 July 2019. The report is found at pages **775a-775h**.

113. On 24 June 2019 there was a council meeting. Although the speakers are not identified on the transcript of the recording, it is identified that a female speaker says (in reference to Ms Atkinson and Ms Farren) '*I know they want Jane to come back with Michael in place but its not about what they want, it's what is correct.*' Further, on **page 42 of 54** of the transcript a male speaker says that the Claimant is not coming back without Mr King in place to manage her. On **page 44** of the transcript a female speaker, who we conclude is councillor Judy Sutherland, is recorded as saying '***they [Ms Atkinson and Ms Farron] have begged me to let her back***'. At various parts a male speaker we conclude to be Councillor Blissett, is adamant that the Claimant is not coming back, at least without a manager in place. The councillors were arguing among themselves. A major concern for some of them was Mr King's absence from the workplace owing to his suspension. The councillors were content to discuss rumours about the Claimant and to give apparent credence to these rumours (such as '*stories about her calling the police on councillors*' and '*sending emails accusing'*). Only councillor Sutherland appeared to speak with some concern for the Claimant, recognising that she had been isolated from the council since February 2019. Councillors agreed to engage a locum clerk in the meantime.

114. The Respondent had no regard for the claimant's mental well-being, in contra distinction to their concern for the well-being of other staff, Ms Farren and Ms Atkisnon (see page 42 of 54 of the transcript of the meeting of 24 June 2019).

115. The following day, 25 June 2019, Councillor Moorhouse met with the Claimant at her home. The Claimant made notes of the meeting which were not challenged and which we find to be an accurate record [**page 760-763**]. Councillor Moorhouse explained that Mr King had been suspended. She said

that a locum clerk was to be appointed and that at a council meeting the previous day it was resolved that she could return to work on a phased return but that a mediator would be present on the day of her return. We conclude that Councillor Moorhouse was hedging her bets at this point. Mr King was suspended and the councillors were arguing among themselves as to what was the best way to extricate the council from what was becoming a very messy scenario. Both the Town Clerk and Deputy Clerk were off the scene. There was concern among councillors about constructive dismissal and severance and talk of the Claimant returning to work, which was being resisted in some quarters within the membership of the council. Councillor Moorhouse was uncertain what the outcome of the investigation into Mr King's conduct would be. She was, we conclude, playing the Claimant along at this point not really knowing where things would end up.

116. In fact, the NEREO report concluded there was no case to answer against Mr King and he returned to work on 04 July 2010. A few days prior to that the Claimant emailed Councillor Moorhouse on 28 June 2019 attaching a proposed return to work plan [**page 766-768]**. It was, in our assessment, a perfectly reasonable proposal. The response which it received from Councillor Moorhouse was, however, unnecessarily combative [**pages 765-766**]. The Claimant had been isolated from work since 25 February by this stage. She had put together a reasonable proposal for getting back to work following Councillor Moorhouse's visit to her home at which she had been told that she would support her return. In her email, the Claimant said she was prepared to compromise on the proposal. Councillor Moorhouse's response was very much in the spirit of not allowing the Claimant to dictate the process or timing (which she was not in fact trying to do). We pause to emphasise our finding that Councillor Moorhouse did not really want the Claimant to return to work. It was simply the difficult circumstances that drove her to have to consider it.

117. On 03 July 2019 Councillor Moorhouse received the NEREO report. Arrangements were made for Mr King to be returned to work immediately. He was notified on 04 July that his suspension was lifted and that he could return to work, which he did that day. Councillor Moorhouse forwarded to Mr King the Claimant's letter of 28 June 2019 [**page 772**].

118. The NEREO report (produced by Joanne Machers) is found at **pages 775a-775h**]. It is common ground that the 'whistle-blower' referred to in the report is Ms Farren. In the 'background' section, Ms Macher records Ms Farren becoming upset deeply and feeling uncomfortable by her awareness of the Claimant having developed personal relationships with Mr King and with councillor Peat. It was the alleged 'cooling' of the relationship between the Claimant and Mr King that was said by Ms Farren to have resulted in the change of atmosphere within the office environment. We must emphasise that we make no finding that the Claimant and Mr King were in any relationship other than a professional relationship at work. We are satisfied from the evidence that their

working relationship had been a good one and that Mr King was a supportive manager of the Claimant – that was agreed by the Claimant. However, neither the Claimant nor Mr King have suggested or accepted that it went beyond this and it is not necessary or proper for us to make any findings in relation to that. It is enough that we find that there was a genuine belief by Ms Farren at least that they had been involved in a personal relationship.

119. Ms Machers did not speak to the Claimant as part of her investigation. However, she spoke to Mr King, to Ms Farren and to Ms Atkinson. In her findings under the subject of 'relationships', she says:

'*YF and CA expressed their desire during this investigation for the team to resolve current problems and go back to being on friendly terms'*

120. In her conclusions section she says: '*CA and YF told the Investigator they would continue to work with JW if support and arrangements were in place.'* In paragraph 6.2 Ms Machers says (emphasis added): '*The relationships JW had with other members of staff appear to be complex. CA and YF have said the impact was to make the office an uncomfortable place for them to work in at times* ***however told the investigator they would continue to work with JW if support and arrangements were in place***.'

121. In paragraph 7.3 she recommended that '*the Council* ***support the team to re-establish and maintain working relationships*** *to protect the wellbeing of all employees'*.[**page 775g**].

122. On 08 July 2019 the staffing sub-committee resolved that the Claimant's phased return to work would start 15 July 2019 on condition that a mediator would be at the office to talk with each member of staff individually then jointly and attempt to agree a working document which all members of staff would agree and adhere to (paragraph 5 **page 775**). It also referred in paragraph 7 to the outstanding disciplinary action being 'actioned' at an appropriate time in the near future. This was a reference to the first investigation undertaken by Mr Piercy.

15 July 2019: mediation meeting

123. An independent mediator, Ms Lorna Jeromson of LBJ Solutions UK, was appointed to mediate the Claimant's return.

124. On 09 July 2019 Councillor Moorhouse emailed the Claimant to say that her phased return to work will begin on Monday 15 July and that a mediator would be on site who will work with each person individually and then hold a joint meeting with the view of agreeing a working document that you can all sign up to. She said that a timetable of the Claimant's times at the office would also be agreed. Councillor Moorhouse provided the contact details of the mediator.

125. On 10 July 2019 the mediator contacted Councillor Moorhouse to say that she had spoken to the Claimant who had been very open and honest about her on-going mental health issues and was very keen to come back to work. She explained that the Claimant would like the mediation process to help draw a line in the sand. She went on to say that the Claimant suggested that it would be helpful for her to have a one to one with Mr King as she felt that there was more work to do to build their relationship. The mediator suggested a series of meetings beginning with Mr King and the Claimant followed by individual meetings with the other members of staff and then a joint meeting. She suggested that the meetings focus on getting the Claimant back to work as opposed to going over old ground [**page 784**].

126. Councillor Moorhouse disagreed and told the mediator that there should first of all be a joint meeting. This was contrary to what councillor Moorhouse had told the Claimant would happen in her email of 09 July. The mediator communicated this 'preference' of Councillor Moorhouse to the Claimant on 11 July [**page 785**]. However, as is clear from point 9 of Councillor Moorhouse's subsequent email of 16 August 2019 she made the decision that Mr King would not take part in an individual meeting with the Claimant on 15 July adding that she did not '*even think he knew about it'*. It is of note that Councillor Moorhouse describes the Claimant's request to speak first with Mr King as her 'demand'.

127. As it happened, on 15 July 2019 the mediation did not end in agreement. It was undoubtedly difficult, especially for the Claimant. It was a mistake to begin with a group session. As we have found, that was not something the mediator had suggested and it was not something that the Claimant or the other staff wanted. The Claimant felt overwhelmed and Ms Atkinson and Ms Farren did not understand why they were present at a group meeting. However, it was, as we have found, insisted upon by Councillor Moorhouse. This was direct contrary to the initial programme as per her email of 09 July.

128. During this group session, there was a discussion about the length of the Claimant's suspension. The Claimant asked Ms Farren whether she thought it fair that she had been suspended for 5 months. Ms Farren said yes, that she deserved it. At this, the Claimant became upset and walked out of the room. The mediator went to speak to her asked the Claimant to return which she did. Difficult as the experience was, it certainly did not end as disastrously as the Respondent endeavours to portray it. It did not result in any written agreement but no one in the office felt that a written agreement was necessary.

129. At a special council meeting on 15 July 2019 at which Mr King and Ms Atkinson were present, the councillors talked of the mediation being horrendous, resulting in no agreement. They discussed again offering the Claimant severance and sacking her if she did not engage in the process that

they were offering (internal pagination, **pages 15-17** of the transcript of that meeting).

16 July 2019: return to work meeting with Mr King

130. Mr King met with the Claimant on 16 July 2019. It was a productive and constructive meeting. They agreed a phased return to work as follows:

- *17 July (am) (including collect market rents)*
- *22-26 July Leave, as agreed*
- *29 July – short day (JW to work as long as comfortable)*
- *30 July – short day (JW to work as long as comfortable)*
- *We agreed to review the arrangements for August – having noted the commitments you had previously flagged in your email on 30 July*

131. On 16 July 2019 at 10.27 am the Mediator emailed an update to Mr Mick Brodie (a NEREO organiser) and Councillor Moorhouse [**page 791a**]. She said that people were unclear about why they had been brought into group mediation and that they did not want to be there albeit were willing to participate; that trust between the team and the Claimant appeared to have broken down. She also reported that the Claimant wanted to move forwards and not discuss the past whereas 'the team want Jane to acknowledge her part in the current and previous situations but that the Claimant appears not to be willing as she does not see herself as being at fault. This, we infer, was a reference to the Claimant's perceived role in developing a relationship with Councillor Peat and Ms Farren's understanding that she had been in a relationship with Mr King.

132. Ms Jeromson added that 3 of the 4 mentioned to her that they had mental health problems. Her suggestion for going forwards was that "*the team may need support to re-build their relationship, and this would need to be done in a very sensitive way. This wasn't discussed with the team or Councillor Moorhouse, but I would be willing to spend some time in discussion about what support they may need going forwards*."

133. The mediator did not report that the situation within the office was doomed or irretrievable. We recognise that the claimant was perceived by Ms Farren and Ms Atkinson as being self-centred and that she would not or could not see things from their point of view, namely that they felt uncomfortable with her relationship with councillor Peat (not so much from a professional but from a personal standpoint given his marital status and his wife's circumstances) and that they saw her as having initiated that relationship and being at 'fault' in that regard. There was also a belief that she had been in a relationship with Mr King. The Claimant did not see herself as being at fault in any respect. We fully recognise that this is a difficult situation. However, no-one was saying it was an irretrievable one. Neither Ms Jeromson nor Ms Machers said this. The employees did not say this. They recognised that work needed to be done to

get back to how things used to be and the mediator reported to Councillor Moorhouse that she was willing to spend time discussing what support all concerned would need going forward.

134. The staffing sub-committee met on 16 July 2019 at 4.30pm. It was said that there had '*been no change since the previous mediation*'. However, the previous mediation had simply been an exercise in seeking a severance agreement, in respect of which the council ultimately decided the Claimant's settlement demands were too high a price to pay.

135. Councillor Moorhouse's note of that meeting at **page 789a** records that:

'It unanimously agreed that the Claimant should be offered mediation as mediation had again failed and not produced a working document that staff could sign up to and that there was an irretrievable breakdown of relationships. That Cllr Mrs. Moorhouse should talk to Jane at the earliest opportunity and offer severance without prejudice but there would be no discussion just the resolution of this committee.'

136. Despite the mediator suggesting that the staff would need support to re-build relationships, and despite having given the Claimant no opportunity to return to work to see how relationships could be rebuilt, the committee decided that day that there was '*an irretrievable breakdown of working relationships in the office*' [**page 789a**]. There was to be no further discussion; the staffing-committee had made its resolution. In his evidence to the Tribunal, Mr King said that the assessment on **page 789a** was not based on any report or account by him that there had been an irretrievable breakdown in relationships. This was, essentially, the end of the road for the Claimant. There was no going back for her. We find that the Respondent's councillors were simply unwilling to spend any more time in seeking to resolve matters and were determined that the Claimant's employment would be terminated.

137. The Claimant was unaware of this resolution of the committee. She attended work on 17 July 2019 as part of the phased return to work. It was not until about 09.30am that morning that she saw an email from Councillor Moorhouse which had been sent to her the previous evening [**page 791**] asking her to attend a meeting on 17 July 2019. The Claimant referred the tribunal to her account of the events of this day at **page 856 – 857** which we accept.

138. The meeting which Councillor Moorhouse asked the Claimant to attend on 17 July 2019 was brought forward to about 10.30 that morning. They met in the Dawson Room in the presence of Mr King. The Claimant had asked for Mr King to attend as her line manager. Councillor Moorhouse read a prepared statement from the staffing subcommittee with an offer of severance. This upset and distressed the Claimant who was by now back at work on her phased return. After Councillor Moorhouse left, Mr King told the Claimant that he was

happy with how her return to the office had been going so far and that he was happy to line manage her going forwards and manage the office. He told the Claimant he would support her. When referred to this account of events by the Claimant in the second paragraph on **page 857**, Mr King agreed with it.

139. The staffing sub-committee having resolved that the Claimant had to leave, Councillor Moorhouse, on its behalf, set about building a case for justifying her dismissal, in anticipation that she would reject the severance offer. She contacted Mr King on 24 July 2019 saying:

'*On behalf of the staffing sub committee would you please answer the following questions to enable us to move forward with our deliberations regarding the position of the Deputy Clerk. The committee would be grateful for your answers for our meeting on Thursday 25th July which will be held at 5-30 in Woodleigh.*

Committee took the decision that there was an irretrievable breakdown between the team and attempting to get back to a proper working relationship for the benefit of the Council was unlikely to succeed.'

140. Councillor Moorhouse went on to ask Mr King 10 questions. The questions and the answers which he inserted into the document are at **pages 798 – 800**. Mr King emailed the answers to Councillor Moorhouse on 25 July 2019 at 10:16am. In his covering email he said: '*here are my responses to the questions posed on behalf of the staffing sub-committee. These are based on the three ½ days Jane has spent in the office so far, including the mediation on Monday 15 July. I have focused on matters of fact and process, which I would hope gives the subcommittee background against which to consider the objectives, progress and shape of the return to work agreed to date*.'

141. He explained that as far as the mediation was concerned, the only area on which all four participants could agree was that they had not reached an agreement as envisaged under the terms on which the mediation was provided. As regards the discussion he had with the Claimant on 16 July 2019 he said it was, in itself, successful and that they identified tasks which she was able to carry out on that day and the following morning. He went on to say that as manager he could identify appropriate tasks to be undertaken by the Claimant, that there were distinct areas of work on which she can work unaided and in which she is experienced and which would not adversely affect the workload of the other staff and which would overall increase the work achieved in the office.

142. Question 8 was put in the following terms by councillor Moorhouse:

'*As you are aware committee have agreed that the situation of Jane returning to work would be intolerable for the other members of staff and are offering severance on the grounds of an irretrievable breakdown of working relationships. It is difficult to consider continuing with this phased return as it*

seems contrary to their decision. As manager would you be able to offer any solution to this situation?'

143. In answer to this, Mr King said that it was his role to implement decisions and that he would manage the phased return in the interim.

144. The overall tenor of Mr King's responses was that he will manage the situation. In answer to question number 2, he said '*the discussion on 16 July was, in itself, successful and identified tasks which Jane was able to carry out on that day and the following morning*.' As to number 3, while his response was guarded it was not negative and in essence was that he could manage the situation. To question 4, he identified areas on which the Claimant could focus. As to questions 5 and 6, he expressed no concerns over the Claimant working as Deputy Clerk in his absence. In his answer to question 8 (which demonstrated that the councillors had already resolved to terminate the Claimant's employment) he was effectively saying that he will manage the phased return to work (with the implication being 'unless otherwise instructed'). In answer to question 9 he said that he was comfortable with managing what work she did in the next two short days that would not cause too much disruption for other members of staff.

145. Nowhere does he say that the phased return was not working or that longer-term it was unrealistic to expect things to work because relationships between him and the Claimant or, as far as he understood, between the Claimant and the other two members of staff were irretrievably broken down. When cross-examined about his answers to Councillor Moorhouse's questions, he agreed that they were positive and that some of the questions were negatively phrased.

146. At **page 805** is a compelling email from Councillor Moorhouse to Mr King. She had by this time received his answers to her 10 questions and it is clear that the answers are not in keeping with her objective and that of the staffing sub-committee that the Claimant's employment was to be terminated on the grounds of an 'irretrievable breakdown'. Put bluntly, she regarded Mr King's answers at **pages 798-800** as decidedly unhelpful in that respect. In her email of 26 July 2019 Councillor Moorhouse said (emphasis added):

'*Thank you Michael and I appreciate that* ***you based your answers on facts and progress but members were somewhat disappointed that your comments appeared to be accepting of the situation****. I understand that you do not want to be put in the position of making a decision on how this rolls out and also that you are perfectly capable of managing the situation whatever it throws at us and I do wonder if sufficient recognition of the opinions of the other members of staff have been considered even though they cannot be fact….Could we have a chat on Monday after 12-30 just* ***for me to make sure that you are supportive of what we are trying to achieve*** *or otherwise and*

that you don't feel unable to be open and frank following on from the investigation. I would feel much better if we met face to face, it can be where ever is best for you.'

147. We are satisfied that Councillor Moorhouse was seeking to exert improper pressure on Mr King because his answers did not fit the plan. As with question 8 in the questions and answers document, this email demonstrated beyond any doubt that the decision had been made that the Claimant's employment was to be terminated.

148. Having left the choice of venue to King to decide, he replied on 29 July 2019 at 11:26am that they could meet in the office and that Councillor Moorhouse should take the opportunity to talk to Claire Atkinson as well [**page 805**]. We were never shown any notes of any discussions Councillor Moorhouse had with the employees or any councillor on the question of whether relationships had irretrievably broken down.

149. The Claimant was on leave from 22 July to 26 July 2019, returning to work on 29 July. On her return, Mr King told the Claimant that Councillor Moorhouse had sent him questions which he had answered. He forwarded to the Claimant the email he had sent to Councillor Moorhouse on 25 July 2019 and the questions and answers [**page 807**].

150. On 30 July 2019 Councillor Moorhouse wrote to the Claimant requiring her to attend a meeting with the staffing sub-committee in the Dawson Room on 01 August 2019 at 4.30pm. She attached a short report. The letter and report are at **pages 813-814**.The purpose of the meeting was stated to be: '

to consider whether your employment as Deputy Clerk is able to continue in light of the apparent fundamental breakdown in the working relationship between your co-workers and members of the Council leading to a loss of trust and confidence in you. I should warn you that the outcome of the meeting may result in your dismissal.'

151. The letter went on to say that the staffing sub-committee did not intend to call any witnesses but

'*if you wish to call any relevant witnesses to the hearing please let us have their names as soon as possible…*'

152. The report at **page 814** stated that '*the staff only agreed to this second mediation with the express purpose of a final attempt at reconciliation'*. However, that was simply not true. Nowhere did Ms Atkinson, Ms Farren or Mr King say this was a 'final attempt at reconciliation. In fact, Ms Atkinson and Ms Farren did not understand why there were asked to be present at a group mediation and said as much to the mediator, which was fed back to Councillor

Moorhouse.. The report also stated that the Claimant's return to work '*has not been successful and there was great concern for the 3 members of staff for their health and wellbeing due to the considerable anxiety her return caused*.' This too was not true. Mr King had reported that 16 July meeting was successful and his questions and answers document revealed that, based on the 3 ½ days in the office, it was progressing well enough. Quite what the 'great concern' for the 3 members of staff was based on was not clear to us. No one had taken any statements to that effect from Ms Atkinson or Ms Farren. Mr King certainly did not say that the Claimant's return to work was causing him considerable anxiety and stress. He said he could manage the Claimant's return to work. It is noteworthy that great concern was expressed for the considerable stress and anxiety caused to everyone but the Claimant.

153. The report prepared by Councillor Moorhouse states that after the second and third half day of the Claimant's return, it was reported that this had a detrimental effect on the other staff and the recognisable effect of stress on them. We have seen no such report and it was certainly not evident in Mr King's questions and answers document.

154. The Claimant responded at 7.31pm that day [**page 817**] asking for the meeting to be delayed to 05 August 2019. She had earlier asked Mr King to attend the meeting as her witness in his capacity as her line manager. In his evidence to the Tribunal Mr King said that he had agreed with the Claimant that he would provide her with a statement which was broadly in line with what he had written in the questions and answers document. The Claimant had hoped to use this statement as part of her response to the proposal to terminate her employment.

155. At **page 819** there is another instructive email from Councillor Moorhouse to Mr King of 31 July 2019. It states (emphasis added):

'*Good morning Michael, …..I am not sure how serious you were about giving Jane a factual statement but it concerned me so much that I felt I needed to check with Claire R about it and she has sent the following. You have no duty to provide Jane with a statement**, in fact it is damaging the Council's position by doing so as it will inevitably go against the assertion that working relationships have broken down irretrievably** and the damaging effect that Jane's behaviour is having on staff. You do not have a duty to provide any statement and if you decide to do so it is then your personal call…*'

156. Yet again, Councillor Moorhouse was intervening improperly. This was the most strikingly improper of her interventions, as it was designed to interfere with the Claimant's right to call Mr King as a witness, he having managed her return to work. Councillor Moorhouse had told the Claimant she could call witnesses provided she told her who they were. Having done so, Councillor Moorhouse then set about exerting improper pressure on Mr King, persuading

him not to give her a statement because it would be damaging to the Council's position. She did so under the cloak of legal advice.

157. Councillor Moorhouse emailed the Claimant again on 31 July 2019 saying that she had rescheduled the meeting to 05 August 2019 at 4.30pm but that in the meantime, she should not attend work [**page 818**].

158. Mr King emailed the Claimant on 01 August 2019 at 13:11 to tell her that he would not be able to appear for her at the hearing and that he had been advised that he had no duty as line manager and should not provide her with a statement [**page 824**]. When asked why he changed his mind, Mr King told the Tribunal that he was employed as a Clerk and would therefore act in the best interests of the Council as advised. Mr King readily understood what acting in the best interests of the Council meant. It meant giving Councillor Moorhouse what she wanted – a statement that would fit the bill.

159. The Claimant replied to Mr King the same day at 16:50 saying that, in any event, she '*will be able to rely on the question and answer document you provided to the Staffing subcommittee, which is supportive to my position that the working environment is not irreparable.*'

160. In an email dated 01 August 2019 at 14:09 [**page 831-832**] Councillor Moorhouse relieved Mr King of the responsibility for line management of the Claimant to *'make absolutely sure that there is no conflict of interest'*. From that point on all communication with the Claimant was to be with the sub-committee Chair. This was blatant and cynical. Knowing that Mr King was the Claimant's line manager; knowing that the Claimant wished to call him as her line manager, and knowing that Mr King may, despite her email of 31 July, still feel obliged to attend as her line manager (and thus damage the Council's position), Councillor Moorhouse, on behalf of the staffing sub-committee relieved him of line management responsibility in the belief that this would resolve any risk of him attending the dismissal meeting. It would remove from him (as Councillor Moorhouse believed) any last sense of obligation to attend as the Claimant's 'line manager'. In that same email Councillor Moorhouse told Mr King: '*it appears that any contact with Mrs Woodward now, however well meant could conflict with the actions that Council are taking*.'

161. Mr King had, as we have found (and as the Claimant agreed) been supportive of the Claimant in the past. The Claimant had regarded the meeting on 16 July was productive. She said in paragraph 138 of her statement that she believed that he was being helpful in sending the questions and answers document to her on 25 July 2019. However, we find that Mr King subsequently let the Claimant down considerably by succumbing to the pressure from Councillor Moorhouse. In particular, he did two things which gave the Claimant no remaining prospect of persuading any of the Councillors that her employment should continue (however small that prospect may have been).

162. The first thing he did was to email a new statement to Councillor Moorhouse on 02 August 2019 [see **pages 826-828**]. Although her position was already fairly hopeless, this made the position utterly so from the Claimant's perspective and was eventually used against her (which was its purpose). Mr King knowingly gave Councillor Moorhouse what she was looking for: some appearance of legitimacy for the decision which had already been made. Councillor Moorhouse replied to this email on 03 August 2019 at 14:01 thanking Mr King for his '*most comprehensive report setting out the difficulties that arise in the office due to the Deputy Clerk's difficult personality which I feel appears to confirm that there has been an irretrievable breakdown in working relationships between all members of staff and councillors*'.

163. We pause to add that the Claimant was never told that the subcommittee considered her 'difficult personality' to be the cause of the irretrievable breakdown.

164. The second thing Mr King did to render the Claimant's position utterly hopeless was in his response of 04 August 2019 to Councillor Moorhouse's email of 03 August 2019 [**page 833**]. In her email, Councillor Moorhouse said to him:

'…I have got an email from Jane stating what she is basing her representations on for Mondays meeting. I will forward her message to you but I note that she refers to the Questions that were asked of you and which you answered for the sub committee meeting on the 25th July. Can you shed any light on how she got hold of these they were only sent between you and I and hard copies given to the members of the sub committee on 25th. As you know I did not want to include these so that there was no way your position could be compromised…. we have to bear in mind that this is not a disciplinary hearing regarding conduct but on evidence that it is her difficult personality that has brought us to consider that the working relationship is irretrievable. For your information I will not be responding regarding her comment about your involvement in the role of line manager etc.'

165. The reference to the 'Questions' is to the questions document referred to above. As we have found, Mr King told the Claimant about these and then emailed them directly to her personal email address. The Claimant then sent them to Councillor Moorhouse as part of her response to her proposed dismissal [**page 829**]. However, Mr King's response to Councillor Moorhouse on **page 834** was duplicitous. He said:

'*I can only assume that Jane's knowledge of, or access to, the questions comes from the email system*.'

166. An honest and accurate answer would have been that he had given them directly to her – which he had. However, this duplicitous response by Mr King enabled Councillor Moorhouse to raise doubts among her fellow councillors on the staffing subcommittee as to how the Claimant had accessed them, thus cementing the view that she was not to be trusted [see **page 845**, item 3]. We can see that Mr King was under pressure but he did his own credibility no favours by not revealing the truth. This only compounded the situation for the Claimant as the belief that she had accessed the email system to obtain the Q&A document (which Councillor Moorhouse had never intended her to see) was used as further evidence of her untrustworthiness. That was grossly unfair.

167. In the same email on **page 834**, Mr King refers to his answers to those questions being '*now less pertinent than the statement I forwarded, which provided a fuller analysis, on 2 August. That sets out my view. Of equivalent weight are the views of Yvette, of Claire and of members. Clearly the subcommittee will make a rounded assessment*.'

05 August 2019: the dismissal hearing

168. On 05 August 2019 the Claimant attended the staffing sub-committee meeting accompanied by her friend, Gill Chappel. The committee members were Councillors Moorhouse, Findlay and Harrison. At the commencement of the hearing Councillor Moorhouse handed the Claimant a document [**pages 843-844**]. This was the new statement prepared by Mr King, referred to above. The copy of the document given to the Claimant was unsigned. That is because no signatures were obtained until after the hearing. This document has been referred to by the Respondent as a 'totally unsolicited document.

169. We reject the suggestion that this document was unsolicited. It had been the product of improper pressure put on Mr King and to which he readily succumbed. The statement was simply an expansion of Mr King's email of 02 August 2019 referred to above. It was turned into a 'statement' and duplicitously described as 'unsolicited' by Councillor Moorhouse and was presented to the Claimant at the outset of the meeting which ended in her dismissal.

170. Unlike his earlier 'positive' document, the tenor of Mr King's new statement was negative. Even then, however, it does not say that he or the other members of staff believed relationships were irretrievably broken down or irreparable. When asked by the Tribunal why he did not say this – knowing that was the very issue – Mr King said that the phrase '*Nothing I have seen to date leads me to believe that effective working relationships and procedures can be resumed….*' was synonymous with that phrase. We reject this. The Claimant had been absent from work for 5 months. There was one mediation which got off to a bad start (and which might have turned out differently, had Councillor Moorhouse not insisted on a group meeting from the outset). There were three ½ days at work which, on his initial assessment, appeared to be working okay.

It was early days in the return to work. Mr King understood the phrase 'irretrievable breakdown' and understood that was the proposed basis for terminating the Claimant's employment. Yet he avoided any reference to the phrase.

171. We conclude that, while Mr King went along with what Councillor Moorhouse wanted, he was still, even then, not prepared to say that the relationships between the Claimant and the staff had irretrievably broken down because he did not consider that they had. Yes, they were strained or damaged. However, even in his oral evidence to the Tribunal he never said his relationship with the Claimant was broken beyond repair and ghe ave no evidence as to the state of her relationship with Ms Atkinson and Ms Farren as he perceived it. In his witness statement, he refers only to a 'strain' in relationships (paragraph 67) and – unusually given the reason for dismissal – says in paragraph 73 that his opinion on the matter was 'immaterial'. We consider that to be a rather telling remark. Given that the Respondent was contending that relationships between the Claimant and the staff had irretrievably broken down, his opinion on the matter was highly material. We find that Mr King was simply toeing the line he knew he was required to by Councillor Moorhouse and he was putting before the Councillors as much as he had to say in order to her and her fellow councillors to terminate the Claimant's employment. We reject the suggestion that Mr King discussed this statement with Ms Farren and Ms Atkinson prior to drafting it. His statement was simply taken from his email of 02 August 2019 at **page 826**. It was only after the Claimant questioned the document at the dismissal hearing that an approach was made to Ms Farren and Ms Atkinson for them to sign it and to say that they agreed with it. Even then, all they did was to sign a comment that said '*I support the comments of the Clerk'*. They did not say it was a joint statement discussed in advance.

172. Although the Claimant was only given this document at the outset of the hearing, she was given time to read it. This was wholly unreasonable – no reasonable employer would have done this without at least considering postponing the hearing. The Tribunal was conscious that the Claimant had complained not only of unfair dismissal but, in paragraph 54h of her Claim [**page 20**], of unfavourable treatment because of something arising in consequence of disability by the Respondent's conduct of the dismissal and appeal hearings. When asked by Mr Moules to articulate the treatment she was complaining of, the Claimant said it was the failure to take into account her mental health.

173. The Claimant had prepared an oral submission which she read to the committee **[pages 850-860**]. In her evidence to the Tribunal, the Claimant said that she was able to present her response and make the points she had to make even though she was presented with the document at the hearing itself which she maintained was unreasonable. Of course, in reality it did not matter

what the Claimant had to say in response as the decision had been pre-determined. The hearing on 05 August 2019 was, we find, a charade.

Appeal against dismissal

174. On 06 August 2019 the Respondent wrote to the Claimant informing her of the decision to terminate her employment [**page 863**]. The letter was hand delivered at 1.45 pm. Rather unusually an appeal had been pre-arranged for the following day. The Claimant emailed on 06 August to say she would be appealing but would not be attending the following day [**page 864**]. She asked for more time and said that she would not be attending at such short notice. This reasonable request was declined by Councillor Moorhouse [**page 866**] who said the appeal would go ahead. The appeal committee (Councillor John Blissett, Councillor Kelly Blissett and Councillor Drew) duly met at 5pm on 07 August 2019 in the Claimant's absence to review the decision. That committee concluded by fully endorsing the decision of the staffing sub committee to dismiss the Claimant. The appeal committee's remit was to 'consider whether the process had been carried out correctly and that the decision arrived at was based on sound information' [**page 865**].

175. On 07 August 2019 at 15:33 [**page 868**] Councillor Moorhouse emailed the Claimant to say there was a meeting of the staffing sub committee the following Monday and she will ask them to agree an appeal meeting with the Claimant present.

176. On 08 August 2019 Councillor Moorhouse emailed the Claimant to say that there would be a meeting at which she '*will be offered the opportunity to put your case and will receive a fair hearing*' [**page 876**]. In the same letter, Councillor Moorhouse added '*it does appear although it is fractionally different my understanding is that we are all probably using the word appeal incorrectly because the dismissal stands and you are not actually trying to overturn the decision but actually you have to put your case to become re-instated*.' The whole purpose of an appeal is to afford the opportunity of overturning the decision. We are not sure what distinction Councillor Moorhouse was trying to draw here. Whatever the remit of this 'appeal' hearing, the Claimant was not going to have a fair hearing. Far from it. The appeal committee had already met on 07 August 2019 unanimously endorsing the decision of the staffing subcommittee.

177. On 13 August 2019, Councillor Moorhouse wrote to the Claimant confirming that her appeal against dismissal had been agreed and arranged for 19 August [**page 886**]. The members of the committee were subsequently confirmed as being Councillor John Blissett, Councillor Kelly Blissett and Councillor Laura Drew. The Claimant wrote on 15 August 2019 objecting to Councillor John Blissett's presence on the appeal committee. He did not withdraw from the appeal committee.

178. On 16 August 2019 Councillor Moorhouse, once again, intervened improperly. We emphasise that the Claimant was never going to and in fact did not obtain a fair appeal hearing. However, to add to the difficulties she faced, Councillor Moorhouse, in response to the Claimant's grounds of appeal at **pages 892-893,** emailed highly subjective comments and a conclusion that was to leave the appeal committee members in no doubt what the decision was to be [**894-895**]. This was sent on the day of the appeal meeting, the transcript of which are at **pages 901a – 901h**]. At the outset of the appeal meeting, Councillor John Blissett told the Claimant that it was not for them to make a decision, that they would have to put it back to the sub-committee for a decision - in other words, back to the committee chaired by Councillor Moorhouse to make the overall decision. The Claimant, understandably, had not appreciated this.

179. The appeal committee did not have before it the pack of documents that the Claimant had prepared. They only had notes from the Respondent's solicitor. The Claimant pressed on and focussed her submissions on points 11-17 of her grounds or appeal.

180. We accept the Claimant's evidence and that of her companion, Ms Cooke that Councillor John Blissett's manner towards the Claimant at the appeal hearing was aggressive. Ms Cooke was about to intervene and would have done but for the other committee members calming him down. We were wholly unimpressed by Councillor Blissett's evidence (as we were by that of Councillor Moorhouse). They were both biased against the Claimant and regarded her to blame for disrupting the working environment and council business. At the appeal hearing, as he was when giving evidence to the Tribunal, Councillor Blissett was more exercised by what he regarded as a slight to his own reputation than by any notion of fairness to the Claimant. He commented about having been 'interrogated' by PC Marsh regarding the sending of anonymous letters, a description which we conclude was wholly exaggerated but which demonstrated a settled animus on his part towards the Claimant. It is clear from reading the transcript of the appeal meeting that the panel was simply going through the motions and they did not even attempt to engage with the very compelling points which the Claimant made. They were, of course, never going to engage with her points because her fate had been sealed some time ago. Both Councillor Moorhouse and Councillor Blissett had ensured that the dismissal and appeal hearings would have only one outcome.

181. On 02 September 2019 the Respondent wrote to the Claimant rejecting her appeal [**page 911**].

Medical records and evidence of the Claimant

182. The medical records of the Claimant began at **page 957** of the bundle. In a letter dated 18 February 2020, the Claimant's GP, Dr Mitchie wrote in support of her complaint to the Tribunal [**page 958**]. He records that she has suffered from depression over a number of years presenting initially in 2010. He says her mental state improved after she joined the Respondent in 2014 and she was coping well until she was suspended from work in March 2019. Since then her mood had deteriorated and her mental condition with it. He referred to the medication which at the time of writing was Sertraline 100, propranolol 40mg tds.

183. Other than a print-out of the medical visits to the Claimant's GP and letters regarding talking therapies and documents from 2014, that was the only medical report placed before the Tribunal. More to the point, as confirmed by Mr Clarke in submissions, it was the only medical evidence as such relied on for the purposes of the disability discrimination claims We were not taken to any other letter or report of any relevance to the issues i.n these proceedings.

184. The Claimant produced a 'disability impact statement' [**pages 62-67**]. In paragraph 22 she said that when she has a period of depression her symptoms can include persistent low mood, lack of motivation and if particularly low, suicidal thoughts. Her anxiety symptoms include palpitations, worrying incessantly, feeling panicky and out of control. In paragraph 23 she said that sometimes she has difficulty controlling her emotions, which can upset other people. In paragraph 33 she says that she is aware that her behaviour can sometimes upset people; that she can sometimes feel very low and tearful and at times has little emotional resilience. She says that she tries to remove herself from others and keep herself to herself if this happens and that she might appear as unsociable and unwilling to interact. In paragraph 34 she says that occasionally she can have difficulty controlling her emotions which can lead to emotional distress. However, she did not describe any examples of losing her self-control resulting in angry outbursts.

185. When asked by Mr Moules to give examples of the sort of thing referred to in paragraph 30 of her disability impact statement that would lead to an increase in anxiety through lack of time to prepare, the Claimant gave as an example the letter of suspension, which did not give her any clear indication of what was going to happen and the letter of 18 March 2019 which referred to an informal resolution even though there was nothing in the procedures regarding this.

Relevant law

Unfair dismissal

186. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the

position which the employee held. The reference to the 'reason' or 'principal reason' in section 98(1)(a) and s98(4) is not a reference to the category of reasons in section 98(2)(a)-(d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal (**Robinson v Combat Stress** UKEAT/0310/14 unreported) which is a question of fact. The categorisation of that reason is then a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.

187. A reason for dismissal '*is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*': **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

Some other substantial reason ('SOSR') – s98(1)(b)

188. Section 98(1)(b) does not prescribe any particular reason for dismissal as being potentially fair. In principle, any reason for dismissal may be relied on by an employer provided it is a *substantial* reason *of a kind such as to justify the dismissal of an employee holding the position which the employee held*.

189. A reason which is trivial or frivolous could not qualify as a 'substantial' reason. A frivolous or trivial reason could hardly be said to justify the dismissal of any employee irrespective of the nature of the job being performed by that employee. That substantial reason must, however, have an additional quality. It must be of *a kind such as to justify the dismissal of an employee holding the position which the employee held*. So, the statute directs us to consider the nature of the position which the dismissed employee held and to ask: 'considering the job in question is the employer's reason capable of justifying dismissal of an employee doing that job. The focus is not on the particular employee at this stage. That comes later, if the employer establishes 'SOSR', when considering section 98(4).

190. In **Leach v Office of Communications** [2012] I.C.R. 1269, CA, Mummery LJ said in relation to the question of the employer establishing 'SOSR' (emphasis added):

*"52. First, the question for the Employment Tribunal was whether the employer's reason for dismissal of the Claimant was 'some other substantial reason' within the meaning of section 98(1)(b) of the 1996 Act. Was it a reason which a reasonable employer **could** rely on to justify a decision as fair for the purposes of section 98(4)? That is essentially a question for the Employment Tribunal's assessment of the facts found in the particular case…*

53….in order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the Employment Tribunal has to examine all the relevant circumstances…"

191. In **Z v A** [2013] UKEAT/0203/13/SM, at paragraph 24 Langstaff P, commenting on **Leach v Office of Communications** said:

"Hence the Court of Appeal plainly contemplated that the assessment by a Tribunal of whether a disclosure of potential risk merited dismissal was one for its judgment."

192. Therefore, in any case where an employer puts forward as the potentially reason for dismissal, 'SOSR', in considering whether the employer has established such a reason it is for the Tribunal to assess whether the reason advanced was indeed of a kind such as to justify dismissal of an employee holding the position which the employee held.

193. In **Perkin v St George's Healthcare NHS Trust** [2005] IRLR 935 the Court of Appeal held that although 'personality' of itself cannot be a ground for dismissal, an employee's personality may manifest itself in such a way as to bring the actions of the employee within s98. Whether the manifestations of an individual's personality result in conduct which can fairly give rise to the employee's dismissal, or whether they give rise to 'SOSR', the employer has to establish the facts which justify the reason for the dismissal.

Reasonableness – section 98(4)

194. If the employer establishes the reason, the next step is to consider section 98(4) of the Act. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. These are not separate issues – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

195. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether, in the particular circumstances, the decision to dismiss was within a band of reasonable

responses which a reasonable employer might have adopted. In assessing this it must do so by reference to the objective standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). It is important that the Tribunal does not substitute its own view as to what was the right course of action.

Polkey

196. What is known as 'the Polkey principle' (**Polkey v AD Dayton Services** [1988] I.C.R. 142, HL) is an example of the application of section 123(1) ERA 1996. Under this section the amount of the compensatory award awarded to a successful complainant of unfair dismissal shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been followed. Thus the 'Polkey' exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.

197. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraphs 53 and 54).

198. An employer which is found to have unfairly dismissed an employee may lead or rely on evidence adduced during a hearing and invite the tribunal to take that evidence into account in determining that the employee would or might have been fairly dismissed in any event. If the evidence shows that the employee may have been fairly dismissed in any event, the tribunal should ordinarily make a percentage assessment of the likelihood and apply that when assessing compensation. It is for the employer to adduce relevant evidence on which it wishes to rely although the Tribunal must have regard to all the evidence which includes evidence from the employee.

Contributory conduct

199. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow**

Security Services Ltd v Millicent [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have actually caused or contributed to the dismissal: **Nelson v BBC (No2)** [1980] I.C.R. 110, CA. For the purposes of the compensatory award there must be a causal connection between the conduct and the dismissal. The conduct must be to some extent culpable or blameworthy (**Nelson v BBC (No.2)** [1980] I.C.R. 110, CA). Langstaff J offered tribunals some guidance in the case of **Steen v ASP Packaging** [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

200. There is an equivalent provision for reduction of the basic award, section 122(2) which states that '*where the tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

201. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

202. When considering the extent to which the compensatory award should be reduced for contributory conduct under section 123(6) ERA, the tribunal is entitled to take into account the amount by which the compensatory award has already been reduced on just and equitable grounds under section 123(1) (by way of a Polkey reduction). This may also entitle the tribunal to reduce the basic award by a greater percentage than the compensatory award: **Rao v Civil Aviation Authority** [1994] I.C.R. 495, CA.

Section 15 Equality Act 2010: discrimination because of something arising in consequence of disability

203. Section 15 provides:

(1) A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

204. The Act does not define what is meant by 'unfavourably'. However, paragraph 5.7 of the EHRC Employment Code says that the disabled person must have been 'put at a disadvantage'. There is little, if any, distinction between the word 'unfavourably' and analogous concepts such as 'disadvantage' and 'detriment' found elsewhere in the legislation: **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2019] I.C.R. 230, SC, per Lord Carnwath.

205. For a claim under section 15 to succeed, there must be something that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability. Paragraph 5.9 of the EHRC Employment Code states that the consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability'.

206. In **Pnaisner v NHS England and anor** [2016] IRLR 170, EAT Mrs Justice Simler, as she then was, summarised the proper approach under section 15 EqA. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person. The 'something' need not be the sole reason for the unfavourable treatment but it must be a significant or more than trivial reason for it. In considering whether the something arose 'in consequence of' the claimant's disability', this could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. There is no requirement that the employer be aware of the link between the disability and the 'something' when subjecting the employee to the unfavourable treatment complained of: **City of York Council v Grossett** [2018] I.C.R. 1492.

sections 20-21 Equality Act 2010: failure to make reasonable adjustments:

207. Section 20 sets out the duty:

(3) where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

208. It is imperative to correctly identify the 'PCP''. Without doing this, it is not possible to determine whether it has put the disabled person at a substantial disadvantage or what adjustments are required. There is no obligation on the employee to identify what those reasonable adjustments should be at the time. However, it is insufficient for a claimant simply to point to a substantial disadvantage caused by a PCP and then place the onus on the employer to think of what possible adjustments could be put in place to ameliorate the disadvantage. There must be 'some indication as to what adjustments it is alleged should have been made' by the time the case is heard before the tribunal: **Project Management Institute v Latif** [2007] IRLR 579, EAT.

209. Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP was capable of amounting to a relevant step under section 20(3). There is no requirement that the adjustment must have a good prospect of removing the disadvantage. It is enough if a tribunal finds there would have been a prospect of the disadvantage being alleviated: **Leeds Teaching Hospital NHS Trust v Foster** EAT 0552/10. The only question is whether it was reasonable for it to be taken.

210. The question that has to be asked is whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. If a disabled person and non-disabled persons are treated equally by being subject to the same policy or disadvantage, this does not necessarily eliminate the disadvantage if the PCP bites harder on the disabled than on the non-disabled. The steps required to alleviate such disadvantages must be steps which a reasonable employer could be expected to take: **Griffiths v Secretary of State for Work and Pensions** [2017] I.C.R. 160, CA.

Knowledge of disability and disadvantage

211. In considering whether the employer can be said to be subject to a duty to make reasonable adjustments, the Tribunal must consider the knowledge of the Respondent. The law is clearly articulated in **Department of Work and Pensions v Alam** [2010] IRLR 283. The employer is not under a duty to make reasonable adjustments if it did not know or could not reasonably have known:

a. That the employee was a disabled person, and

b. That he was likely to be placed at a substantial disadvantage by the relevant PCP

section 26 Equality Act 2010: harassment related to disability

212. Section 26 provides that:

> (1) A person (A) harasses another (B) if--
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, 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.

213. The intention of those engaged in the unwanted conduct is not a determinative factor although it may be part of the overall objective assessment which a tribunal must undertake. It is not enough that the alleged perpetrator has acted or failed to act in the way complained of. There must be something in the conduct of the perpetrator that is related to disability. The necessary relationship between the conduct complained of and the protected characteristic is not established simply by the fact that the Claimant is disabled and that the conduct has the proscribed effect.

214. It is helpful to consider cases involving harassment allegations by looking at the separate components of section 26, referring to the complainant as ‘B’ and the alleged harasser as ‘A’; and ask:

a. If the Tribunal finds that A conducted himself as alleged, was the conduct unwanted conduct?

b. Did the conduct have the proscribed purpose or effect?

c. Did the conduct relate to disability?

215. Sometimes, it may be helpful to consider points a and b together because the question whether conduct had the proscribed effect may be best looked at when considering whether it was unwanted and vice versa.

216. Unwanted conduct is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant (see ECHR Code of Practice on Employment, paragraph 7.8). This does not mean that express objection must be made to the conduct before it can be said to be unwanted. It does not follow that because A's conduct has been going on for some time without any apparent objection from B that B condones it or accepts it. The Tribunal must be alive to the very real possibility that a person's circumstances may be such that they feel constrained by certain pressures whether in their personal life or in work which explains a failure to object (expressly or impliedly) to what they now say, in the course of litigation, was objectionable and unwanted conduct. Equally however, B is not required to expressly approve of A's conduct before a Tribunal may find that A's conduct was not unwanted. Clearly, conduct by A which is by any standards, or self-evidently, offensive will almost automatically be regarded as unwanted and in the vast majority of cases there is nothing to be gained by considering whether B objected to the conduct.

217. The unwanted conduct must be related to the protected characteristic. This is wider than the phrase 'because of' used elsewhere in the legislation and requires a broader inquiry.

218. Finally, section 26(4) requires the Tribunal to consider whether it is reasonable for A's conduct to have the effect referred to in section 26(1)(b).

Burden of proof

219. Section 136 EqA, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Gampian Health Board** [2012] I.C.R. 1054.

220. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question:

Madarassy v Nomura International plc [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA

Submissions on behalf of the Claimant

221. Both representatives prepared written submissions which they supplemented with oral submissions.

222. For the Claimant, Mr Clark contended that the Respondent canncould not show that it had a potentially fair reason for dismissal. The reasons in the outcome letter do not amount to 'SOSR'. Even if they did, reliance on them was unreasonable. He referred us to the case of **Eszias v North Glamorgan NHS Trust** [2011] IRLR 550 confirming that a reason for dismissal may be 'SOSR' rather than conduct where there is a fundamental and irretrievable breakdown of working relations between an employee and his colleagues and he is dismissed for the fact that the breakdown has occurred rather than because he was to blame for causing it. Mr Clarke reminded the Tribunal of **Perkin v St George's Healthcare NHS Trust** [2005] IRLR 935 the CA and the applicability of the **Burchell** test.

223. He submitted that the dismissal stemmed from the events of 19 February 2019 and the Claimant's emotional outburst. Because the second disciplinary allegations did not provide a basis for dismissal, he submitted that SOSR (an irretrievable breakdown in working relations) was simply used as a pretext for terminating the Claimant's employment.

224. He submitted that The Staffing Subcommittee decided on 16 July 2019 that there had been an irretrievable breakdown of working relationships in the office without having established whether or not this was the case. He submitted that the claimant was dismissed because of her difficult personality and the members resolution, particularly that of councillors Moorhouse and John Blissett, to achieve her removal her from the office. Mr Clarke submitted that the Respondent acted unreasonably throughout.

225. As regards the complaint of discrimination under section 15 EqA, Mr Clark reminded the Tribunal of the approach in **City of York v Grosset** [2018] EWCA 1105 and **iForce Ltd v Wood** (UKEAT/0167/18/DA) where it was stated that the concept of arising 'in consequence' of a disability is very broad – the disability does not have to be the sole or immediate cause of the 'something' provided that there is some connection; He also directed us to the example given in section 5.9 of the EHRC Code and referred us to the case of **Baldeh v Churches Housing Association of Dudley & District** (UKEAT/0290/18/JOJ). He made factual submissions on the Claimant's suspension and dismissal being discriminatory within the meaning of section 15 EqA.

226. In terms of the complaint of failure to make reasonable adjustments he submitted that the 'disciplinary proceedings' are capable of amounting to a 'PCP'. In oral submissions he contended that 'suspension', the 'condition' of mediation and the r'e-opening of the first investigation' were practices which put the Claimant at a substantial disadvantage compared to on-disabled persons. In relation to 'suspension', he submitted that the Claimant ought to have been returned to work.

227. Mr Clark made brief submissions on the issue of harassment. He said there was little to add to his written submissions and that the Claimant's case was advanced on the basis of the 'effect' of the alleged unwanted conduct as opposed to its 'purpose'.

Submissions on behalf of the Respondent

228. The Respondent submitted that the reason for the Claimant's dismissal was that there had been "irretrievable breakdown of working relationships between C and her co-workers and members, which led to a loss of trust and confidence in her ability to carry out the role of Deputy Clerk. This breakdown, it was submitted, commenced as early as late 2017 and became irretrievable as at July 2019 following the failings of a second workplace mediation. Ms Rumble urged us of the need to consider the circumstances of this case in the context of a small office comprising only four staff.

229. She relied on the things identified in paragraphs 8 – 10 of her submissions as evidence of the irretrievable breakdown in working relationship between the Claimant and Ms Farren and Ms Atkinson; the Claimant and Mr King and the Claimant and councillors. She submitted that this resulted in a loss of trust and confidence in C's ability to carry out the role of Deputy Clerk. That, she submitted, was the reason for dismissal and was, in the circumstances a substantial dismissal justifying dismissal of an employee holding the position the Claimant held.

230. Ms Rumble reminded the Tribunal of the case of **Perkin v St George's Healthcare NHS Trus**t **[2005] IRLR 934** where the Court of Appeal was of the view that where a personality clash had led to a breakdown in the functioning of the employer's operation it could reasonably amount to some other substantial reason for the dismissal.

231. As to reasonableness, Ms Rumble referred us to **BHS v Burchell [1980] ICR 3030,** and **Boys & Girls v MacDonald [1997] ICR 693**. She reminded the Tribunal that it must not supplant its views for that of the respondent. She made submissions on procedural fairness in paragraph 63.

232. In relation to the complaint of disability discrimination (section 15 EqA 2010) Ms Rumble directed the Tribunal's attention to **Pnaiser v NHS England [2016] CLY 1664**

233. As to reasonable adjustments, she submitted that the Claimant must establish the 'PCP' and that it caused a substantial disadvantage. Before the burden shifts, the Claimant must also establish evidence of an apparently reasonable adjustment which could be made and of such an adjustment alleviating the disadvantage (*Project Management Institute v Ms Latif (UKEAT/0028/07CEA*).

234. Ms Rumble submitted that the argument that the disciplinary process put the Claimant at a substantial disadvantage was extremely wide. She further submitted that it is unlikely that the application of a flawed disciplinary procedure on a one-off basis will amount to a 'PCP', referring us to the observations of the EAT in **Nottingham City Transport Ltd v Harvey** [2013] EqLR 4, [2013] All ER (D) 267 (Feb), that 'practice connotes something which occurs more than on a one-off occasion and which has an element of repetition about it.'

235. In paragraph 83, Ms Rumble submitted that accepted C was disabled and MK had knowledge of that at all material times. However, it was not accepted the Respondent was aware or ought to have been aware the Claimant was put to any substantial disadvantage by a PCP.

236. Finally, Ms Rumble submitted that any complaints of discrimination taking place before **19 July 2019** were prima facie are out of time and that it would not be just and equitable to extend time.

Discussion and conclusion

237. We turn now to our conclusions on the issues which we shall take in the order in which they were agreed by the representatives.

Unfair dismissal

Reason for dismissal

238. The Respondent contended that the reason for dismissing the Claimant was its genuine belief that there had been an irretrievable breakdown of working relations between the Claimant and her co-workers and members of the Council which had led to a loss of trust and confidence in her ability to carry out her role of Deputy Clerk (see paragraph 35 Response, **page 36**). This, it contended was a substantial reason justifying dismissal of an employee holding the position the Claimant held (known as 'SOSR').

239. We accept that a breakdown in confidence between an employer and a senior employee for which the latter is responsible and which actually or potentially damaged the operation of the employer's organisation, or which rendered it impossible for employees to work together as a team, can amount to some other substantial reason for dismissal. We have given careful consideration to this principle in light of our findings of fact. We remind ourselves that the burden of establishing the reason falls on the Respondent.

240. However, the Respondent has not satisfied us that the principal reason for dismissing the Claimant was in fact that it genuinely believed there to have been an 'irretrievable' breakdown in relationships between the Claimant and her co-workers in the office or that the actual reason was a substantial reason of a kind such as to justify dismissal of an employee holding the position the Claimant held. As demonstrated by Councillor Moorhouse's email to Mr King] **page 819**] she was only too aware that Mr King's account of life in the office did not support 'the assertion' that there had been an irretrievable breakdown, so she contrived to ensure that he gave her something that would support this 'assertion'. In our judgement it was simply a convenient label to effect the Claimant's dismissal. Whilst the councillors believed that relationships in the office were damaged, it was never a genuinely held belief that they were irretrievably so. In any event, even if genuinely held, we are satisfied that this belief was not a reasonably held one

241. Before arriving at this conclusion, we have considered counsel's submissions on behalf of the Respondent. The points in paragraph 8a-d of Ms Rumble's written submissions simply demonstrate what everyone was agreed on, namely that relationships were damaged. However, the office functioned reasonably well after Ms Farron ceased reporting directly to the Claimant in February 2018, and Ms Atkinson's decision in February 2019 was only shortly before the Claimant's suspension following which she was absent from the office for 5 months, isolated and excluded and given no opportunity to repair matters. We do not accept the submission in paragraphs 8e and 8f, which we consider to be exaggeration by the Respondent in the course of and for the purposes of defending these proceedings. We would have expected to see statements from the individuals that they would leave the employment of the council if the Claimant stayed had this been the case. There is not a single email from them to that effect and is mentioned nowhere in any statement contemporaneous or otherwise. The statement which they signed on 05 August was not a joint statement and they were simply asked to put their signature to it after the decision to dismiss had been made.

242. Councillor Moorhouse who chaired the dismissal meeting had already received an update from Mr King in his questions and answers document but she and other members were disappointed in this because – as she put it in the subsequent email – it ran contrary to 'the assertion' that there had been an irretrievable breakdown (see the emails at **pages 805 and 819** and our findings

on those emails). Councillor Moorhouse had also been told by councillor Sutherland on 24 June 2019 that Ms Atkinson and Ms Farron wanted the Claimant to return to work. The NEREO report of 03 July 2019 said that Ms Farren and Ms Atkinson told the investigator that they would continue to work with the Claimant if support was put in place. Ms Jeromson's report was not that the mediation was horrendous or a disaster but that she would help support the staff re-build relationships.

243. We do not agree that the points highlighted in paragraph 9 of Ms Rumble's submissions demonstrate an irretrievable breakdown between the Claimant and Mr King. Yes, they were strained, as he put it in his own witness statement. We have found that Mr King was simply toeing the line and he gave Councillor Moorhouse a statement that would legitimise her actions, However, even then, he held back from saying that there was an irretrievable breakdown.

244. The Respondent did not advance any evidence that might reasonably be regarded as showing any breach of the staff handbook (paragraph 10a of Ms Rumble's submissions). While the Respondent was right to emphasise the need for propriety and equality of service, there was no evidence that could lead anyone to believe that the Claimant had breached the provisions of the handbook. As to paragraph 10b, it may well have been a councillor who sent the anonymous letter. Nobody could sensibly rule that out. Given the proximity of the briefing to councillors in April 2018 and the sending of the letter it was not unreasonable to believe that this was possible. However, the Claimant had always said that it was a councillor or someone associated with a councillor and Mr King acknowledged that the letter revealed matters that could only have been known within the council. It is certainly not evidence of an irretrievable breakdown in relationships and nor is any of the other matters referred to in paragraph 10 of Ms Rumble's submissions.

245. We reject the point made by Ms Rumble in paragraph 11 of her written submissions. There was no evidence as to ineffective working. On the contrary, Mr King's assessment in his questions and answers document suggested the contrary.

246. As to whether there was an irretrievable breakdown in relationships between the Claimant and elected members, this was only advanced as a secondary consideration to that of the relationship between the staff. In any event, it was never made clear what was meant by 'members'. There were 12 councillors. It was not suggested that each and every councillor's relationship with the Claimant had irretrievably broken down. We heard only from two of them and neither Councillor Moorhouse nor Councillor Blissett say anything in their evidence about this aspect of the response.

247. There was certainly a poor relationship between Councillor Blissett and the Claimant but this was the result of Councillor Blissett's aggressive approach

towards the Claimant at the meeting with PC Marsh and his dislike of her. From that point, we conclude he simply did not like the Claimant regarding her as someone who impugned his character. Councillor Moorhouse had a dim view of the Claimant's role in developing a relationship with Councillor Peat, but as she demonstrated by her visit to the Claimant's home, she was (because of the circumstances surrounding Mr King's suspension) prepared to allow the Claimant to return to work as deputy town clerk when the circumstances demanded.

248. We conclude that the concept of 'SOSR' was seized upon by the Respondent, and particularly by Councillor Moorhouse, as a convenient label for removing the Claimant because by that point she was perceived to be a difficult personality who had manipulated Councillor Peat into a relationship and who refused to acknowledge the upset that she had thereby caused. We agree with what is pleaded in paragraph 41 of the Particulars of Claim [**page 1**8] that a large part of the councillors' thinking was that it wanted to terminate her employment rather than reintegrate her into the workforce. 'SOSR' was seen as the easiest way to achieve dismissal, the Respondent believing that it could avoid having to apply its disciplinary procedures and waste any more valuable time in dealing with matters arising out of the aftermath of this relationship,

249. Although we have rejected the Respondent's case that it genuinely believed there was an irretrievable breakdown in relationships between the Claimant and the other members of staff, we have gone on to ask what if we are wrong about that? Therefore, on the premise (albeit one which we have rejected) that the Respondent did genuinely believe there was an irretrievable breakdown in relationships between the Claimant and her co-workers and elected members we have asked whether that amounted to a substantial reason justifying dismissal of an employee holding the position the Claimant held.

250. Such a belief, if genuinely held and advanced is capable of being a substantial reason justifying dismissal of an employee holding the position the Claimant held. We agree with Ms Rumble's submission in paragraph 7 as to the context being a small office, in a small community where workers need to get on reasonably well in order to function effectively. If relationships deteriorate to a point where it is adversely affecting the proper functioning of the office, then this may well constitute a substantial reason for terminating an employee's employment.

251. However, an employer must nonetheless act reasonably in treating that reason as a sufficient reason for terminating the employee's employment. We conclude that the Respondent acted unreasonably in treating such a reason as a sufficient reason for dismissal in all the circumstances of this case. As confirmed by Wall LJ in the **Perkins** case (paragraph 65), there is no reason

why the principles of fairness set out in the case of **Burchell** (a conduct case) should be limited to cases arising under section 98(2)(b).

252. We have asked whether such a belief was formed on reasonable grounds. We conclude that it was not. Certainly, the Respondent had reasonable grounds for concluding that relationships were damaged and needed repairing. The Claimant herself acknowledged this. However, in arriving at the conclusion that they were damaged beyond repair the Respondent did not act reasonably.

253. The Respondent failed to carry out anything like a reasonable investigation before arriving at that conclusion. No statements were taken from Ms Atkinson or Ms Farren. The only reasonably reliable material was that provided by Mr King in his questions and answers document. His further statement was unreliable because it had been obtained following improper pressure by Councillor Moorhouse and was obtained for the purposes of contriving a dismissal which had already been decided upon.

254. Ms Rumble submits in paragraph 16a that the Respondent acted reasonably in facilitating two mediations. However, the first mediation was not worthy of the name as it was designed to get the Claimant to enter into a settlement agreement whereas she had come hoping to mediate workplace relationships with a view to getting back to work. As regards the second mediation, Councillor Moorhouse unreasonably interfered and insisted that there be a group meeting, going against what the mediator and the Claimant had agreed and without properly setting the scene for a group session.

255. Further, the longer the Claimant remained away from the workplace on suspension (or paid leave) the more isolated from her colleagues she became. A reasonable employer would not have excluded the Claimant for such a long period of time as the Claimant was. It would have arranged for her return to work fairly quickly – as happened in the case of Mr King. A reasonable employer would not have continued the Claimant's suspension beyond 18 March 2019 once it had decided no disciplinary action was to be taken against her. A reasonable employer would have heeded the Claimant's expressed concerns about her mental health and at the very least would have considered obtaining occupational health input.

256. We conclude that a reasonable employer would not have characterised the allegations in the second investigation as gross misconduct and would not have suspended the Claimant in respect of them. It was unreasonable to confirm and continue that suspension from 15 April 2019 (as set out in the letter at **page 404**) given that a simple inquiry would have established that Mr Piercy, the independent investigator, did not consider the Claimant to be prevented from accessing emails and that he had discussed her doing so. A reasonable employer would have interviewed Mr Piercy either at the point of considering

whether it was necessary to suspend the Claimant and at the very least would have interviewed him during the investigation into those matters and prior to 15 April 2019 on which date the Claimant's suspension was to be reviewed. A reasonable employer would have seen that the letter of suspension did not preclude the Claimant from entering council premises to hand deliver a letter for Councillor Blissett. A reasonable employer would have recognised that the letter was delivered after a decision had been made not to take formal disciplinary action against her. No reasonable employer would have issued a written warning in light of the terms of the suspension letter, the evidence from Mr Piercy given at the disciplinary hearing on 29 April 2019 and the unchallenged account given by the claimant about those matters. No reasonable employer would have continued to exclude her from the workplace after 02 May 2019 and would have attached a condition that she attend a mediation before she could return to work. All of these things are, in our judgement, outside the band of reasonable responses of a reasonable employer.

257. Moreover, the efforts by Councillor Moorhouse in contriving to produce the desired outcome of dismissal renders any process and decision outside the band of reasonable responses. Reasonable employers do not contrive to effect dismissals. At the very best, and looking at it as favourably as we can from the Respondent's standpoint, it might be said that the Respondent was getting mixed messages about the nature of relationships within the office. However, the information that was being given to members of a horrendous mediation, of the Claimant creating considerable anxiety in the office for the other staff, was coming primarily from Councillor Moorhouse. It seemed at odds with what councillor Sutherland reported and with what Mr King said in evidence that the view on an irretrievable breakdown was not based on anything he had given to members. It seemed at odds with what Ms Machers of NEREO had been told by the office staff. If Councillor Moorhouse was getting this information from Ms Atkinson and Ms Farren directly, she did not record it anywhere – and as a decision-maker she would have been conflicted if she was going directly to them. When Councillor Moorhouse asked Mr King for answers to her 10 questions she had no intention of showing the questions and answers to the Claimant. When she received Mr King's response she did not like it. The Respondent took no steps to obtain any statements from anyone setting out what the root cause of this breakdown in relationships was. Nothing other than Councillor Moorhouse's report was sent to her. The allegedly 'unsolicited statement' was presented to her only at the outset of the dismissal hearing.

258. The procedure the Respondent followed leading up to dismissal was inherently unfair. Councillor Moorhouse improperly interfered in matters in a number of respects as we have set out above.

259. We must make clear that, even though, on 20 February 2019, Councillor Moorhouse influenced the decision to suspend, we conclude that a reasonable

employer may well have reasonably suspended the Claimant in the first instance in light of the events of 19 February 2019. A reasonable employer would be entitled to suspend an employee who berated her line manager and the Mayor in a small working environment such as this. However, given the discrete nature of the incident, we would have expected a short period of suspension in order to investigate this single event. It is not the act of suspension that we find to have been unreasonable, but the interference in it by Councillor Moorhouse, its length and its continuation beyond 18 March 2019.

260. Councillor Moorhouse also put pressure on the mediator – in fact she insisted – that the 15 July 2019 mediation start with a group session against the desire of the Claimant and the suggestion of the mediator and without checking if the other members of staff were comfortable with this. She also interfered with the Claimant's right to decide who she would call as a witness at her dismissal hearing. She put pressure on Mr King to change his statement and put pressure on him to back off from giving any support. She set about influencing the appeals committee. This is not the behaviour of a reasonable employer.

261. The Claimant stood no chance of a fair hearing because the decision had been made before 05 August that she be dismissed. She was given short notice of the dismissal hearing. The appeal against her dismissal, the date for which was pre-arranged, was effectively decided in her absence one day after her dismissal. The hearing which she ultimately attended on 19 August was as much a charade as the dismissal hearing itself. Councillor Blissett was aggressive and uninterested. He was more concerned about his own reputation than fairness to the Claimant and he told her at the outset that the appeal committee could do nothing other than send the matter back to the staffing committee chaired by Councillor Moorhouse (if it was going to do anything at all, that is). The panel did not have the pack of papers before them.

262. Therefore, we have rejected the reason advanced by the Respondent and rejected not only its genuineness but – in the event that we might be wrong about that – the reasonableness of the decision to terminate the Claimant's employment on grounds of an irretrievable breakdown in relationships. We have considered what are often referred to as matters of 'substantive' and 'procedural' unfairness together in assessing whether the Respondent acted reasonably in treating the reason for dismissal as sufficient. The statute poses one question and our unanimous answer to that question is that the Respondent did not act reasonably in treating the reason for dismissal as a sufficient reason.

The real reason for the Claimant's dismissal

263. The Respondent's councillors (In particular Councillor Moorhouse and Blissett) lost respect and trust for the Claimant. This loss of respect arose out her relationship with Councillor Peat and the upset this caused, not only to

some employees but to some councillors and to some members of the local community who knew Mr and Mrs Peat. We infer from our findings that Councillor Moorhouse saw matters as Ms Farren saw them and as she described them in paragraph 9 of her witness statement: that Councillor Peat was being manipulated by the Claimant at a vulnerable point in his life. She also saw the Claimant as Ms Atkinson came to see her: namely, that the Claimant liked to command the attention of men and 'rule the roost'. Councillor Moorhouse not only heard gossip about the Claimant being a 'gold digger' but we infer from evidence generally and in particular her reference to 'high heels' that she saw the Claimant in a similar vein: that she used her femininity to manipulate a relationship.

264. The councillors were also influenced in their decision making by what they saw as her reneging on an agreement to leave the council with a severance agreement and that she had been responsible for the second mediation failing to reach any agreement.

265. We conclude that the principle reason for her dismissal was that Councillor Moorhouse and Councillor Blissett believed the Claimant to have been responsible for disrupting what had been a previously harmonious, friendly working environment by developing an intimate relationship with Councillor Peat and refusing to acknowledge that this damaged relations and upset the previous harmony in the council. She believed her to be manipulative. Councillor Blissett stood by the beliefs of Councillor Moorhouse and he also believed the Claimant to have tarnished his reputation by involving the police (even though Mr King had initiated this) and took this as a personal accusation by her that he had been the sender of an anonymous letter. Councillors Moorhouse and Blissett had lost trust and respect for the Claimant. Both councillors saw her as a difficult personality and someone who had taken up enough council time and money after she had reneged on an agreement to leave with a severance payment. They exerted their influence over other councillors in meetings leading up to the dismissal and appeal hearings and at those hearings. They also believed that the Claimant was responsible for the failure of the second mediation by walking out and making it all about her.

266. The above beliefs were based on their own moral standpoints and subjective views of the Claimant's character.

267. Applying the principles of **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA, it was those beliefs that caused the Claimant's dismissal and constituted the principal reason for her dismissal.

268. We have set out above what we find to be the actual reason for dismissal. In terms of the categorisation of that reason within section 98 ERA 1996, we conclude that it was, in fact, a reason related to the Claimant's perceived conduct under section 98(2)(b). However, the Respondent did not

advance 'conduct' as a potentially fair reason for dismissal. Indeed, during the lead up to her dismissal it expressly rejected the notion that her dismissal was a 'conduct' dismissal. Councillor Moorhouse stressed that it was not a 'disciplinary' hearing (see paragraph 164 above and **page 833**). However, the hearing of 05 August 2019 was a disciplinary hearing in substance. The Respondent was simply contriving to find a more convenient label and they had carried out nothing like a reasonable investigation into these matters. All the Respondent did was write to her to say that the Council was considering terminating her employment because of an irretrievable breakdown in relationships. It did not tell her that this was because she had a difficult personality or that it believed she was believed to have manipulated Councillor Peat at a vulnerable time for him. Even if the Respondent had advanced conduct as a potentially fair reason we would have concluded that the Respondent acted unreasonably in treating that as a sufficient reason for terminating the Claimant's employment for the reasons set out above in the context of 'SOSR'.

269. We turn now to the issues on disability.

Disability

270. The Respondent conceded that the Claimant was a disabled person at all material times and that Mr King had, at all material times, knowledge of her disability. Therefore, there is no requirement for us to consider the issue of substantial adverse effect or whether the effects were long term. We conclude that elected members were aware that the Claimant was a disabled person, certainly from 18 March 2019. Neither Councillor Moorhouse nor Councillor Blissett say anything in their witness statements about their knowledge (or lack of knowledge) of the Claimant's mental health or their knowledge as to whether she satisfied the definition of a disabled person. At no point did they say they did not know she was disabled or that they could not reasonably have been expected to know this.

271. We conclude that they were aware from 20 February 2019, when they met with Mr King, that the Claimant suffered from depression and anxiety. Of course, it does not follow from this that councillors must be taken to have known that she was a disabled person at that time or at any time thereafter. However, Mr King and Councillor Moorhouse were aware from the Claimant's correspondence that she suffered from depression and anxiety and that she was on medication. The councillors referred to her mental health at meetings and the effects of the ongoing suspension on her health.

272. Having regard to our findings above on the discussions which took place between councillors on the subject of the Claimant's mental health and given the silence in the witness statements of the Respondent's witnesses on the subject, we infer from those findings (and from that silence) that councillors, including Councillors Moorhouse and Blissett had at the very least, constructive

knowledge that the Claimant's depression amounted to a disability by 18 March 2019. Mr King accepts that he knew the Claimant to have been a disabled person as understood by the Equality Act 2010 and that is sufficient (given he was the most senior office in the council) to fix the Respondent with relevant knowledge. However, we conclude in any event that councillors ought reasonably have known by 18 March 2019 that the Claimant was a disabled person.

273. Mr King was made aware, as were councillors, that excluding the Claimant from work was having a detrimental effect on her health. For example, Mr King was made aware of the increase in her medication and that she had experienced a panic attack [**page 296**]. This panic attack occurred around the time he had written to her to say that there were no circumstances under which it would be reasonable for her to return to work until the investigation being undertaken by Mr Piercy had been completed [**page 285**]. Mr King made members aware of the damaging effect to the Claimant's health of the ongoing suspension. No-one challenged this and in fact, all recognised the potential that she might claim that the Council had failed to make reasonable adjustments.

Discrimination arising from disability

274. Moving to consider the specific complaints of disability discrimination and taking the section 15 Equality Act claim first. We had to consider whether the conduct identified at paragraph 54 of the Particulars of Claim [**page 20**] take place?

(a) The Claimant's suspension

275. Clearly the Claimant was suspended. This was, we conclude, unfavourable treatment. The Claimant contended that her suspension was because of 'something' (her outburst on 19 February 2019) arising in consequence of her disability (which meant that she struggled to control her emotions). This was a difficult issue for the Tribunal, but in the end we have rejected this argument because the Claimant has not satisfied us on the balance of probabilities that her conduct in berating Councillor Moorhouse and Mr King in the Dawson room and later saying to Mr King 'how can you do this to me you bastard' arose in consequence of her disability. We could see how that argument might be advanced and we looked carefully at the evidence that the Claimant presented: her own evidence, her impact statement and the medical documents contained in the bundle.

276. That the Claimant was suffering from depression and anxiety it does not follow that her actions were in consequence of that depression and anxiety – even applying the much looser connection as required by cases such as **Grossett**. A person who has no history of depression and anxiety may well have reacted precisely as the Claimant did on 19 February 2019 upon learning the subject matter of the meeting to which she had not been invited. That is not

to say that this is the answer to the question. It was simply the starting point in our analysis: was there anything in the conduct itself which could be said to arise in consequence of depression and anxiety?

277. There would have to be something more than the fact of depression and anxiety and the conduct to enable us to conclude that the latter arose in consequence of the former. Therefore, we looked to see what more there was in terms of evidence that demonstrated a connection. We had the evidence of the Claimant herself of course and we have set that out above in paragraphs 182-185. We have taken that evidence into account. However, the Claimant has not satisfied us to the standard required that her conduct was connected with her depression and anxiety. We would have benefited from some medical evidence in support of that but there was none. The GP letter was adduced for the purposes of these proceedings yet did not engage with the issue. Further, we have found that the reaction to the news of the meeting was not instantaneous. Her decision to speak to Councillor Moorhouse was considered. We are conscious, of course, that a reaction need not and will not be immediate – that a reaction could have been building over the minutes that had elapsed between being informed by Councillor Peat as to what had happened and going into the Dawson room to speak to Councillor Moorhouse and Mr King, resulting in the outburst and the comment to Mr King. We considered that, but again concluded that there was not enough evidence to establish a connection.

278. Mr Clark tried hard to link the Claimant's talked about 'mood swings' with what had happened and we considered his submission in relation to section 5.9 of the EHRC Code. However, all cases turn on their own facts and we did not have much evidence as to how these mood swings manifested themselves. If anything, in cross examination the Claimant's evidence tended to suggest that she became low and withdrawn, or tearful, rather than angry and combative, as she behaved on 19 February 2019. Moreover, her comment to Mr King was made outside the Dawson room when she was back at her desk. We conclude that the Claimant felt able to say what she said to Mr King because of the hitherto relaxed environment and because he had always supported her. She saw his action in arranging a meeting without her as an act of betrayal. This was not something which, on the evidence, we could see had arisen in consequence of disability. She never suggested any link when she emailed Mr King wondering if there might be repercussions. It was not in dispute that the Claimant carried the burden of establishing a sufficient connection between her disability and the thing that led to her suspension**.**

279. In the end we concluded from the evidence that the Claimant was angry and upset by what had happened on 19 February 2019 and it was this that explained her reaction. Her anger and upset was a consequence of learning the subject matter of the meeting. It may well have been, with some additional evidence perhaps from a medical or other independent source, that we might have concluded her conduct also to have been a consequence of her disability

but from our overall assessment of matters she had adduced insufficient evidence to satisfy us of that.

280. Therefore, we conclude that the suspension of the Claimant, albeit unfavourable treatment, was not because of something arising in consequence of her disability.

(b) The continuance of disciplinary proceedings relating to the first disciplinary allegations despite the resolution to accept Mr Piercy's recommendations

281. The Respondent did threaten to reopen this investigation and this was, in our judgement, unfavourable treatment. However, it was entirely unconnected with the Claimant's disability. It was wholly (albeit unreasonably) because of the view that was taken by the Respondent that Mr Piercy was biased in favour of the Claimant and that he had assisted her. The unreasonable perception of Mr Piercy favouring the Claimant ('the something') did not arise in consequence of the Claimant's disability.

(c) The Respondent's conduct of the second disciplinary proceedings including sanction

282. This was unhelpfully very widely framed. However, from our findings of fact we conclude that the second disciplinary proceedings were instigated and continued against the Claimant because councillors took the view that she had breached the spirit if not the letter of her suspension. The Claimant's actions in accessing her emails and entering council premises were not actions which arose in consequence of her disability. She accessed her emails as a response to the first allegations and because Mr Piercy asked her to give him any relevant evidence. She entered the premises because she was delivering a letter for Councillor Blissett.

283. Neither Mr King nor Councillor Moorhouse – nor anyone else we could identify – was motivated consciously or unconsciously by the Claimant's disability in pursuing the second disciplinary proceedings. This aspect of the complaint was also put in such vague terms that it was difficult to discern what particular treatment was said to have been because of something arising in consequence of the Claimant's disability.

(d) The Claimant's exclusion from the workplace following the conclusion of the second disciplinary proceedings

284. The disciplinary proceedings were at an end as of 29 May 2019. The Claimant was excluded thereafter because the Respondent wished to negotiate a favourable exit package for her to leave the employment of the council – she was only returned on 15 July 2019 because those negotiations got nowhere. Again, we were conscious that the issue is whether there was 'something'

arising in consequence of her disability because of which the Claimant was excluded – and that those issues of 'because of' and 'arising in consequence of' had to be approached in accordance with the principles established in cases such as **Grossett**, **Baldeh** and **Pnaiser**. Mr Clark submitted that the 'something' was the Claimant's struggle to control her emotions, her anxiety and her difficulty coping with change – manifesting itself in the emotional outburst of 19 February 2019. Mr Clarke referred to the references to the Claimant being a 'difficult personality'. We have addressed the issue of whether there as a connection between the outburst on 19 February 2019 and the Claimant's disability and rejected this.

285. We conclude that the 'something' relied upon by Mr Clark (the perception of the Claimant being a difficult personality) did not arise in consequence of the Claimant's disability. Her disability played no part in the motivations, conscious or unconscious of the Respondent in seeing her as a difficult personality The 'difficult personality' was a reference to the fact that the Claimant had (from the perspective of Councillors Moorhouse and Blissett and others) taken advantage of Councillor Peat and formed a relationship which they disapproved of, and her perceived refusal to recognise the damaging effect this would have on wider relationships and the bad atmosphere in the council. It was also a reference to her reneging on a severance agreement and that she was seen as responsible for the failure of the mediation on 15 July 2019. As unreasonable as her exclusion from work was, we do not conclude that it was because of something arising in consequence of the Claimant's disability.

(e) Re-opening the first investigation

286. It was agreed that this added nothing to (b) above – it was the same point.

(f) The requirement for the Claimant to attend mediation as a condition she be permitted to return to work

287. The Claimant was required to attend a mediation as a condition of returning to work. We agree that this was unfavourable treatment. However, this was not because of something arising in consequence of her disability. The Claimant herself had suggested mediation (albeit not as a condition). Mr Piercy had suggested mediation (albeit not as a condition of returning to work). We could readily understand why an employer would wish mediation to be carried out in circumstances where employees were acknowledging that there was significant damage to relationships which required re-building. It was not suggested that the requirement for mediation was unfavourable treatment or that it was because of something arising in consequence of disability – just the 'condition' element. We could see and accept that the attachment of a 'condition' might be seen by a reasonable employee to be unfavourable treatment. However, we could not understand why the attaching of the condition was said to be because of something arising in consequence of disability when

there was no suggestion that the requirement for mediation was something that arose in consequence of disability. We conclude that the condition was not influenced in any way by what Mr Clarke described as the Claimant's struggle in control her emotions or ability to cope with change. It was simply regarded as the best way to proceed prior to her return, rightly or wrongly.

(g) The halting of the Claimant's phased return to work

288. This had nothing to do with the Claimant's struggle to control her emotions or cope with change. It was entirely because of the decision made by the resources committee on 16 July 2019 that her employment be terminated. We conclude that the councillors were simply unwilling to spend more time on the Claimant's reintegration into the workplace. They had decided she was to be dismissed and that there was to be no point in continuing with a phased return to work. This was perfectly clear from Councillor Moorhouse's question 8 in her list of questions to Mr King (see paragraph 142 above). Continuing with the phased return to work would be inconsistent (and operate against) the decision which had been made on 16 July 2019. It was a contrived situation by Councillor Moorhouse. However, we are satisfied it was not because of something arising in consequence of the Claimant's disability – it was done to fit in with and not operate against the decision which had been made.

(h) The Respondent's conduct of the Claimant's dismissal including the appeal against dismissal

289. This too was, unhelpfully, very broadly put. However, as unreasonable as we have found the Respondent's procedure and decision to be, the way in which the councillors and Mr King conducted themselves was, on our analysis, unconnected with the Claimant's disability or any thing said to arise in consequence of that disability. The Claimant was presented with the 'unsolicited statement' late in the day because Mr King provided it late in the day. He provided it because of the improper pressure put on him by Councillor Moorhouse. The failure to investigate was because the decision had been made that the Claimant was to be dismissed for 'SOSR' which, the Respondent believed, did not require a procedure similar to that which would be necessary under its disciplinary procedures. Councillor Blissett was aggressive at the appeal hearing because he bore a grudge against the Claimant for, as he saw it, impugning his reputation by having a police officer 'interrogate' him and implying that he had sent the anonymous letter. The appeals panel did not engage with the Claimant's appeal because all concerned had already decided that the Claimant's employment was ended and the only thing it would have contemplated doing was to refer the matter back to the staffing subcommittee. None of this was because of something arising in consequence of the Claimant's disability.

The dismissal as an act of unfavourable treatment because of something arising in consequence of disability

290. Although not expressly set out in the list of issues, it was clear from the pleaded case and agreed that the Claimant contended her dismissal to be because of something arising in consequence of disability – the 'something' being that set out above.

291. The real reason for dismissal was as set out in paragraphs 263-266 above. It remained for us to consider under this aspect of the claim whether the decision was materially influenced by something arising in consequence of the Claimant's disability. It does not follow that because we have found the principal reason to be those things we have identified above that the decision was not also materially influenced by something arising in consequence of the Claimant's disability. We had to consider whether there was 'something' which arose in consequence of the disability' and which had a material effect on that decision to dismiss.

292. Mr Clark relied on the reference to the Claimant's 'difficult personality' and he referred us to **page 846** of the bundle (Councillor Moorhouse's briefing to the appeals committee of 07 August 2019). We would add that Councillor Moorhouse also used the phrase on 03 August 2019 in her email to Mr King [**page 826**]. However, as set out above, the references to 'difficult personality' were made at a time when she was perceived to have 'reneged' on an offer to leave the council with a settlement and was being difficult. It was also made in the context of the Claimant having formed what was considered to be an inappropriate relationship with Councillor Peat. We do not agree that this phrase was used as a reference for or to describe her difficulty in controlling her emotions.

293. Therefore, our conclusion is that the dismissal of the Claimant, whilst unfair and amounting to unfavourable treatment was not because of something arising in consequence of her disability.

Failure to make reasonable adjustments

294. It was argued that the Respondent's disciplinary proceedings amounted to a 'PCP'. This was extremely widely put and we were unclear what aspect of the procedures were said to have put the Claimant at a substantial disadvantage compared to a non-disabled person. We were directed to paragraph 3.1(ii)(a)-(i) of the Claimant's Further and Better Particulars [**pages 59-60**]. In his written and oral submissions Mr Clarke simply submitted that the procedures are capable of amounting to a PCP and said no more on the subject.

295. It is imperative that the PCP is correctly and precisely identified because of the necessity to consider not only whether the Claimant was put to a substantial disadvantage but also whether an employer knew (or could

reasonably have known) that the PCP was likely to place the employee at that substantial disadvantage.

296. There was one PCP which we have concluded was applied to the Claimant and which put her at a substantial disadvantage compared to those without her disability. That was the practice of suspending employees who were the subject of an allegation of gross misconduct. Mr King said in evidence that as there was an allegation of gross misconduct, suspension was mandated. We conclude that the practice of suspension was one which the Respondent applied to the Claimant and would have applied to others who were not disabled and who were also facing allegations of gross misconduct. This practice put the Claimant at a substantial disadvantage in comparison with persons without depression and anxiety, in that exclusion from the workplace on suspension was more likely to lead to a deterioration in her mental health and well-being than to a person without her disability. Work was, for the purposes of her mental health, her coping mechanism. Her health did deteriorate during suspension, resulting in at least one panic attack and a need for increased medication. This was never disputed by the Respondent.

297. There remains the issue as to whether the Respondent knew or could reasonably have known that she was likely to be put at that disadvantage by the practice of suspension.

298. On **page 958** the Claimant's doctor comments on her mood and mental condition deteriorating since her suspension from work. This report is after the dismissal. However, in our findings of fact, we have set out how the Respondent, through Mr King and also the Councillors through his updates, was aware that the Claimant's mental health was deteriorating and that it was her exclusion from work that was causing it to deteriorate. She had raised this a number of times in February, March, April and May. 2019. The Respondent only had the Claimant's word on this issue but it never challenged it. Moreover, it could and ought reasonably have obtained some medical input in light of what she had reported.

299. Had the Respondent made reasonable enquiries of the Claimant and medical professionals it would have understood how her disability impacted on her day to day life (as set out in her impact statement) and would have learned of those things as subsequently set out in the GP letter at page 958. However, the Respondent took no steps during this period (or at all) to obtain any medical or occupational health advice. The Respondent is to be judged not only on what it knew but on what should have been known to it had it made reasonable inquiries.

300. On 03 June 2019 Councillors were made aware by Mr King of the potential that the Claimant might claim that the council failed to make reasonable adjustments by virtue of the ongoing suspension. However, it ought reasonably to have been clear to all concerned by 18 March 2019 not only that

she was disabled but that the Claimant was likely to be placed at the substantial disadvantage (the damage to her health) by continuing the suspension. The Respondent could reasonably and in our judgement made those inquiries in March 2019. Mr King had been made aware of the increased medication and panic attack by that date [**page 296**] and, had he acted reasonably, would have been in a position to update the councillors at the meeting on 18 March 2019 not only with the Claimant's account but also with some medical opinion on the subject. Mr Piercy emphasised the Equality Act and the need to act without delay on 18 March 2019.

301. The Respondent, therefore, knew or ought reasonably to have known of the Claimant's disability and that the practice of suspension was likely to put her at a substantial disadvantage in comparison with non-disabled persons – that disadvantage being the detrimental impact of suspension on her mental health and wellbeing. Accordingly, it was under a duty to take such steps as it was reasonable to have to take to avoid putting her to the disadvantage from the point at which it could reasonably have known the Claimant was likely to be put at that substantial disadvantage, which we conclude was from 18 March 2019.

302. The obvious adjustment in this case – and the one the Claimant had sought from the very beginning, and of which the Respondent was fully aware, was to remove her suspension and return her to work.

303. We conclude that it was reasonable for the Respondent to take the step of reviewing the suspension and return her to the workplace at various stages, along the way namely: 18 March 2019 (the end of investigation 1); 15 April 2019 (review of suspension); 30 May 2019 (end of investigation 2); 13 June 2019 (Mr King's suspension). Returning her to work would have had a real prospect of alleviating her stress and anxiety and the damage being done to her mental health. We have considered the Respondent's argument that it could not reasonably have lifted the suspension and returned the Claimant to the workplace from 18 March 2019 because Mr King was away on leave and no mediation had taken place. However, we reject this. The situation was far from perfect but the Claimant was Deputy Clerk and had worked as such – even if at times in a frosty atmosphere – in Mr King's absence prior to February 2019. There was, at that stage, no suggestion that relationships were so strained that they were at breaking point or beyond. It was sensible for there to be mediation but that was not a reason to continue to exclude her from the workplace. The situation was that the Claimant was not to face disciplinary action. She was the deputy clerk. It was reasonable to return her to work at that point and the Respondent failed to do so.

304. We have found no other aspect of the disciplinary processes that placed the Claimant at a substantial disadvantage comparted to non-disabled persons. The Tribunal, through Mr Moules, explored paragraph 3(ii)(a) on **page 59** of the

bundle with the Claimant during her evidence. The Tribunal was keen to understand what particular features of the disciplinary process (other than the suspension) was said to have placed her at a substantial disadvantage compared to non-disabled persons. Mr Clark did not identify anything in particular, other than the late handing up of the supposedly 'unsolicited' statement from Mr King at the dismissal hearing. While we have no doubt that this was unfair, nevertheless it did not place the Claimant at a substantial disadvantage in comparison with non-disabled persons, who would similarly be disadvantaged by the unfairness and she and her colleague who supported her at the appeal confirmed that she was able to engage and make her points at the dismissal hearing and the appeal hearing even though, as she rightly maintained, the outcome had already been pre-determined.

Time point

305. The ET1 was presented on 19 November 2019. Ms Rumble contended that, allowing for ACAS conciliation, any act before 19 July 2019 is out of time and should not be extended. Mr Clark submitted that all the disability discrimination complaints were in time but, if not, time should be extended allowing for the Claimant's deteriorating mental health.

306. It would be very easy to get side-tracked on questions such as whether there was an 'act' of suspending/excluding the Claimant from the workplace as opposed to whether there was a 'failure' to return her to the workplace and whether this makes any difference to the application of the statutory provision on time-limits. In reality, they amount to the same thing. The Claimant's deliberate exclusion from the workplace was a continuing act in the sense that (save for a short period in July 2019) it extended over a period of time right up to the point of her dismissal. By suspending her, and subjecting her to two disciplinary investigations, the Respondent started a state of affairs which continued right up to her dismissal.

307. However, the position on reasonable adjustments is complicated in that, in accordance with the Court of Appeal decision in **Hull City Council v Matuszowicz**, [2009] I.C.R. 1170 a failure to make a reasonable adjustment is an omission. In cases of omission the position is to be considered in light of section 123(4) EqA. A failure to do something is to be treated as occurring on when the person in question decided upon it. On that basis, the Council made a decision on the 'failure' to return the Claimant to the workplace on 18 March 2019. However, having had further opportunities to restore the Claimant to the workplace, it repeated that decision again on 15 April 2019 and again on 02 May and on 30 May 2019. The Respondent then returned the Claimant to work on 16 July 2017 but she was then excluded again on 31 July 2019. It could, on this analysis, be argued that time ran from any of the dates of 18 March, 30 May 2019 or 31 July 2019. On Ms Rumble's case either of the first two would nevertheless render the claim out of time. If time ran from 31 July 2019 (when the Claimant was again excluded from work) then the complaint would be in

time. In our judgement, time runs from 31 July 2019. There had been a series of repeated 'decisions'. Although, on 31 July 2019 there was an act of excluding the Claimant, as opposed to a 'failure' to return her to the workplace, it amounts to the same thing in substance. In our judgement, the complaint was brought in time.

308. If we are wrong about the complaint being in time and that time should run from the earliest of those dates, namely 18 March 2019), we are satisfied that it is just and equitable to extend time to 19 November 2019 in respect of the complaint of failure to make a reasonable adjustment. The Respondent was not put to and did not suggest any prejudice in having to address the complaint – indeed it contemplated possibility during the period of the Claimant's employment that it was discriminating against the Claimant in this respect and the prospect that events may end up in an employment tribunal. The Claimant, on the other hand, would be prejudiced in that she would be unable to pursue a substantial and meritorious complaint. The Claimant was suffering from depression and anxiety during this period and her health was in deteriorating as a result of being excluded from the workplace. During this period she was genuinely trying to save her employment and it is understandable that she had not taken any legal action until the point that she did. In the circumstances, the balance of prejudice favours the Claimant and we conclude that it is just and equitable to extend time. In doing so, we have had regard to the principles in **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650 and **Selkent Bus Co Ltd v Moore** [1996] ICR 836.

309. Therefore, we uphold the complaint of disability discrimination for failure to make a reasonable adjustment in that one respect: the failure to lift the suspension/exclusion of the Claimant and return her to the workplace.

Harassment

310. The issue here was whether the conduct identified at paragraph 60 of the Particulars of Claim took place and if so whether it amounted to harassment within the meaning of section 26 Equality Act 2010.

(a) Overstating the first and second disciplinary allegations as gross misconduct

311. Looking at matters objectively, the Claimant's conduct on 19 February 2019 was 'capable' of being considered gross misconduct. The allegation of harassment is in the 'overstating' of the conduct on that occasion. We conclude that the berating of Mr King and Councillor Moorhouse and the offensive comment made by the Claimant was not overstated (although we do consider the allegation of the improper use of confidential information to have been overstated). Even if it had been, the conduct of suspending the Claimant (unwanted as it was) was not related to disability. There is no connection between the Respondent's conduct and the protected characteristic. We accept that the words 'related to' have a broad meaning. The purpose of suspending

the Claimant was not for any of those set out in section 26(1)(b) Equality Act 2010. Mr Clark's submission was that it had the proscribed 'effect'. Other than to clarify that, Mr Clark submitted there was little to add to his written submissions. We accept that suspension had the effect of creating a humiliating environment for the Claimant in its broadest sense. However, the conduct of suspending her was not related to disability.

312. We do regard the second disciplinary allegations to have been overstated as gross misconduct. However, again we are unable to conclude from the evidence that this overstating was 'related to' disability. There was no attempt by Mr Clark in his submissions to articulate in what way it was said to be so related.

(b) Suspending the Claimant without consideration, failing to support her during her suspension and not keeping the suspension under review

313. It was not explained what was meant by suspending without consideration but we take it to be a reference to the failure to consider alternatives to suspension. We have concluded that the first matter for which the Claimant was suspended was objectively capable of amounting to gross misconduct. It does not follow, of course, that suspension should be automatic even in such cases. A reasonable employer will consider alternatives to suspension. We have also found that Mr King did not suspend the Claimant until after Councillor Moorhouse got involved and influenced him in that direction. However, the conduct in suspending the Claimant was not related to disability. Nor did the failure to support her during the suspension or keep it under review. Mr Clark did not articulate how the failure was said to relate to disability The failure to lift the suspension was discriminatory in the sense that it was a failure to make a reasonable adjustment but the conduct complained of was not related to disability in the wide sense in which we must consider it. That these things take place in the context of the Claimant being disabled does not equate to the conduct 'relating to' disability, which was in essence what Mr Clark's submission came down to.

(c) Excluding the Claimant from the workplace following the conclusion of her suspension

314. For the same reasons as above, we conclude that the continued exclusion of the Claimant from the workplace (being a failure to make a reasonable adjustment) was not related to the Claimant's disability.

(d) Failing to address the Claimant's concerns about bullying and the impartiality of councillors

315. We heard nothing about the failure to address bullying and no submissions were made about this. In any event, the matters complained of here does not amount to conduct which related to disability. Councillors

Moorhouse and Blissett were not impartial but this was wholly unconnected with the Claimant's disability and had everything to do with their view of her relationship with Councillor Peat and the Claimant's character, from Councillor Blissett's perspective the perceived impugning of his character.

(e) Failing to keep the disciplinary proceedings confidential;

316. We received no submissions on this and in any event we fail to see how this related to disability.

(f) Taking unnecessary disciplinary action and issuing the Claimant with an unreasonable disciplinary sanction

317. This relates to the second disciplinary matter. Again, it was not explained how this related to disability. Mr Clark in his written submissions simply referred back to the 19 February 2019. However, the second disciplinary allegations related to the Claimant accessing emails and entering the premises. The fact that these things would not have happened had she not been suspended in relation to 19 February 2019 was not enough to conclude that the disciplinary action related to disability. We have concluded in any event that the first disciplinary sanction and investigation did not relate to disability.

(g) **Requiring the Claimant to attend mediation as a condition of her being permitted to return to wor**k.

318. There is no evidence that could lead us to conclude that this was conduct related to disability. As with all of these pleaded items, it is not for the Tribunal to assume or guess what the connection might be. There must be some evidential basis for establishing the admittedly broad connection between the unwanted conduct and the protected characteristic. In the absence of any submissions directing us to that connection and in circumstances where the Tribunal has not readily been able to identify any connection, we conclude that the complaint of harassment must fail.

Remedy issues

319. We turn now to address two issues on remedy, namely: 'Polkey' and 'contributory conduct'. We have directed ourselves in accordance with the principles laid down in **Software 2000** and noted that the Respondent led no particular evidence in support of the argument that the Claimant would have been dismissed fairly had it followed fair procedures and acted reasonably.

Polkey

320. Ms Rumble referred to paragraphs 65-67 of her submissions. We had to fall back on the evidence as a whole. We have found that the Claimant was excluded from the workplace for an unreasonably long period and conclude that

mediation should have happened earlier. We have found that the first mediation was simply an exercise in trying to get the Claimant to accept a severance package and that it was unreasonable for Councillor Moorhouse to interfere with the second mediation. We have found that Mr King reported positively on the Claimant's return to work in the questions and answers document but that Councillor Moorhouse then expressed her disappointment that it did not appear to fit with the council's objectives. We have found that it was reported to the mediator and the NEREO investigator that Ms Atkinson and Ms Farren were willing to re-build relationships. We have found that the mediator, Ms Jeromson, expressed a willingness to assist in that exercise

321. We have found that the Claimant genuinely wanted to continue in her employment. We have also found that Mr King never expressed that relationships were irretrievably broken. We have found that at the heart of this whole story lay a moral disapproval of the Claimant's relationship with Councillor Peat. Councillor Moorhouse that staff said they would leave if the Claimant returned.

322. We have asked what would have happened or what was likely to have happened had the Respondent not acted in this way and had acted fairly and reasonably: by reinstating her to the workplace at the earliest opportunity; by arranging for mediation earlier; by allowing the mediator the freedom to conduct it as she saw fit and proper and offering support to all staff in a transparent way; by not seeking to persuade the claimant to leave with a severance and by not perceiving the Claimant in a negative light by virtue of her relationship with Councillor Peat and by not taking regarding her personal relationship with disapproval. Had the Respondent acted reasonably we conclude that the prospects of the Claimant remaining in employment were very high indeed. There was sufficient reliable evidence that the employees in the office were willing to work with the Claimant. The evidence of the 'unsolicited' statement was, we have found unreliable. If managed reasonably, we conclude that the Claimant would have come to recognise the particular sensitivities of her colleagues who, in a controlled and supported environment would have been able to open up in a non-accusatory way. This is, at the end of the day, an exercise in judgement - recognising that the Polkey exercise is speculative in nature.

323. What makes this exercise particularly difficult is the extent to which we have found the Respondent to have acted unreasonably. We have to consider whether there is evidence from which we could conclude that <u>this</u> employer might have fairly dismissed the Claimant had it acted reasonably. Our conclusion is that there is no evidence, at least there is no reasonable evidential basis, that leads us to conclude that it would be just and equitable to reduce the compensatory award by any proportion or percentage on the grounds that this employer might fairly have dismissed the Claimant.

324. We reach this conclusion even though we have found that relationships were strained or damaged and that the Claimant herself recognised this and that it was necessary to rebuild relationships. We have also found that the Claimant was to an extent insensitive to the sensitivities of those around her in terms of how they felt about her relationship with Councillor Peat, although we have rejected the evidence given by Councillor Moorhouse that staff were prepared to leave the council if she remained. However, we infer from the positive comments passed to the mediator and to the NEREO investigator and from Mr King's initial questions and answers document that with reasonable effort and support, with sensitive and frank discussions in a managed and supportive environment – things which a reasonable employer would provide – we conclude that the Claimant would have been able to return to work and do so effectively as she had done up to February 2019.

325. In our judgement this is one of those cases where it would not be appropriate to make any 'Polkey' reduction.

Contributory conduct

326. The Respondent submitted that there should be a reduction in the basic and compensatory awards of up to 100%. This was put on the basis that the Claimant, by her conduct, had demonstrated a continued failure to engage in a positive working relationship with the Respondent and its other employees. We reject this. We have found that the Claimant genuinely wished to retain her employment. She did not refuse or fail to engage in positive working relationship any more than Ms Atkinson, Ms Farren or Mr King refused to engage in a positive working relationship. We have found that it was a difficult scenario but one in which all those in the office were willing and prepared to engage as was reported by NEREO and as was evidenced in Mr King's questions and answers document. It was the elected members who decided that there had been an irretrievable breakdown of relationships. That the Claimant left the group mediation session on 15 July 2019 was not culpable or blameworthy conduct. It was a symptom of a difficult situation, and in any event the Claimant returned to the room. The Claimant had always wanted to engage in mediation at a much earlier stage and was not refusing to mediate on 30 May or 15 July 2019. She was willing to rebuild relationships. It would not be just and equitable in our judgement to reduce the basic or compensatory award of compensation where a mediation did not result in a particular outcome. We have not found there to be any culpable or blameworthy conduct in the widest sense contemplated by the Court of Appeal in the case of **Nelson**. We make no reduction in either the basic or the compensatory award.

Remedy

327. In light of our conclusions a remedy hearing will be necessary, at which the Tribunal will consider the Claimant's claim for financial losses and in light of the finding of unlawful disability discrimination in respect of the failure to make

reasonable adjustments, for an award of injury to feelings. One particular aspect of the remedy hearing on which the parties will be invited to make submissions is on the applicability of the ACAS Code to the Claimant's dismissal.

Employment Judge Sweeney

Dated 4 January 2021

APPENDIX

LIST OF ISSUES

Unfair Dismissal

1. Was the sole or principal reason for the Claimant's dismissal some other substantial reason, namely an irretrievable breakdown of working relations between the Claimant and her co-workers and members of the Council which led to a loss of trust and confidence in her ability to carry out her role of Deputy Clerk?
2. Alternatively, was the sole or principal reason for the Claimant's dismissal conduct, namely her continued failure to engage in a positive working relationship with the Respondent and its other employees?
3. Did the Respondent act reasonably in treating the reason as a sufficient reason to dismiss the Claimant in the circumstances?
4. Did the Respondent follow a fair and reasonable procedure in dismissing the Claimant?
    a. Did the Respondent have a genuine belief in the reason?
    b. Was that belief formed on reasonable grounds?
    c. Did the Respondent carry out a reasonable investigation?

Disability discrimination

Disability

1. Did the Respondent know or could the Respondent reasonably be expected to have known that the Claimant was a disabled person with the meaning of section 6 of the Equality Act 2010 at the material times?

Discrimination arising from disability

1. Did the conduct identified at paragraph 54 of the Particulars of Claim (page 20) take place?
2. Does this amount to unfavourable treatment?
3. Was the unfavourable treatment because of the Claimant's struggle to control her emotions, her social anxiety and her difficulty coping with change which arises in consequence of her disability causing her from time to time to feel stressed and anxious and suffer from a low mood?
4. Was the treatment a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

1. Did the Respondent's disciplinary proceedings amount to a provision, criterion or practice (PCP)?
2. Was the Claimant placed at a disadvantage in comparison with persons who do not share her disability as a result of the PCP?
    a. Did the conduct identified in 3.1(ii)(a)-(i) in the Claimant' Further Information (pages 59-60) place the Claimant at a disadvantage in comparison with persons who do not share her disability?

3. Was the disadvantage substantial?
4. Did the Respondent take reasonable steps to the disadvantage?
    a. Would the adjustments identified in 3.1(iii)(a)-(i) in the Claimant' Further Information (pages 60-61) have been reasonable?
    b. Would these adjustments have had the effects identified in 3.1(iv)(a)-(f) in the Claimant' Further Information (page 61)?

Harassment

1. Did the conduct identified at paragraph 60 of the Particulars of Claim take place?
2. Does this amount to unwanted conduct?
3. Did the unwanted conduct relate to the Claimant's disability?
4. Did the unwanted conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
    a. What was the Claimant's perception of the conduct?
    b. What were the relevant circumstances?
    c. Was it reasonable for the conduct to have this effect?

<u>Limitation</u>

1. Are the discriminatory acts relied on by the Claimant in time?
2. If any of the alleged discriminatory acts are not in time, do they constitute conduct extending over a period within the meaning of section 123(3)(a) of the Equality Act 2010?
3. If not, is it just and equitable for the Tribunal to extend time in accordance with section 123 of the Equality Act 2010?

<u>Remedy</u>

1. In the event that the claim succeeds in part or in full:
    a. At what level should the Claimant be awarded damages for injury to feelings in relation to any successful discrimination claims?
    b. Are the losses sustained by the Claimant as a result of the dismissal in so far as they are attributable to the action taken by the Respondent just and equitable in all the circumstances and has the Claimant taken reasonable steps to mitigate her losses?
    c. Should there be an uplift in compensation because the Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?