



EMPLOYMENT TRIBUNALS

Claimant: Ms M Bryans
Respondent: North Hykeham Town Council
Heard at: Nottingham - hybrid
On: 16, 17, & 18 August 2021
Before: Employment Judge Victoria Butler
Ms J Bonser
Ms F Betts

Appearances:

Claimant: In person
Respondent: Mr G Hine, solicitor

Covid-19 statement:

This was a hybrid hearing – the Employment Judge and Ms Bonser attended in person at the Tribunal and Ms Betts and the parties attended remotely by Cloud Video Platform. The parties did not object to the case being heard on this basis. It was not practicable to hold a fully face-to-face hearing because of the Covid-19 pandemic

JUDGMENT

The unanimous decision of the Employment Tribunal was that:

1. The Claimant's claim that she was unfairly dismissed fails and is dismissed.
2. The Claimant's claim that the Respondent failed to make reasonable adjustments fails and is dismissed.
3. The Claimant's claim that she was treated unfavourably in consequence of something arising from her disability fails and is dismissed.

JUDGMENT having been sent to the parties on 19 August 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The Claimant presented her first claim of disability discrimination to the Tribunal on 24 August 2019. She presented a second claim of unfair dismissal on 20 May 2020 and the cases were consolidated at a closed telephone preliminary hearing on 31 July 2020. She was employed by the Respondent as an Assistant Town Clerk from 5 August 2013 until her dismissal after a period of sickness absence on 27 February 2020.
2. The Respondent accepts that the Claimant was a disabled person for the purposes of the Equality Act 2010 (“EQA”) by reason of anxiety and depression at the material time.
3. She claims:
 - Unfair dismissal;
 - Discrimination arising from disability; and
 - Failure to make reasonable adjustments.

The issues

4. The issues we were required to decide were:
 - Unfair dismissal*
 - 4.1 What was the reason or principal reason for dismissal? The Respondent says the reason was capability (long term absence).
 - 4.2 If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, in particular, whether:
 - 4.2.1 The Respondent genuinely believed the Claimant was no longer capable of performing her duties;
 - 4.2.2 The Respondent adequately consulted with her;
 - 4.2.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
 - 4.2.4 Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant; and
 - 4.2.5 Dismissal was within the range of reasonable responses

Discrimination arising from disability (Equality Act 2010 section 15)

- 4.3 Did the Claimant suffer unfavourable treatment as a result of something arising from her disability, the unfavourable treatment being the lack of opportunity to attend for interview for the post of deputy Clerk, it not having been postponed by the Respondent and being offered to Ms Brown?
- 4.4 The something arising from the disability was the time that the Claimant needed to recover from the exacerbation of her disabilities to enable her to fully participate in the interview process.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

- 4.5 Did the Respondent impose a provision, criterion or practice that put the Claimant as a disabled person at a substantial disadvantage in relation to a matter in comparison with persons who were not so disabled - namely that all applicants for the post of Deputy Clerk should attend a personal interview?
- 4.6 Did the Respondent fail to carry out a reasonable adjustment by not postponing the Claimant's interview to enable her to recover from the exacerbations to her disability that she raised a complaint about?

The hearing

- 5. The hearing was listed for 17, 18, 19 & 20 August 2021 but the final day was not required. We used the first day to read the papers and heard evidence over the following two days. We listened to submissions from both parties on 19 August 2021 and gave an extempore judgment that day.
- 6. Prior to the hearing we were presented with an extensive bundle of documents and witness statements.

The evidence

- 7. We heard evidence from the Claimant and from Sandra Green, Consultant Town Clerk, for the Respondent. We found both witnesses to be honest, albeit they had very differing perspectives on matters that arose at the material time.

The Claimant's evidence

- 8. However, we found the Claimant's evidence to be less reliable than the Respondent's given that she held the belief that many key documents were fabricated or made after the event without foundation. The reality was that they simply did not suit her case.
- 9. She also asserted that everyone at the Respondent lied and the only person whose honesty was not in question was hers. We do not doubt that the Claimant genuinely holds this belief but, at times, she contradicted herself and her evidence was in direct contrast to contemporaneous documents.

The Respondent's evidence

10. The Respondent failed to call both the dismissing and appeal officers which we found surprising to say the least. Mr Hine for the Respondent explained that it was his decision not to call them having held the mistaken belief that Ms Green was involved in the decision to dismiss the Claimant. He asked us to attach weight to the documents in the bundle and we deal with this in our conclusions below.
11. Where there was a conflict in the evidence, we preferred the evidence of Ms Green which was supported by contemporaneous documents where they exist.

The facts

12. The Claimant commenced employment with the Respondent on 5 August 2013 as an Assistant Town Clerk. In early 2019, the incumbent Town Clerk was Ms Elaine Preece and the Deputy Clerk was Ms Sandra Green.
13. In or around November 2018, the Respondent appointed a second Assistant Clerk, Ms Becky Brown, who worked alongside the Claimant, Ms Preece and Ms Green in the same office. They comprised a small team working in close proximity.
14. From the outset, the Claimant had a difficult working relationship with Ms Brown. She found Ms Brown's behaviour inappropriate and felt that she invaded her personal space (more below). In consequence, the Claimant began to withdraw and showed little interest in any conversations of a personal nature with her team, thereby resulting in an uncomfortable atmosphere in the office.
15. Given that the Claimant worked within a very small team, her demeanour in the office had an impact on her colleagues and the prevailing mood. In consequence, Ms Preece raised the matter at a Personnel Sub Committee meeting in which it was recorded that:

"The last topic that the Clerk wished to raise at the meeting was the increasing animosity growing from an Assistant Clerk towards her. The extent of the animosity was not personally felt by the Clerk on a daily basis however it had come to light that she had approached at least three councillors (1 frequently) to share her resentment within the office over decisions made by the Clerk with possibly further defamatory statements. It has been obvious in the office for some time that she is not happy at her work and that she resents decisions made by the Clerk. Whilst work requests have not been declined by the Assistant Clerk she has deflected them towards other members of staff who have accommodated her unbeknown to the Clerk until later. She is unsupportive to the new Assistant Clerk and uncooperative when it comes to supporting her training and indeed refuses to engage with any further training herself. The atmosphere in the office is dictated by the Assistant Clerk whose mood swings are unbearable at times. Lack of interest and at times lack of approachability is having a knock-on effect on the rest of the office staff and others that the Assistant Clerk chooses to confide in" (pages 175-176).

16. In February 2019, two of the Respondent's Councillors, Little and Rogers met with members of staff to discuss the obvious tensions. Councillor Little made notes of the meetings and recorded:

"Basically the interviews revealed no issues or complaints whatsoever but for one clear exception regarding a source of stress within the office. Both employees were unambiguous and forthright in their answers.

They both separately explained that the office is, although it could and should be, not a pleasant and affable work environment. This has been the case for a number of months, due specifically they said to the usual moody demeanour, immature attitude, lack of team spirit and often rebellious behaviour of a third assistant Clerk within the team, Michelle Bryans.

Asked what might be the probable result of a continuation of this circumstance, both employees said that there could ultimately be resignations such was the disruptive and negative atmosphere engendered by Michelle. Both of the employees appeared saddened to have to reveal this problem, especially the deputy Clerk who had previously had a good relationship within the office with Michelle. However, now Michelle's behaviour was unpredictable this is no longer the case" (page 177)

17. Mr Little met with the Claimant on 6 February 2019 and noted after the meeting that:

"the impression gained by Councillor Little was that Michelle was unhappy about Becky undertaking a role in the office, with duties that Michelle believed she could undertake. Michelle seemed to be upset and agitated about Becky's role in the office being similar or of greater value than her own" (page 178).

18. On 26 February 2019, the Claimant e-mailed the personnel sub-committee with a number of complaints, more particularly about Ms Brown. It was these complaints which formed the basis of the Claimant's continuing dissatisfaction with her employment at the Respondent:

"When I was asked to attend a meeting with two members of the Personnel Sub Committee to discuss 'some areas of concern within the office' I was quite surprised that I hadn't initially been approached by my boss to try and air such concerns. Due to some discussions I'd already had with Sandra I was aware of what it was referring to.

.....I consider myself to be of a warm, funny, friendly, caring and compassionate nature and I welcome new people with open arms and I did this with Becky in November. It was within only a matter of days of Becky working here that she approached my desk whilst I was sitting at it, opened my drawer and took something out of it and walked back to her own desk without saying a word. I was very taken aback by this behaviour and when I looked over I saw it was a hole-punch, no big deal, however I was a bit annoyed by the intrusion. I do become slightly guarded with people who show an immediate lack of respect and consider intruding on a person's space as acceptable, but I know I'm not alone with this trait. I felt that she wouldn't do this to any other staff member and that made me feel slightly belittled and confused. However, not being a fan

of that kind of confrontation I decided to give her the benefit of the doubt and let it go although a couple of days later when Sandra asked me what I thought of Becky, I did say she's very nice but I told her about the drawer incident and that I thought it was quite rude and it would have been polite to just ask me, to which she agreed. Over the days and weeks following this I started to feel quite stifled by many things, including being constantly talked over, deprived of the ability to answer questions asked of me by myself and the ability to advise members of the public.....

A day or 2 after the incident with the drawer Elaine called out "Sandra do you have a long ruler I can borrow" to which Sandra replied "yes it's here in my drawer (got it out and held it up).... Seconds later she added "actually if you ever need anything out of my drawer just take it, I'm not precious". I was reeled by this comment and I immediately went on the defensive (unsurprisingly) and took it as a personal 'dig' which left me feeling extremely upset in that I had confided in her and she had used it in this way. I did at a later point make her aware of this and she assured me she hadn't meant it personally but she understood completely how I could have taken it that way for which she apologised and again I let it go.

..... there are two things I value and protect vehemently; My independence and my personal space. I feel that both of these have been compromised over the last 3 months and I have simply felt unable to express my feelings within the office because given the comment from Sandra when I had put my trust in her and as Becky had previously worked at the nursery which Elaine's two children had attended and an old work colleague of mine had also been selected for interview and Becky was chosen for the position, I believed, rightly or wrongly, that I would most likely be misconstrued as overreacting or making a fuss and so decided to keep my head down and do the job I'm paid for and I became disinterested in what was going on or being discussed on a personal level with the people around me. I felt detached and unable to have my feelings 'heard and understood' which in itself is suffocating. Over a period of time I also felt a lull in the workload and I was worried that I was going to lose some of the work I love and have done well for 6 years and be left 'twiddling my fingers'.

.....One day during the week up to my leave, Becky asked me if I had the name of a particular supplier and I replied, she thanked me and I continued working. The next thing I knew she came up to the inside of my desk and with her hand on my mouse said "which is your email icon" to which I replied "pardon, why?" and she said "I want to see if you've got an email from said supplier" Once again I was speechless. I pointed out my email icon (I have no idea why, not wanting to be confrontational no doubt) and she opened my e-mail and started typing on my keyboard whilst I sat staring in utter disbelief... then I asked, quite simply and with no malice "I'm sorry but what exactly are you looking for?" and she said "I'm seeing if you've got an email address for Showcase Signs"..... is it not normal practice to ask a person for this information rather than once again intrusively and unwelcomingly invade their personal space??? On the back of this I was starting to feel quite aggrieved by

these things that were happening and finding it harder to shake it I quite possibly became somewhat standoffish on a personal level.....

Throughout the 6 years of working here and indeed during my whole career I have held an exemplary record and have never found myself in this type of situation. Whilst I accept I have dealt with some of my own worries and concerns incorrectly (or not at all) and I completely agree that there has been a certain atmosphere in the office, but with all of the above now said I don't believe that I should be deemed solely responsible for a bad situation that I have also been affected by" (pages 182-184).

19. In response to the Claimant's e-mail, Ms Preece met her a few days later on 4 March 2019. She made notes and observed that there were two issues needing further exploration at the time, namely inappropriate conversations outside the office and the atmosphere in the office leading to low morale.

20. Ms Preece's notes recorded:

"As for the low morale in the office she is aware and does realise that she is the driving force behind it. She said that at the time of the appointment of Becky and after the incidents that she directly referred to Becky in her letter addressed to the Personnel Sub Committee, she decided what's the point and chose her mood. I explained that we are a small team and that her mood has a direct impact on everyone else and it was when she was in a mood it put everyone on edgeShe is a naturally defensive person and whilst she felt that she has only been replying to direct situations she came across as defensive, aggressive at times, unapproachable and dismissive. This was affecting the team but also her performance as she didn't take on natural responsibilities for anything that she came across and she didn't go any way to supporting other activities in the office

As for the morale in the office we did discuss her triggers. She knows that she does suffer from anxiety and that her hormones can cause mood swings. We discussed mechanisms for dealing with these and perhaps informing those in the office that she is feeling a bit low/ down/ annoyed and that she just wishes to get on with her work. I explained that when she doesn't everyone continues to walk on eggshells around her and that she genuinely makes it a very unpleasant environment. To a certain extent she did accept this but referred back to Becky saying that she invaded her space and that she finds this very difficult to deal with as an individual as she does not like 'someone in her face'

I feel that it was a healthy conversation and certainly cleared the air acknowledging that this was a direct consequence of Michelle's actions. I feel what she may take away from this meeting is that she should not be discussing her working life outside of the office in a public space with Councillors. Although she acknowledged the atmosphere in the office she may play down her influence on this. What I will take away is that she knew that she was having a negative effect on the morale in the office and seeing that as a way of her

retaliating or as she describes it in her letter to the Personnel Sub Committee as 'having a voice'.

I explained that we could consider mediation for the office staff moving forward however I did note that Michelle's mood within the office had been really positive in the last couple of weeks. I asked her did she think this was sustainable? She said yes and given the earlier conversation on which her mood was a chosen one by her she feels that this conversation has been helpful. Michelle did apologise for her behaviour" (pages 185-186).

21. On 15 March 2019 the Claimant attended her appraisal with Ms Preece after which Ms Preece noted:

".....Michelle does appreciate that multi skilling in the office is important but still sees Becky as a real threat as she does not understand her enthusiasm to learn more within the job.

The morale in the office has continued to increase and I hope that this will be maintained. I did focus on the fact that if I as her line manager had exhausted all avenues to support Michelle enjoying her job that she too needs to take responsibility for her own happiness which may or may not be within the organisation.

The appraisal was aimed at focusing on Michelle and her performance however she did keep reverting back to how Becky makes her feel as though she is responsible for how Michelle is feeling or how much she enjoys her job. I did offer to mediate between her and Becky however she did not feel comfortable with this either. It felt a little like going around in circles as she continued to revert back to Becky but not wish to take any help in addressing the issue with Becky." (page194).

22. Ms Preece left the Respondent and on 23 April 2019, Ms Green was appointed as Town Clerk. Consequently, the position of Deputy Clerk became vacant and the Respondent chose to advertise the post internally in the first instance on 15 April 2019. The advertisement confirmed that interviews would take place on 29 April 2019 taking the format of an interview and presentation to the Town Clerk and two Councillors from the Personnel Sub Committee (page 210).
23. On 23 April 2019, the Claimant e-mailed her expression of interest in the role (page 212/213). Ms Green responded and confirmed to the Claimant that the interview would be held on the 29th of April and that she would give her an exact time as soon as she possibly could. She also advised the Claimant to let her know if she needed any aids for her presentation (page 212). The only other applicant for the role (of which the Claimant was aware) was Ms Brown.
24. On 24 April 2019, Ms Green asked her team generally for some assistance with a spreadsheet into which the Claimant had already provided input. Ms Brown offered to assist, leaving the Claimant feeling aggrieved because Ms Green had not asked her directly to help.

25. The following day, Ms Green apologised to the Claimant about the incident and their conversation became quite heated. During their exchange, the Claimant said that she would not be carrying out a presentation in her interview for Deputy Clerk because Ms Green had not had to do one in her interview for Town Clerk. Ms Green left the room to compose herself and when she returned the Claimant had already left the building. Thereafter, the Claimant remained off sick.
26. On Friday 26 April 2019, Ms Green telephoned the Claimant to go through a 'welfare questionnaire' (page 216). During this conversation, Ms Green asked the Claimant if she would like her interview date rescheduling. The Claimant said yes but could not confirm until when.
27. In the meantime, the Respondent had formed the interview panel which comprised of Councillors Charters and Rogers.
28. The Respondent's local elections were imminent, and its standing orders and the Local Government Act 1972 require both a Town Clerk and Deputy Clerk to be in office. Councillor Rogers' appointment was coming to an end on or around 2 May 2019 and he had not put himself forward for re-election. The Respondent was concerned about the impact this would have on the recruitment process and took advice from its external HR consultants who advised that if the interviews were not complete by that date, the recruitment process would need to start again with an alternative Councillor.
29. Following that advice, Ms Green advised the Claimant that her interview could be rescheduled until 1 or 2 May 2019 explaining that "*these dates are in line with the process of the local council elections and have been agreed under advice from our HR consultants*". The Claimant queried this explanation and Ms Green explained that if the interview process was not concluded by 2 May 2019, the recruitment and interview process would need to commence again (page 218).
30. On 29 April 2019, the Claimant asked Ms Green by e-mail what times she could attend an interview on either 1 or 2 May and said she would confirm her preferred date and time the following day. The Claimant also inquired who would be conducting the interview and Ms Green confirmed that it was Councillors Rogers and Charters (page 219).
31. On 30 April 2019, Ms Green chased the Claimant and asked her if she had decided on the date of her interview so she could assemble the panel. However, the Claimant had become so consumed by her perception of injustice that she took the decision not to attend the interview or return to work until such time her grievances (as expressed in her e-mail dated 26 February 2019) were resolved to her satisfaction. She replied to Ms Green at 6.20am on 1 May 2019 in the following terms:

"Apologies for the delay in the response.

As I am currently off sick (statutory Sick Pay Form in today's post) and given my discussions both verbally and in writing to the previous Town Clerk, the Personnel Sub Committee members and yourself, highlighting some areas of concern which I have had over the last 6 months which to my knowledge have not been addressed, and having expressed a keen interest in the Deputy Clerk

vacancy, I don't however feel that partaking in the interview process for the position at the present time will be beneficial to my well-being or recovery. Could you please therefore inform the members of the Personnel Sub Committee of my current situation and having missed the 24 hour deadline notice for the offer of the interview today, could you please advise them that unfortunately the 2nd date offered to me for interview of 02.05.19 is not currently practical" (page 221).

32. The Claimant consulted solicitors and e-mailed again later that day to confirm her request for a delay in the interview process for the role saying:

"..... It is my intention to pursue the vacancy and I would like the opportunity to attend an interview at a later date when I am in a better frame of mind to partake in the process...." (page 222).

33. In response, Ms Green replied explaining the Respondent was unable to delay the process any further due to the timing of the local elections but that the Claimant was welcome to apply for any future roles within the Respondent (page 223).

34. In the meantime, Ms Brown attended her interview. The Respondent was content that she was suitable for the role and duly appointed her.

35. On 14 May 2019, the Claimant raised a lengthy formal grievance referring to the following matters:

- The meeting with Councillors Charters and Rogers on 22 February 2019;
- Her letter dated 26 February 2019;
- The meeting with Ms Preece on 4 March 2019,
- Her appraisal;
- Comments allegedly made by Councillor Charters in respect of training courses;
- An email from Ms Brown to Ms Preece regarding the interview;
- The fact that Ms Preece sent out the advertisement for the Deputy Clerk role the day before she left the Respondent;
- The lack of response from other Councillors to the Claimant's email about an alleged incident in the office where Ms Green said that she could not access Town Clerk emails;
- The discussion between herself and Ms Green on 25 April 2019; and
- The Respondent's refusal to delay her interview (pages 230 – 233).

36. In respect of Ms Green's e-mail dated 1 May 2019 confirming that the Claimant's interview could not be delayed beyond 2 May 2019, the Claimant described it as resulting in the complete breakdown of her relationship with the Respondent saying:

"My trust and confidence in the management and members of the Personnel Sub Committee has completely eroded due to a lack of consideration, duty of care and employee support as well as non-compliance with any intentions made to me in good faith by my managers, both past and present. All other informal attempts I have made to find resolution in respect of my concerns have been unsuccessful. I feel very unfairly treated and badly let down and it is with

deep sadness that I am now left with no choice but to consider my options” (page 233).

37. On 22 May 2019, Respondent acknowledged the Claimant's grievance and confirmed that an HR consultant from Peninsula would hear her grievance on 28 May 2019 (p.244).

38. The grievance hearing ultimately took place on 18 June 2019 and was conducted by Mr Patrick Kiernan. Following the hearing, the Claimant sent her ideal grievance outcomes to Mr Kiernan as follows:

“Due to the treatment meted out to me and the lack of support and expected duty of care from my employer, North Hykeham Town Council which has ultimately led to the breakdown of the implied trust and confidence in the employment relationship, I feel I am unable to return to work under the circumstances as they currently stand, therefore I wish to make the following proposals:

1. That all managers, staff supervisors, members and chairman of the Personnel Sub Committee, both present and future, are required to undertake vital comprehensive training in human resources matters to better equip them when dealing with the health, wellbeing, and general treatment of employees under their care, and to have greater recognition, understanding and empathy of prevalent mental health issues.

2. That all town council members, including those standing on the Personnel Sub Committee, be made aware of the entirety of my concerns leading up to and resulting in my sick leave and subsequent grievance, including all supporting documentation, to allow for any necessary investigations to be carried out and dealt with appropriately and in accordance with the North Hykeham Town Council's own policies and best practices, in order to protect the reputation and prevent repeat incidents with other present and/or prospective future employees.

3. That, after investigation, I am vindicated and I receive a sincere apology for the personal damage that has been caused by this sorry situation which could have been so easily prevented had a measure of professionalism and procedure been applied at the very outset.

4. That, in order to protect the Council's reputation, Sandra Green and Rebecca Brown, at the very least, be demoted to their original positions of Deputy Clerk and Assistant Clerk respectively, and to employ an appropriate Town Clerk/Responsible Finance Officer already in possession of effective managerial skills, substantial knowledge of human resources practises and all other relevant experience to meet the criteria required for the position, to be externally appointed from a wider spectrum of applicants and under the usual lengthy and scrutinised recruitment/ interview process” (page 263).

39. On 26 June 2019, Ms Green had a further welfare conversation with the Claimant during which the Claimant said that *“due to the complete breakdown of trust in my manager(s) I'm unsure of which direction I'm moving in anyway* (page 264).

40. On 5 July 2019, Ms Green held a further welfare call with the Claimant in which she advised that she had seen her GP again on 24 June 2019 but had no further appointments scheduled (page 267).
41. On 9 July 2019, Mr Keenan produced his grievance outcome report in which he recommended that the Claimant's grievance be dismissed in its entirety (pages 275-296). His report was sent to the Claimant on 16 July 2019 and in response, the Claimant provided a lengthy document commenting on Mr Kiernan's findings (pages 319, 297-303).
42. On 10 July 2019, the Claimant submitted a further formal grievance to Councillor Rigby. Her belief was that she had experienced a complete lack of support from her employer, the Chairman and the members of the Personnel Sub Committee. She confirmed that if she received any further correspondence from Ms Green or Ms Brown then she would have no choice but to submit a further grievance (page 305-307).
43. On 23 July 2019, the Claimant submitted her formal appeal against the grievance outcome and an appeal hearing was scheduled for 1 August 2019 (pages 323 and 328). The hearing was chaired by Councillors Jackling and Briggs and not upheld (page 351).
44. The Claimant continued to remain absent from work and, on 15 August 2019, the Respondent wrote to her requesting her consent to obtain an occupational health report (page 354).
45. On 20 August 2019, the Respondent replied to the Claimant's grievance dated 10 July 2019. Ms Green apologised for the delay in dealing with it but explained that "*your first grievance process has just ended and it would not have been appropriate to commence this latest grievance before the conclusion of the last one*". However, it was the Respondent's view that the matters raised in the Claimant's current grievance had already been dealt with and she had not provided any new information for it to investigate. Regardless, it responded to her grievance in writing albeit did not uphold it. The Claimant was given a right of appeal (pages 359-362).
46. The Claimant responded to Ms Green's letter on 27 August 2019 stating:

"Please accept my apologies for any repetitive statements I make, it seems that I have to keep re reiterating things in the hope that one day I might be properly heard ... you, as my employers and managers have made absolutely no attempt to support me from the onset of my concerns being raised or since. In fact, you have made my situation worse by your ongoing treatment of me and your complete lack of duty of care to me as a long term employee with many rights, as documented in my contract of employment and the NHTC Employee Handbook" (page 373).
47. On 3 September 2019, the Claimant wrote a further letter to Mr Briggs which was, in essence, a complaint about the grievance process and the matters she had raised in her appeal. It was an extremely lengthy letter which she acknowledged, saying:

“Under these circumstances, please accept my sincere apologies for the unavoidable length of my notes and any repetition I may make, sadly it seems that I have to keep reiterating things in the hope that one day I might be heard, believed and receive the answers I ask for. I would have preferred to attend a meeting to direct my questions at the relevant people in person, one in particular, in order to gauge her responses and witness her inability to answer questions directly and truthfully (because she has blatantly lied to you already) but I know this won’t be permitted so I have to rely on you to ask on my behalf and provide me with truthful answers” (page 376).

48. On 13 September 2019, the Respondent acknowledged the Claimant’s further grievance (dated 3 September 2019) but again took the view that the issues raised were fundamentally the same as those already dealt with (page 391).
49. On 17 September 2019, the Claimant attended an assessment with an Occupational Health Practitioner. The subsequent report suggested a number of adjustments that the Respondent could consider and *“that with optimal intervention, there could be a return to work within 6-10 weeks”* (pages 392-396).
50. On 24 September 2019, the Claimant wrote to Ms Green enclosing a list of questions that she wanted answers to about her grievances (page 397). Ms Green replied attempting to answer those questions, one such question being: *“If Sandra Green didn’t accept the Town Clerk position would an external one been appointed in 2 weeks? If Rebecca Brown was unsuitable for Deputy Clerk would an external one be appointed in 2 weeks? If so, why when all previous application and interview processes have extended over weeks (if not months)?”*. Ms Green advised that Ms Brown would have been appointed as acting Town Clerk.
51. The Claimant responded to Ms Green’s answers with either a comment or another question. She said: *“I looked forward, once again to your reply to these unanswered and further questions, without unreasonable delay”* (pages 401, 404-408).
52. Ms Green responded by way of further letter dated 18 October 2019 confirming that the Respondent had already provided her with answers and outcomes to her questions and grievances including appeals on 16 July 2019, 12 August 2019, 20 August 2019 and 3 October 2019. She said that any further queries could be answered at the Employment Tribunal hearing (page 409).
53. On 28 October 2019, the Claimant was invited to a formal capability meeting held by a consultant from Peninsula, Mr Barnaby Rudston, to discuss the following:
 - *“your absence from work due to ill health;*
 - *The enclosed copy of a medical report from the Occupational Health Practitioner;*
 - *The likelihood of you returning to your job/work in the near future;*
 - *Whether there are any reasonable adjustments that can be made to your job or in the workplace that would facilitate a return to work;*
 - *Whether there is any alternative employment available that would be suitable for you”* (page 413)

54. The capability meeting was lengthy, and the Claimant was given the opportunity to air her grievances again. The adjustments recommended by Occupational Health, including mediation, were also discussed. The Claimant acknowledged that given the size of the Respondent, there were no alternative roles that she could consider.
55. Thereafter, Mr Rudston produced a '*capability case report*'. This was subject to a number of reviews before the final version was produced but one of his recommendations was that mediation take place between the parties and the Claimant should be offered a phased return to work (page 433).
56. On 30 December 2019, Ms Green wrote to the Claimant as follows:
- "... I would be grateful if you could kindly provide me with a written update as to whether you believe that you will be fit to return to work after your current sick note has expired on 5 January 2020. This is so that we can make any necessary arrangements regarding any reasonable adjustments that you may need a upon your return to work"* (page 539).
57. In response, the Claimant confirmed that she would be submitting a further medical certificate covering her absence for another six weeks (page 540).
58. A second medical capability hearing took place on 22 January 2020 chaired by a Ms Debbie Ramsden from Peninsula. The Claimant confirmed that she would be able to return to work on expiry of her current medical certificate on 16 February 2020 and Ms Ramsden recommended the following: mediation, a phased return to work and a risk assessment to discuss the Claimant's workload and job role. Ms Ramsden produced a report in which she noted that the Claimant was unable to offer any other suggestions to assist her in attending work more regularly, save those already mentioned (pages 564-596).
59. However, by this time the Claimant had formed the view that she could not return to work whilst Ms Brown and Ms Green remained in the Respondent's employ, as confirmed in paragraph 121 of her witness statement:
- "... I tentatively agreed to return to work on the 17th February, on the premise that full, open, honest, and supportive intervention was offered beforehand, even though by this point I already knew that, unless, for now obvious reason, Mrs Brown and Mrs Green were no longer working there, a return to work was almost untenable. Despite everything that had gone on, particularly the realisation of all the dishonesty, the lack of support, and the lack of any blame or remorse which had resulted in my lack of trust in both, I still couldn't bring myself to give up my rights or lose the job I'd loved for so long".*
60. The Claimant was not only unwilling to return until all her complaints had been resolved to her satisfaction, but she was also unable to accept any responsibility for the circumstances leading to her absence or the Respondent's view that her grievances had no foundation.
61. On 12 February 2020, the Claimant and Respondent attended a mediation. The Claimant had understood that it was a further opportunity to air her grievances, which was not the purpose, and it was unsuccessful (pages 607-611).

62. Following the failed mediation, the Respondent wrote to the Claimant on 14 February 2020 to enquire if it was still her intention to return to work. The Respondent confirmed that if she was returning, the following adjustments would be put in place:
- a phased return to work;
 - rearranging her responsibilities to ease pressure;
 - allowing time off for appointments;
 - altering working hours if necessary;
 - a review of the physical working environment;
 - provision of a quiet place for her to go if she was feeling anxious or stressed;
 - training on the Respondent's new accounts system; and
 - fortnightly supportive checks (pages 599-600).
63. The Claimant attended the Respondent's premises on the agreed return to work date of 17 February 2020, with the sole purpose of submitting a further letter a complaint to Councillor Charters about the way her concerns had been dealt with. She said that a further meeting was urgently required to ensure the "*smooth transition of [her] return to work*" (pages 602-606).
64. The Claimant was invited to attend a further grievance hearing which was quickly arranged for 20 February 2020 (pages 612-613). It was agreed that the meeting would be an informal discussion and was chaired by Councillors Briggs, Sellers and Goddard. The Claimant was given the opportunity to air her concerns again. She was asked what she wanted in order to resolve matters and she said that she wanted to be '*heard*'. She declined further mediation and ultimately lost her temper and said that she "*may as well resign and claim for constructive dismissal*". At this point she left the meeting (page 622).
65. The following day, the Claimant sent a lengthy e-mail to Councillor Briggs apologising for her frustrations in the meeting the previous day. Amongst other matters she said that:
- "I feel that I have been constantly denied the opportunity, not only as a long serving and loyal employee but as a human right, to discuss all concerns I've had and still have, not by impersonal outside organisations but by proper internal measures with professional managers and employees in an open forum and where people were well advised to be honest and some form of agreeable result achieved as opposed to constantly asking ME what can make it possible for me to return to work"* (pages 623-624).
66. On 21 February 2020, the Respondent wrote to the Claimant inviting her to a further medical capability meeting on 25 February 2020 if she was not intending to resign. The Claimant was advised that the outcome of the meeting may be the termination of her employment on the grounds of ill health (page 625).
67. On 24 February 2020, Mr Briggs wrote to the Claimant with his findings following the meeting on 20 February 2020. He concluded that he could not find sufficient grounds

to substantiate her complaints (pages 626-628). The Claimant wrote a lengthy in response challenging each of Councillor Briggs' findings (pages 629-632).

68. Prior to the final medical capability meeting, the Claimant provided a statement of her position. She recapped on her complaints and the process followed to date and concluded by saying:

"Taking into consideration all of the above, as well as requesting an eventual risk assessment to outline any potential risk to health, whether that be mental, physical or emotional, I pose the question to my employers and managers what are they going to do to make it possible for me to return to the work that I'm thoroughly entitled to return to" (page 634)

69. The hearing was chaired by Councillor Charters. He had a list of nine pre-prepared questions from Peninsula which he used to conduct the hearing. The Claimant was confrontational during the meeting and failed to engage about a potential return to work.

70. The Claimant was asked how she was feeling on a scale of 1-10 with 10 being the highest she replied: *"absolutely horrendous"*. Councillor Briggs repeated the question again and she responded with a "12" and then a "-2". He asked her if she was returning to work, she said *"I don't know"*. When asked whether her GP had said anything about a return to work, she said that was a matter between her and her GP.

71. The Claimant was asked: *"what limitations do you think you will have upon your return to work and will you require any further reasonable adjustments that we have not already discussed or agreed?"*. She replied *"the limitations on my return to work are down to my employers and my managers not me. It's down to what is going to be done by you and them to enable a smooth return to work and at this moment in time what are you doing - fraternising?"* She also said that nothing had changed since her last meeting with the Respondent.

72. Councillor Charters asked the Claimant what adjustments the Respondent could make, and her reply was simply *"that's down to you"* (pages 635-639). Councillor Charters concluded the meeting and thereafter, made the decision to dismiss the Claimant. He confirmed his decision in writing, explaining the following:

".....During a meeting, we discussed your current state of health, previous medical capability hearings, the occupational health report of 17th September 2019 and took into account Dr Ogunyemi's opinion and recommendations.

We also discussed your view during the meeting and you said you did not know when you would be returning to work. We discussed the reasonable adjustments that were offered to you on 14th February 2020 further to the recommendations of Dr Ogunyemi. During the meeting, you could not give us any further reasonable adjustments that would facilitate your return to work. You also explained that the reason why you have not returned to work is due to your treatment by North Hykeham Town Council as outlined in your grievances.

We have made every possible effort to address each and every formal grievance and informal concern that you have raised with us with written outcomes and meetings if appropriate. We have held medical capability hearings on 31st October 2019, 22nd of January 2020 and 25th February 2020 in order to explore different ways to allow you to return to work with reasonable adjustments having addressed concerns that you have brought to our attention. We have arranged occupational health reports on 24th January 2018 and 17th September 2019 in order to receive an advice on when and how we can facilitate a return to work and have always followed the advice of the reports and offered the reasonable adjustments recommended. Following the medical capability hearing on 22nd January 2020, you informed us that you would definitely be returning to work on 17th February 2020 if we arranged mediation. We subsequently arranged for an independent third party to carry out the mediation to assist you with a return to work and the offer of a phased return on flexible terms.

For the avoidance of doubt, on the following dates you have raised concerns or complaints. We subsequently responded on the dates outlined below in line with our grievance procedure.

Grievance one

MB	14.5.2019	Formal letter of Grievance
MB	14.5.2019	Letter from Ringrose Law seeking settlement
TC	28.5.2019	Face2Face Grievance hearing/Settlement meeting
TC	18.6.2019	Face2Face Grievance Hearing
TC	19.7.2019	Face2Face Grievance Hearing Report issued

Grievance 2

MB	17.6.2019	Formal letter of Grievance
TC	21.6.2019	Correspondence dismissing as no new Grievances raised

Grievance 3

MB	10.7.2019	Formal letter of Grievance to Cllr E Rigby
TC	26.7.2019	Letter of explanation re concerns re role of Proper Officer
TC	20.8.2019	Grievance Outcome Letter

Appeal to Grievance 1

MB	23.7.2019	Grievance appeal against Grievance 1 Report
TC	1.8.2019	Appeal Hearing – Grievance 1
TC	12.8.2019	Appeal Hearing Outcome Report

Grievance 4

MB	3.9.2019	Formal letter of Grievance to Cllr Briggs re Grievances 1,2,3 & Appeal(1)
TC	13.9.2019	Response re Grievance 4

MB 20.9.2019 Letter advising that not a formal Grievance with 25 questions attached
TC 3.10.2019 Response to 25 questions of 20.0.2019

MB 8.10.2019 Request for further information on 25 questions
TC 9.10.2019 Response within one calendar month
TC 10.10.2019 Responded with further information re 25 questions

Grievance 5/Informal meeting

MB 16.2.2020 Letter to Chairman & Vice Chairman Personnel SC
TC 18.2.2019 Invitation to Grievance Hearing
MB 18.2.2019 Request for Informal Hearing
TC 19.2.2019 Invitation to Informal Hearing
TC 20.2.2019 Informal Hearing takes place
TC 24.2.2019 Outcome letter

We have considered the operational needs of the organisation and came to the conclusion that there was no prospect of you returning to work within the foreseeable future. We have also considered the possibility of suitable alternative employment, but unfortunately, there were no suitable vacancies. Under these circumstances, we have regrettably been left with no alternative other than to terminate your employment on the grounds of medical capability.

This will take effect immediately and you will be paid one month plus 2 weeks pay in lieu of notice and annual leave entitlement owing of 3 weeks pay.

You have the right of appeal against this decision ...” (pages 640-641)

73. On 3 March 2020, the Claimant appealed the decision to dismiss her stating that she did not:

“.....believe that I have been given a fair and thorough opportunity to discuss all of my previous concerns in accordance with the internal policies of your Council and my Contract of Employment. I have also asked for information that is not yet been received regarding those past and ongoing concerns and in light of this I believe that this decision is premature...” (page 642)

74. An appeal hearing took place on 9 March 2020 chaired by Councillor Briggs. During the hearing the Claimant confirmed that she was still feeling aggrieved about her complaints and that there was no prospect of her returning to work because her colleagues and employers were making her ill. Councillor Briggs allowed the Claimant further opportunity to air her grievances but given that she was unable to return to work took the decision to uphold the decision to dismiss her (pages 647-672).

The law

Unfair dismissal

75. Section s.98 Employment Rights Act (“ERA”) provides.

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and*
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) A reason falls within this subsection if it—*
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
.....*
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
 - (b) shall be determined in accordance with equity and the substantial merits of the case.”*

76. We have had regard to the following cases: *S v Dundee City Council* [2014] IRLR 131; *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439; and *Post Office v Foley* [2000] IRLR 827.

Reasonable Adjustments (sections 20 & 21 EQA)

77. Section 20 EQA provides:

“(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, 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.

.....”

78. Section 21 provides:

“(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

.....”

79. The EHRC Employment Code confirms that the term ‘provision, criterion or practice’ is capable of covering a wide range of conduct, noting: *‘The phrase... is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions’* — para 4.5.
80. We have also had regard to the following cases: *Environment Agency v Rowan* [2008] IRLR 20; *Essop and ors v Home Office (UK Border Agency)* and another case 2017 ICR 640, SC; *Clarke and anor v Eley (IMI) Kynoch Ltd* 1983 ICR 165, EAT.

Discrimination arising from disability

81. Section 15 Equality Act 2010 (“EQA”) 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”.

82. We have had regard to the following cases: *Secretary of State for Justice and anor v Dunn* EAT 0234/16; *Basildon and Thurrock NHS Foundation Trust v Weerasinghe* 2016 ICR 305, EAT; *Hall v Chief Constable of West Yorkshire Police* 2015 IRLR 893, EAT, and *Pnaiser v NHS England and anor* 2016 IRLR 170, EAT.

Burden of proof

83. Section 136 EQA provides:

“(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision”.

84. We have had regard to the following cases: *Igen Limited v Wong* [2005] IRLR 258,; *Madarassy v Nomura International PLC* [2007] ICR 867; *Laing v Manchester City Council* [2006] IRLR 748 EAT; *Martin v Devonshires Solicitors* [2011] 352 EAT;

Nagarajan v London Regional transport 1999 ICR 877.

Conclusions

85. We deal firstly with the Claimant's complaint that the Respondent failed to make reasonable adjustments. The Respondent does not seek to argue that it did not have knowledge of the Claimant's disability at the material time.
86. The Claimant's case is that the Respondent applied a PCP of requiring all applicants for the post of Deputy Clerk to attend a personal interview and this put her at a substantial disadvantage compared to those were not so disabled. The Respondent failed to make a reasonable adjustment in postponing the interview to allow her to recover from the exacerbations to her disability.
87. In accordance with *Environment Agency v Rowan [2008] IRLR 20*, we must identify:-
- (a) the provision, criterion or practice applied by the employer;
 - (b) the identity of non-disabled comparators where appropriate; and
 - (c) the nature and extent of the substantial disadvantage suffered by the Claimant.
88. Dealing with the first two considerations, we are satisfied that the Respondent required all applicants to attend a personal interview for the role of Deputy Clerk and that such requirement amounts to PCP. The appropriate pool for comparison is all those who also applied for the role and were required to attend a personal interview so, in this case, the comparator is Ms Brown.
89. A '*substantial disadvantage*' is one which is more than minor or trivial. In deliberating whether the PCP placed the Claimant at a disadvantage, we had regard to the factual background leading up to the interview.
90. The Claimant had clearly taken umbrage to Ms Brown's arrival in an equivalent role and her friendship with Ms Green. She felt that Ms Brown was invading her personal space and following the incidents in the office (taking her holepunch, using her mouse and looking at her e-mails) and the comment by Ms Green that she '*was not precious*' about people taking things from her drawer, the Claimant withdrew from the team.
91. We are satisfied that the Claimant's hostility towards Ms Brown led to tension in the office, so much so that Councillors Little and Rogers met with the team individually to discuss those obvious tensions. We have no reason to doubt the authenticity of the notes produced following these interviews and accept that it was the Claimant's behaviour that was the root cause of the prevailing atmosphere.
92. The Claimant, however, was adamant that she had been wronged and sent her lengthy letter of complaint to the Personnel Sub Committee on 26 February 2019. Ms Preece met with the her on 4 March 2019 and recorded that the Claimant acknowledged that she was the driving force behind the low morale in the office and after the 'incidents' with Ms Brown and Ms Green she '*decided what's the point and*

chose her mood'. Again, we have no reason to doubt the authenticity of Ms Preece's notes.

93. A few weeks later the Claimant had her appraisal with Ms Preece during which the Claimant focussed on her perception of Ms Brown's behaviour and how it was affecting her. Ms Preece offered to mediate but the Claimant declined. She noted that *"it felt a little like going round in circles as she continued to revert back to Becky but did not wish to take any help in addressing the issue with Becky"*.
94. On 23 April 2019, the Respondent advertised the vacancy for deputy Town Clerk and the Claimant expressed her interest in applying the same day. The following day the Claimant was aggrieved when Ms Green did not ask her directly to assist with some work and Ms Brown assisted instead. This led to a heated conversation with Ms Green on 25 April 2019, after which the Claimant was absent from work and remained so until her dismissal.
95. We are satisfied that by 30 April 2019 at the latest (paragraph 31 above), the Claimant had taken the decision that she was not going to attend her interview or return to work until her grievances were resolved to her satisfaction – including action in respect of Ms Green and Ms Brown. This is affirmed by the Claimant in her *'ideal grievance outcomes'* in which she said her trust and confidence in the Respondent had broken down; she wanted all the Respondent's members to have sight of her concerns, investigate them and *"after investigation, I am vindicated and I receive a sincere apology for the personal damage that has been caused by this sorry situation"*; and, her view was that Ms Green and Ms Brown *"at the very least"* were demoted to their original positions. The Claimant was so entrenched in her own sense of injustice that she would not entertain attending the interview or returning to work until her desired outcomes were achieved. She subsequently confirmed in her witness statement that *'a return to work was almost untenable'* whilst Ms Green and Ms Brown remained.
96. Given our findings, we are entirely satisfied that the Claimant chose not to attend her interview because of her unresolved grievances and need to have them resolved to her satisfaction - not because of the requirement to attend in person or any need to recover from ill health. She made an active decision not to participate in the process until they had been resolved, such resolution including the demotion or removal of Ms Green and Ms Brown from their respective roles.
97. Our conclusion is further supported by the Claimant's witness statement at paragraph 45 in which she states: *"In a list of questions to the Respondent, I also asked if Mrs Green hadn't chosen to take the position would they have recruited externally in a very short space of time? I received the answer "SG would have been Acting Town Clerk" (399 and 402). Therefore, if this was possible, then the Respondent could have placed Mrs Brown in a position of 'Acting' Deputy Clerk to temporarily cover their alleged legal positions. This would have allowed time for my concerns to be properly and thoroughly addressed (our emphasis), and for me to recover sufficiently, with their full support, and to then carry out interviews on my return to work afterwards, even if Mrs. Brown gained the position over me anyway, as was expected"*

98. In conclusion, we are satisfied that the application of the PCP did not place the Claimant at a disadvantage. Rather, she took the decision not to attend the interview until her grievances were resolved to her satisfaction and that was the sole reason for her non-attendance. Accordingly, her claim fails at this stage and is dismissed.

Discrimination arising from disability

99. In *Secretary of State for Justice and anor v Dunn EAT 0234/16*, the EAT identified four elements that must be made out for a claim of discrimination arising from disability to succeed, namely:

- i. There must be unfavourable treatment;
- ii. There must be something that arises in consequence of the Claimant's disability;
- iii. The unfavourable treatment must be because of the something that arises in consequence of the disability; and
- iv. The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

100. The Claimant identifies the unfavourable treatment as being the lack of opportunity to attend the interview for the post of Deputy Clerk because it was not postponed by the Respondent. However, as per our findings above, the Claimant took the decision that she was not going to attend the interview (or entertain a return to work) until her grievances were resolved to her satisfaction. Given the Claimant's decision, she was not deprived of the opportunity of attending because of the Respondent's action in not postponing it – she withdrew herself from the process. Accordingly, we are satisfied that the Respondent's failure to postpone the interview beyond 2 May 2019 did not amount to unfavourable treatment and the claim fails at this stage.

101. Even if we are wrong on that, the Claimant did not persuade us that the '*something*' arising in consequence of her disability was the need to recover from its exacerbation to enable her to participate. The focus of her evidence was on her sense of injustice about events leading to her absence from work and how her complaint was dealt with – rather than evidencing a need to recover from her illness. Notably, the Claimant chose not to attend the interview but was able to attend a grievance hearing later that month and was, therefore able, to participate in matters fully in person to suit.

102. Taking matters one step further, even if the Claimant had persuaded us that her disability had the consequence of a need for time to recover, we are entirely satisfied that the Respondent's refusal to delay the interview after 2 May 2019 was not because of that something. Rather, it declined to postpone the interview any further because Councillor Rogers had not put himself forward for re-election and would vacate his post shortly thereafter. The Respondent took advice from its external HR consultants who advised that the interview must take place on or before 2 May 2019 to avoid the recruitment process having to start again. The Respondent is a small organisation and heavily reliant on external advice which it followed without question. It was in

consequence of the timing of the local elections and external HR advice that led the Respondent to insist that the interview take place by no later than 2 May 2019, rather than anything arising in consequence of the Claimant's disability.

103. Given our conclusions, we do not need to consider whether the treatment of the Claimant is a proportionate means of achieving a legitimate aim.
104. The Claimant's claim that she suffered unfavourable treatment because of something arising in consequence of her disability therefore fails and is dismissed.

Unfair dismissal

105. We deal with the absence of the dismissing and appeal officers in the first instance. We accept Mr Hine's explanation as to why these witnesses were not in attendance, despite it resulting in an unsatisfactory situation for both the Claimant and the Tribunal. Typically, our role involves an assessment of the witness' credibility by assessing the extent to which we find their evidence satisfactory and reliable as a matter of common sense and judgment (*Pearl v Dixons Store Group Retail Ltd EAT 0630/04*). Obviously, we were unable to do this in respect of Councillors Charters and Briggs. However, in light of the documentary evidence in the bundle and the Claimant's own evidence, we were unable to find that the Claimant was unfairly dismissed by default for the reasons we explain below.
106. We are satisfied that the Claimant was dismissed because of her long-term absence, therefore capability, and the Claimant does not challenge this as the reason. She had been absent from her duties for circa ten months with no foreseeable return at the time of her dismissal.
107. In the absence of the Respondent's key witnesses, we examined the facts leading up to Councillor Charters' decision to dismiss and the information he had before him at the material time.
108. The Claimant commenced her sickness absence on 25 April 2019. The Respondent maintained contact with her in respect of her welfare, and in respect of her numerous grievances. The Claimant was able to attend meetings relating to those grievances.
109. The Claimant attended Occupational Health on 17 September 2019 and the physician said that with '*optimal intervention, there could be a return to work within 6-10 weeks*'. Their report was used in the first medical capability hearing on 31 October 2019 during which the Claimant acknowledged that there were no suitable alternative roles available. There was some delay in the '*capability case report*' being sent to the Claimant but the report recommended mediation and a phased return to work.
110. The Claimant remained absent from work and a second medical capability hearing took place on 24 January 2020 at which the Claimant agreed to mediation and a phased return to work on 16 February 2020. The Respondent also agreed to implement additional reasonable adjustments to facilitate her return.

111. The Respondent arranged mediation on 14 February 2020, which failed. On the Claimant's agreed return to work date, she attended the Respondent's premises with the sole intention of submitting a further letter of complaint insisting that she could not return to work until a further meeting to discuss her concerns had been held. The Respondent responded quickly and arranged the meeting a few days later on 20 February 2020 to facilitate her return. The Claimant lost her temper in this meeting and left, stating her intention to resign.
112. Consequently, the Respondent invited the Claimant to a third medical capability meeting on 24 February 2020 and warned her that her employment might be terminated. During this meeting, the Claimant was obstructive and refused to engage constructively with Councillor Charters. She still held the view that she could not return to work until her grievances had been resolved to her satisfaction and gave no indication that she would be able to return. Accordingly, Councillor Charters took the decision to dismiss her.
113. Having regard to the factual background, we are satisfied that the Respondent adequately consulted with the Claimant throughout her absence. However, the only thing that would enable the Claimant to return to work was the resolution of her grievances to her satisfaction. She often referred to that fact that all she wanted was to be '*heard*' and felt that the Respondent had ignored her concerns. We are satisfied that the Claimant was '*heard*' on numerous occasions as set out in the dismissal letter. Not one e-mail was ignored, and each was responded to appropriately with care and attention. However, the Claimant's pursuit of her grievances was relentless, and she refused to accept the Respondent's findings.
114. The Respondent held four meetings with the Claimant in attempt to resolve her grievances and went as far as attending a mediation. However, we are entirely satisfied that she was never going to be appeased until they were resolved in her favour and action was taken in respect of Ms Green and Ms Brown – whether that be demotion or dismissal. The Respondent had done its upmost to facilitate the Claimant's return to no avail. Even with reasonable adjustments in place she refused to return. When a phased return was arranged in February 2020, the Claimant submitted a further complaint and requested another meeting.
115. At the final capability meeting, the Claimant maintained her position that she was unable to return because of the treatment she perceived she had suffered and failed to engage in how her return to work could be facilitated. She confirmed that she was feeling '*horrendous*' and despite the Respondent putting into place reasonable adjustments, the Claimant simply asked the Respondent what it was going to do enable her return. She was not able to offer a timescale by which she was likely to return. Consequently, Councillor Charters took the decision to dismiss her.
116. The Claimant exercised her right to appeal but was still unable to indicate a return to work or any further steps that the Respondent could take to facilitate a return.
117. It was clear from the Claimant's own evidence that she was never going to return to work until her grievances were resolved to her satisfaction. In her view, all trust and

confidence had broken down and she was unable to work alongside Ms Green and Ms Brown.

118. We are satisfied that, following consultation with the Claimant, there was nothing more the Respondent could do for her. The Respondent had followed the advice of Occupational Health by implementing adjustments, arranged a mediation and done its utmost to resolve her concerns. There was no alternative employment available and the Claimant would not engage constructively about a return. Given the small size and administrative resources of the Respondent, it had exhausted all options in trying to get her back. Given that there was no foreseeable return to the work, the Respondent acted reasonably in all the circumstances by dismissing her and not waiting any longer before doing so.
119. Even in the absence of oral evidence from the Respondent, we are satisfied that the Claimant's dismissal was both procedurally and substantively fair. The documentation before us was extensive, recording events as they occurred. The Claimant was at pains to argue that they were fabricated but we had no reason to doubt their authenticity.
120. Accordingly, we are satisfied that her dismissal fell within the range of reasonable responses of a reasonable employer and her claim of unfair dismissal fails and is dismissed.

Employment Judge Victoria Butler

Date: 18 November 2021

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