EMPLOYMENT TRIBUNALS

Claimant:	**C**	
Respondent:	**The Council**	
Heard by	**On:**	**13, 14 and 15 September 2021**
		18, 19 and 20 October 2021
Deliberations:		**21 October 2021**

Before:	**Employment Judge Rogerson**
Members:	**Mr P Northam JP**
	Mr M Firkin

Representation

Claimant:	**Mr F Mortin (counsel)**
Respondent:	**Mr A Johnston (counsel)**

RESERVED JUDGMENT

1. The Claimant's complaints of disability discrimination (discrimination arising from disability, failure to make reasonable adjustments and direct disability discrimination) are not well founded and are dismissed.
2. The Claimant's complaint of victimisation is not well founded and is dismissed.
3. The Claimant's complaints of protected disclosure detriment and automatically unfair dismissal for making a protected disclosure are also not well founded and are dismissed.

REASONS

1. By a claim presented on 13 December 2019, following a period of early conciliation between 15 October 2019 and 15 November 2019 the Claimant sought to bring a number of claims against the Respondent. An agreed list of issues (LOI) identified the claims pursued at the final hearing.

2. At the end of the hearing the 6 remaining claims were:

(1) Direct disability discrimination contrary to section 13 Equality Act 2010 ('EqA'). The Claimant complains the dismissal was an act of less favourable treatment because of her disability (fibromyalgia)

(2) Discrimination arising from disability contrary to section 15 EqA.

2.1 The Claimant complains she was unfavourably treated in the following ways because of something arising in consequence of her fibromyalgia.

2.1.1 On 5 February 2019 AA reprimanding the Claimant from working from home.
2.1.2 On 21 February 2019 BB making the comment "well you do talk a lot".
2.1.3 May 2019 the Respondent overlooking the Claimant for the role of Town Clerk.
2.1.4 On 13 June 2019 CC accusing the Claimant of being absent without authorisation in relation to her absence on 6 June 2019.
2.1.5 The Respondent failing to arrange and invite the Claimant to a second probationary review meeting after the first meeting on 19 June 2019 was suspended and/or carrying one out.
2.1.6 The Respondent taking the decision to dismiss the Claimant on 23 July 2019.

2.2 The Claimant claims the following things are the 'something' arising in consequence of her fibromyalgia:

2.2.1 Absence from work on 6 June 2019.
2.2.2 Increased pain if required to sit still for prolonged periods.
2.2.3 Cognitive problems if she is unable to prepare sufficiently for meetings and/or meetings are not structured.
2.2.4 Increased stress during difficult discussions.
2.2.5 Inability to concentrate in an environment with additional or unnatural noise (such as a radio) due to heightened senses (of smell, hearing etc) and inability to properly process and complete work without sufficient information regarding the parameters of such work.

(3) Failure to comply with the duty to make reasonable adjustments contrary to sections 20(3) and 21 EqA.

3.1 The Claimant relies upon 5 provisions criterion or practices of the Respondent (PCP's):

3.1.1 A requirement to work from the office.
3.1.2 Assigning tasks and duties primarily through oral instruction.

3.1.3 A requirement to comply with absence management process.
3.1.4 Managing probationary periods in accordance with the Respondent's internal processes.
3.1.5 Managing complaints and grievances in accordance with the grievance policy.

3.2 The Claimant complains that these PCP's were applied by the Respondent and put her at a substantial disadvantage compared to those who do not suffer from fibromyalgia in the period from 5 February 2019 to 19 June 2019 in the following ways:

3.2.1 The Claimant finds it difficult to block out noise and distractions which impact on her concentration and her ability to carry out tasks assigned to her or absorb new information.
3.2.2 The Claimant struggles to absorb new information unless it is provided in a clear written format or notified in advance.
3.2.3 The Claimant needs additional time to consider new information.
3.2.4 The Claimant's conditions are aggravated by stress which result in her suffering additional pain.
3.2.5 The Claimant has to attend a significant number of medical appointments to manage her condition on an ongoing basis.

(4) Victimisation contrary to section 27 EqA.

4.1 The alleged protected act is that on the 20 June 2019 the Claimant indicated an intention to raise a grievance alleging discrimination.

4.2 The Claimant alleges she was subjected to the following detriments ***because*** the Respondent believed the Claimant had done (or might do) a protected act (issue 17).

4.2.1 The Respondent failed to arrange or invite the Claimant to a second probationary review meeting at a mutually convenient time after the first meeting on 19 June 2019 was suspended and/or failed to carry one out.

4.2.2 Taking the decision to dismiss on 23 July 2019.

(5) Detriment on the grounds of having made a protected disclosure in accordance with section 47B of the Employment Rights Act 1996 ('ERA').

5.1 The Claimant relies upon 2 disclosures qualifying for protection in accordance with section 43B ERA.

5.1.1 On 24 May 2019 in text messages to EE *"that legal notices for a meeting had not been displayed".*

5.1.2 On 22 and 28 May 2019 "*in an email to CC* and *during a phone call and email to II that a Councillor had not signed their declaration of office in the required time period and the Respondent was failing to take appropriate action as required by statute"*

5.2 The Claimant relies upon 10 detriments in the period from 30 May to 20 June 2019 that CC subjected her to on the grounds of her protected disclosures:

5.2.1 On 30th May CC playing the radio from her computer.
5.2.2 Late May/early June 2019 CC ignored the Claimant.
5.2.3 On 30 May 2019 CC refused to share her mobile telephone number with the Claimant.
5.2.4 On 11 June 2019 CC allocated work to HH which should have been completed by the Claimant to upload a Staff Meeting Notice.
5.2.5 On 13 June 2019 CC told the Claimant the Staffing Committee were seeking legal advice about the Claimant's ongoing employment.
5.2.6 On 13 June 2019 CC refusing to assist the Claimant with a financial enquiry.
5.2.7 On 13 June 2019 CC accusing the Claimant of taking unauthorised absence when attending a medical appointment which had been authorised by EE.
5.2.8 Mid-June 2019 CC delayed providing the Claimant's pay cheque by a week.
5.2.9 On 19 June 2019 CC sent tasks to the Claimant without attaching the documents the Claimant needed to do the tasks.
5.2.10 On 20 June 2019 CC did not allow the Claimant to go to the bank to deposit her cheque during her working hours.

(6) Automatic unfair dismissal for having made protected disclosures contrary to section 103A ERA('ERA').

3 All complaints were resisted by the Respondent. The Respondent's asserted reason for dismissal was that the Claimant had failed to satisfactorily complete her probationary period, there had been an irretrievable breakdown in relationships between the Claimant her colleagues and councillors during the probationary period and an overall loss of trust and confidence. The Claimant asserts that those reasons are not the genuine or real reason for dismissal. The real reasons are discriminatory, either because of her fibromyalgia or because of something arising in consequence of her fibromyalgia or because the Respondent believed she may do a protected act or because she had made protected disclosures.

Disability Issue

4 Prior to this hearing and following the Claimant's disclosure of information relating to disability (medical evidence and a detailed impact statement) the Respondent conceded that the Claimant is a disabled person by reason of fibromyalgia. Knowledge of disability/substantial disadvantage acquired during these proceedings after the impugned treatment is not enough. The Respondent denies it had the requisite actual or constructive knowledge at the material for liability for disability discrimination to be established. It and argued it "*Did not know and could not reasonably be expected to know that the Claimant had a disability and was likely to be placed at a substantial disadvantage by any practice of the Respondent" (issue 5 and 9 LOI)*.

Jurisdiction

5 Jurisdictional issues arise in this case which were also identified in the list of issues. Counsel have agreed that having regard to the date of presentation of the claim and the effects of early conciliation any act or omission which occurred before 16 July 2019 is prima facie out of time and only the termination of contract(dismissal) on 23 July 2019 is in time. If the Tribunal finds the dismissal was not discriminatory all the pre-dismissal complaints are out of time and the Tribunal had no jurisdiction to consider them. In those circumstances for any out of time discriminatory act that is proven the Claimant will rely on the Tribunal exercising its discretion to extend time on just and equitable grounds from the date of that act to the 13 December 2019 when the claim was presented. In the list of issues Mr Mortin puts it this way: "*If the Tribunal finds that the Claimant has been discriminated against but that such acts of discrimination do not represent a course of continuing conduct of which the last act is in time, would it be just and equitable to extend time to hear the claims ?* (issue 34 LOI).

6 In relation to the protected disclosure detriment and dismissal complaints any act or omission before 16 July 2019 is also out of time. If the Tribunal found the dismissal was not automatically unfair it was agreed that all the pre-dismissal detriment complaints are also out of time and the Tribunal had no jurisdiction to consider them. For any proven out of time complaint the Claimant will seek an extension of time on the grounds that it was not reasonably practicable for her to present the claim in time and her claim was presented within a further reasonable period thereafter (issue 36 and 37 LOI).

Assessment of credibility

7 An anonymity order made previously in these proceedings applies. Counsel agreed to a 'key' to be used by the Tribunal to identify any named individuals to the parties and witnesses, while preserving their anonymity when these reasons are published. Mr Johnston also provided a helpful agreed chronology of the principle relevant events which we have used to set out some of the undisputed events. We have separately set out our findings on any material disputed facts.

8 The Tribunal heard evidence from the Claimant (C) and then for the Respondent AA, BB and EE. We also saw documents from an agreed bundle of documents. During the hearing, some additional relevant documents were also added to that bundle with the permission of the

Tribunal. The references to page numbers in these reasons are to the page numbers in the bundle.

9 Where the Tribunal had to resolve material disputes of fact, we did so, based on our assessment of the credibility of the witness evidence and by attaching weight to the contemporaneous documentary evidence. We found the Respondent's witnesses gave their evidence in a more straightforward and direct way and were able to corroborate their answers by reference to the contemporaneous documentary evidence. We found the Claimant was evasive in answering some questions, some of her answers did not support her case and some answers did not accurately reflect the reality of her probationary period with the Respondent. When tested her evidence did not stand up to scrutiny and inconsistencies were exposed. Even the Claimant's handwritten notes (which she says were made at the time of these events) did not support the case presented at this hearing. Mr Johnston has in his written closing submissions suggested the Respondent's evidence was more persuasive and identified key areas where the Respondent's evidence was not challenged and how that evidence was supported by contemporaneous documentary evidence. Overall, we found the Claimant's recollection of events was less reliable and less credible than the Respondent's witnesses and for those reasons we accepted and preferred the Respondent's witness evidence on any material dispute of fact.

Findings of fact

10 The Claimant was employed by the Respondent as a Deputy Town Clerk from 30 January 2019 until her employment was terminated during her probation period by letter dated 19 July 2019 with notice taking effect from 23 July 2019.

11 On or about 7 November 2018, the Claimant applied for the positions of Town Clerk and Deputy Town Clerk. The Claimant's application form is at pages 212 to 220 in the bundle. The Claimant's employment history shows she had previously held senior management roles before starting this role. The Claimant confirmed she did not consider she had a disability and did not require any reasonable adjustments to be made for her interview.

12 The recruitment process had been outsourced to a third-party recruitment agent 'A-MBC'. The Claimant was interviewed for both roles during the week commencing 26 November 2018. Following interview, another candidate was offered (but ultimately rejected) the position of Town Clerk. None of the other candidates (including the Claimant) were considered appointable to the post of Town Clerk (page 221). Based on the recommendations provided by A-MBC it was made clear to the Respondent that as far as the Town Clerk position was concerned, there was "*no second choice based on the interviews"*. The Claimant was however the preferred candidate for the Deputy Town Clerk post.

13 In the absence of a suitable candidate for the Town Clerk post, the Respondent appointed a locum Town Clerk, AA, with effect from 4 December 2018. AA has over 30 years' experience in local government and the highest qualification available (CILCA) for the post. He worked for the Respondent as Town Clerk until 18 May 2019 when CC another locum took over the role until the appointment of a permanent Town Clerk (NN) on 16 July 2019.

Disability

14 On 6 December 2018, the recruitment team at A-MBC wrote to the Claimant formally offering her the post of Deputy Town Clerk subject to completion of satisfactory pre-employment checks. The Claimant then completed a 'declaration of health' form which was returned to the recruitment team on 14 December 2018 (pages 166 to 168). Within that document the Claimant disclosed that she had been diagnosed with Fibromyalgia, some 11 years previously with varying symptoms which she managed, and which did not affect her work. She confirmed that she did not envisage any problems in the role of Deputy Town Clerk (question 1 at page 167). Whilst referencing her fibromyalgia, the Claimant positively asserted (at questions 5 and 7 at page 167) that she did not require any adaptations to assist her at work (save possibly in relation to heavy lifting) and secondly that she did not have a physical or mental medical condition that might affect her ability to perform the proposed job. No adverse effects of her fibromyalgia were disclosed.

15 Following receipt of the form by A-MBC the Claimant was spoken to by A-MBC's Occupational Health Manager who subsequently sent an email (page 222) forwarded to the Respondent indicating "*the Claimant has an underling health condition that is well controlled with medication. No adjustments or restrictions are envisaged to enable her to do the proposed role*." No other information was provided to the Respondent. The Respondent was not provided with a copy of the health declaration form, presumably on the basis that given its content and the assurances the Claimant had provided it was not considered necessary by the recruitment team at A-MBC who had not envisaged any need for adjustments/restrictions. Subsequently no further information was provided by the Claimant to the Respondent that made any reference to her fibromyalgia or to its adverse effects or impact on her ability to perform her role. No references were made to subsequently in any of the contemporaneous documents and in the emails exchanged between the Claimant and her managers or councillors during the probationary period.

16 The only information provided by the Claimant about her Fibromyalgia was the information she provided in the health declaration form which the Respondent did not see but was seen by A-MBC. The enquiries made by the recruitment team were not simply a tick box exercise where it was possible the Claimant might have missed or misunderstood the enquiry or why information was being sought. Given the Claimant's extensive senior management background she was familiar with the recruitment process and how it works. Question 3 of the form specifically identifies the purpose of the enquiry by reference to the legal duty of the employer, "*not to put any perspective or existing employee's health at risk and to make any reasonable adjustments relevant to the post*". The form makes it clear the information is used to "*determine whether any reasonable adjustments or auxiliary aids may be required to accommodate any disability or impairment which a candidate has declared and* ***ensure that none of the duties of the job will adversely affect any pre-existing health conditions the candidates has declared***"(highlighted text is Tribunal's emphasis). The Claimant's answer is unequivocal and clear: "***I manage it daily and has not affected my work. I do not envisage any problems in the role of Deputy Town Clerk***" (Question1). Question 3 "***Since this diagnosis I've***

proved myself able to carry out a senior management role effectively*". Question 5 – "****if moving and handling above includes heavy lifting. I may require assistance such as a trolley but I'm not sure what it refers to, so it is difficult to say****".** Finally, in answer to question 7 – *Do you have, or have you had a medical condition either physical or mental that may affect your ability to perform the proposed job*? The Claimant's answers '**no**'. The Claimant signed a declaration confirming all the information she provided was "*true and accurate and to the best of her knowledge*".

17 The Claimant understood the importance of the questions and the significance of her answers. She accepted that if she had answered the questions differently this might have prompted the Respondent to make further enquiries, seek and obtain advice and respond differently. The Claimant accepted her answers did not accurately reflect the evidence she gives now. She could not explain why she did not answer the questions accurately at time to explain the effects of her fibromyalgia. Even if the Claimant did not envisage any difficulties before she started the role, after starting the role and during her probation if she was experiencing any difficulties in the role because of her fibromyalgia she could have told the Respondent about them and that the position had changed. Instead the Claimant supressed information from the Respondent about her fibromyalgia and its effects.

Contract

18 The Claimant signed her contract of employment on 21 January 2019 (page 183).The contract expressly provides that the employment would be subject to "*satisfactory completion of a probationary period of not less than six months*" (clause 4 at page 171) and that the "*usual place of work is the Town Clerk's office*" (clause 8.1 at page 172). The Claimant was permitted to work from a meeting room away from the office. Working from home was not a requirement of the role. The contract expressly provides that "*working at home insurance*" was not applicable. The normal working days were Tuesday to Thursday (clause 13 at page 175).

19 The Claimant commenced her employment on Wednesday 30 January 2019 working two days in her first week. On her first day she had an induction with AA and spent some time with the Administrative Assistant GG, who was a very experienced clerk who had been the 'acting' Deputy Town Clerk before the Claimant was appointed. The Claimant was also provided with various reading materials and sources of information to refer to and was told she could work in other parts of the building such as the meeting room and the library. The office is a small office shared by AA, GG and the Claimant. They were the only paid employees of the Respondent providing the administrative support required for the Town Council to complete its business. As a small team they were all expected to work flexibly and closely to achieve that goal.

20 The Claimant was provided with a 'job' description for her role. One of the objectives of the post was to "*provide a* ***comprehensive support*** *service to the Town Clerk and to the Town Council as a whole especially through its committees and sub-committees, for which specific responsibilities will feature and for which a* ***flexible approach will be necessary****.* ***Working closely with the Town Clerk*** *and elected members the post holder would*

deliver a public profile for the Town Council and the Office of Mayor being specifically responsible for the Mayor's diary of engagements, Town Council publications and website".

21 The jobs description (paragraph 9) requires the Deputy Town Clerk to ensure that "***efficient and effective*** *methods of work in the general office administration to* ***deputise in the absence of the Town Clerk as far as possible within the limitations of the post to ensure that the operation of the Town council can continue in such cases"***. It was made clear to the Claimant that her role was to work closely and effectively with the Town Clerk for the benefit of the Town Council.

Probationary Period

22 On Monday 4 February 2019 the Claimant's spent three hours working from home even though Monday was not her normal working day and she had not been given permission to work from home/change her working day. On 5 February 2019 AA informed the Claimant that she should not have worked from home/changed her day without permission, it was not permitted under her contract of employment and should not happen again. The Claimant admitted she was at fault and apologised. She did not tell AA her reason for doing this was because of her fibromyalgia or any of its effects.

23 Despite those undisputed facts the Claimant complains that AA's 'reprimand'' was unfavourable treatment because of something arising in consequence of her disability namely "*her inability to concentrate in an environment with additional or unnatural noise*". The Claimant knew that her contract did not permit her to change her working day or to work from home. She knew she could work away from the office in a meeting room if she needed a quieter place to work. AA's 'reprimand' was a reasonable management response to the Claimant's admitted conduct in breach of her contract of employment. At the time she accepted she was at fault and had apologised but she was clearly annoyed about being pulled up for it. The Claimant was not treated 'unfavourably' by AA who was simply trying to do his job and manage her. The Claimant was not accustomed to being held accountable and was put out by the fact that she had not been appointed to the more senior role of Town Clerk.

24 On 7 February 2019, the Claimant informed AA that she wanted all instructions for tasks to be communicated by email only. The Claimant did this because she wanted to avoid speaking to AA. The Claimant was making it difficult for AA to manage her. She claims she made this request because of her fibromyalgia because she "*struggles to absorb new information unless it is provided in a clear written format"*. If that was the real reason for the request, she would have told AA about her fibromyalgia, how it affected her and why she needed to have all instructions for tasks in writing. She supressed that information. Given the timing of this request it was reasonable to infer that the issue in the forefront of the Claimant's mind was AA's 'reprimand' and her building resentment about his appointment.

25 On 8 February 2019 the Claimant went to see the Chair of the Staffing Committee (BB) at her home. This meeting took BB by surprise as she had returned from holiday and was not expecting the Claimant to visit her at home. The Claimant's main priority was to find out why she had not been recruited into the Town Clerk role and to complain about AA. She told BB

that she did not like AA or his management style and that did not want to work with AA. BB described it as a difficult meeting that the Claimant talked a lot and BB allowed her to 'offload' and say what she wanted to. BB was very concerned by some of the personal comments and criticisms made about AA which did not reflect her view of AA based on her interactions with him. BB agreed that the best way forward was a joint meeting with the Claimant AA and BB and a separate meeting between the Claimant and AA so that he could provide the Claimant the feedback on the interviews given by A-MBC. The Claimant did not inform BB about her Fibromyalgia or any effects it was having on her ability to perform her role.

26 On 13 February 2019 the Claimant cancelled the 'Interview Feedback Session" with AA which had been arranged for 14 February 2019.

27 In advance of the joint meeting on 21 February 2019 BB prepared an agenda (page 355). The first item on the agenda was "recruitment and feedback" which she had gleaned was the most important item for the Claimant. At this meeting the Claimant made no reference to her Fibromyalgia, or to any adverse effects or to any difficulties she was experiencing in her role. The Claimant has accepted that in the contemporaneous documents (including her own notes) there is no record of her raising her Fibromyalgia or any of its effects on her ability to perform her role, now relied upon to support her claim.

28 At the meeting on 21 February 2019 between the Claimant, AA and BB. CC describes how the Claimant largely dominated the meeting making personal accusations about AA and his management style to suggest incompetence. AA was mortified by what the Claimant was saying. As at 8 February 2019, when the Claimant had complained about him to BB all that had happened was the induction and the 'reprimand'. Nevertheless, he apologised if he had caused any offence. The Claimant accepted his apology said she was prepared to put the issue behind her and move on. BB accepted that at this meeting she had said to the Claimant "*well you do talk a lot'* but this was said in the context of the Claimant talking over and dominating the meeting not allowing AA to speak. We accepted that was the context of the comment and the Claimant was not unfavourably treated.

29 In evidence AA explained that he found it difficult working with the Claimant because she did not like taking instruction from him and took any constructive feedback he gave badly. He explained that the Town Clerk role requires certain procedural steps to be taken in a certain way at specific times for Council business to be completed effectively. He gave an example where the Claimant had been given a precedent to use to prepare a notice of a meeting. Instead of following the precedent the Claimant challenged the correctness of the terminology used in the precedent. When AA corrected the Claimant disagreed with the correction. Instead of learning from AA and accepting his guidance the Claimant made it difficult for AA. As a result of the poor working relationship AA decided to leave his employment and move on maintaining a professional working relationship with the Claimant until then.

30 On 26 March 2019, the Claimant emailed BB expressing an interest in reapplying for the permanent role of Town Clerk when it was advertised. There were 2 vacancies at that time because both AA and GG were leaving.

GG left the Respondent's employment on 4 April 2019. Before leaving she had an exit interview with AA (pages 401 to 406). In it she praised AA's management but referred to "*a very difficult and awkward environment in the office due to the working style of one individual*" which was a reference to the Claimant. GG reported a difficult working relationship with the Claimant who was "*openly critical of AA and of the councillors*" in GG's presence. After GG's departure a new Administrative Assistant HH was appointed who also reported having a difficult working relationship with the Claimant.

31 On 18 April 2019, the Council advertised for a Locum Town Clerk. On the same date the Claimant wrote to BB expressing her interest in applying for the locum position. On the same date BB informed the Claimant that the Staffing Committee were looking for someone who already had experience of inducting a new Council given the forthcoming elections in May 2019. BB explained they also needed someone who could deal with the financial side of the Council's business and the Claimant did not have the required qualification for this.BB confirmed that the Claimant's expression of interest would be taken into consideration but highlighted the difficulties she saw because the Council needed to have someone who could hit the ground running. The Claimant complains she was subjected to unfavourable treatment by being 'overlooked for the role of Town Clerk (or Locum Town Clerk) and her expression of interest was not taken seriously. She says this was because of something arising in consequence of her disability.

32 The Claimant's interest in the Town Clerk role was not overlooked it was considered and it was decided she was not suitable for it. CC was more experienced and more qualified (CILCA) and could hit the ground running. In contrast the Claimant was still in her probationary period as Deputy Town Clerk. She had not completed her probationary period there were concerns about her conduct and performance and she had not been confirmed in post. She had also not completed the lesser ILCA qualification. Furthermore, her application for Town Clerk had already been assessed in the recruitment exercise in late 2018 when she had not been considered 'appointable' as Town Clerk. She was not 'overlooked' for the role she was unsuitable for appointment. The Claimant has not proved she was treated unfavourably.

33 On 1 May 2019, BB and DD (former Mayor) met with CC. The only difficulty she had with taking the role was her limited availability. As a result, it was agreed that32 CC could work remotely and attend the office 1 day a week.

34 AA's last day of work with the Respondent as Locum Town Clerk was 18 May 2019, coinciding with the Annual Town Council Meeting, which was the first meeting of the new Council following the election of new Councillors.

Alleged Protected Disclosures

35 AA had become aware of a procedural issue relating to a prospective councillor MM who had not attended the Annual Meeting and had also failed to attend an earlier informal meeting on 9 May 2019 at which the majority of members of the new Council had signed their 'Declaration of Acceptance of Office'. This is a requirement for a Councillor to hold office. MM did not sign his declaration until after the Annual Meeting concluded on 18 May 2019. It

was agreed that this was a breach of the requirements of section 83 of the Local Government Act 1972.

36 AA had flagged up this issue on 21 May 2019 by sending an email to the Claimant and HH (blind copying CC). He explained what had occurred in relation to MM and clearly expressed his view that there was "*little doubt"* that MM's declaration of acceptance had not been signed in accordance with the relevant legislation in breach of the requirements resulting in a "Casual Vacancy" for a Councillor.

37 On 22 May 2019 the Claimant forwarded this email to CC believing that she had not been sent a copy. The Claimant accepts that she did not disclose any information to CC and no longer relies upon this as a disclosure qualifying for protection.

38 On 24 May 2019 the Claimant sent a text message to EE, the new Mayor, drawing his attention to the fact that while she was in Town on her day off she noticed that the notices had not been posted by HH for the Extraordinary Town Council meeting that was due to take place on 30 May 2019. It is accepted that if the notices had not been posted by EE and the Claimant that day the required statutory public notice period for that meeting would not have been met and the meeting would have been postponed until later in the week. The Claimant and EE ensured the requisite notices were posted on the 3 Public Notice Boards located in Town. It is clear from the exchange of text messages that EE was highly appreciative of the Claimant's assistance. The Respondent accepts that the Claimant made a disclosure of information when she informed EE that legal notices in respect of the Extraordinary Town Council meeting had not been prominently displayed around town. It is accepted there is a statutory requirement for appropriate notices to be displayed a set number of days in advance of a meeting taking place and that if the notices had not been displayed on 24 May 2019 the requirement would not have been met.

39 The disputed issue was whether the Claimant reasonably believed at the time of making the disclosure that she was making it in the public interest. In deciding what the Claimant reasonable belief was at the time she sent her text messages to EE we considered the evidence she gave about this during cross examination. The Claimant accepted HH was at fault in not putting up the notices. She had not contacted CC to inform her of that failure and accepts CC was unaware of the mistake. Although the Claimant initially said she raised it with EE 'not to criticise anyone' she also then described herself as '*someone more experienced in the role*' 'flagging' up 'something CC had missed' to EE. The Claimant's answers revealed her genuine subjective belief at the time she sent the text to EE. She was not concerned about the effect of the statutory notices or any delay of the meeting. She saw an opportunity to use a mistake by HH to criticise her manager and to portray herself to the new mayor in a positive light and her manager negatively for her own personal benefit. She was using this mistake to ingratiate herself with EE to develop a close relationship which was later used to bypass her manager on other matters, for example getting EE to authorise an absence from work in June 2019.

40 On 28 May 2019 the Claimant sent an email to CC informing her that II from the Elections Office had called to enquire if there was a Casual Vacancy.

The Claimant informed II that an Extraordinary Town Council meeting was due to take place on Thursday 30 May 2019 to discuss this. The Claimant has not disclosed any evidence of any other communications with II. She admitted that she deleted any emails to keep her communications with II secret from the Respondent and CC because she did not want them to know she had been communicating with II. The Claimant conceded that by concealing what she had done neither CC nor anyone else at the Respondent could have known what (if anything) she had disclosed to II.

41 On 30 May 2019, at the Extra Ordinary Council meeting AA's advice was considered and a vote held on the Casual Vacancy issue. Against AA's advice the majority voted against formally declaring a Casual Vacancy. Following an email from II on 5 June 2019 reminding the Council they must declare the Casual Vacancy as flagged up by AA, the Respondent sought legal advice upon the position. This ultimately led them to reverse the decision made at the Extraordinary Meeting and declare a Casual Vacancy, notice of which was given on 11 June 2019. While it is now clear that behind the scenes the Claimant was in contact with II to inform her of the outcome, no one at the Respondent knew of the Claimant's communications with II. It was possible that an interested member of the public or a Councillor who disagreed with the majority decision could have reported it to the Elections Office.

42 When CC commenced her employment with the Respondent the Claimant was on holiday. CC only worked in the office one day per week, so she and the Claimant had very limited personal contact. On 30 May 2019 the Claimant and CC worked together in the office. CC played the radio in the office. Instead of the Claimant communicating directly with CC and asking her to turn down/switch off the radio, she sent an email to BB to complain about CC playing the radio in the office. In the email the Claimant only says she found the music 'distracting'. She did not say her concern about the radio playing was in any way connected with her Fibromyalgia or it affected her ability to perform her role.

43 Late on 5 June 2019, the Claimant sent an email to CC informing her that she would not be in the office the whole of the following day (6 June 2019) due to a medical appointment. The Claimant had known about the appointment some weeks before that date but did not inform CC about it or what it related to or that it was part of her management of her condition on an ongoing basis.

44 On 11 June 2019, CC instructed the Claimant to share her log in details with HH so that he could upload a document onto the Respondent's website in the Claimant's absence. The Claimant initially refused to comply insisting HH obtain a separate log in. CC made it clear to the Claimant it was a time sensitive issue and a management instruction. If, any issue arose about HH using the login CC confirmed she would be accountable.

45 On 13 June 2019 the Claimant requested paid time off for her absence on 6 June 2019. There followed an exchange of emails between the Claimant and CC in relation to how this absence should be recorded. CC believed that the time off would need to be recorded as an 'unauthorised absence' because neither CC nor BB had authorised the absence. The Claimant had not informed CC, that EE had authorised the absence for the medical

appointment or that it related to her fibromyalgia or that she "*has to attend a significant number of medical appointments to manage her condition on an ongoing basis"* (the substantial disadvantage relied upon). The Claimant had not informed her manager that the appointment was only for ½ hour, when she claimed a full day's pay. Looking at the contents of the email exchange it was reasonable for CC to respond in the way she did by querying the request and expressing her concerns about the absence and the way the Claimant had dealt with it. The Claimant has not proved she was treated unfavourably

46 EE confirmed that he had been under the impression that the Claimant had not been able to contact CC and BB and he was unaware that the Claimant had bypassed them both and had subsequently sought to claim paid time off for the whole day. The Claimant had become difficult for CC to manage. CC's email response of 13 June 2019 was a reasonable management response to the Claimant's absence on 6 June 2019 which had not been authorised in the way it should have been and was completely justified in the circumstances. CC was not treating the Claimant unfavourably or detrimentally.

47 An issue then arose in relation to the payment of the Claimant's salary in June 2019. Contractually the Claimant should have been paid on or before 16 June 2019. She was not in fact paid until 20 June 2019. It is apparent from the contemporaneous correspondence that the reason for the delay was an issue getting cheques signed because of the change of Council members following the election. When the Claimant received her salary cheque on 20 June 2019, she asked for permission to go to the bank in her working hours to pay the cheque in. CC asked the Claimant to do this during her lunch break. The Claimant disagreed and left the office to pay the cheque into her bank without authorisation. While the Claimant might genuinely feel aggrieved by the delay, she had been refused permission by her manager. Despite that refusal the left went ahead and left the office during work time to deposit the cheque. She was not put at any disadvantage or subjected to any detriment by CC.

48 On 18 June 2019, the Claimant was invited to a probationary meeting on 19 June 2019. In advance of the meeting the Claimant was provided with a proforma probationary review form (page 419). The Claimant attended the probationary review meeting with BB and EE on 19 June 2019. The Claimant's says (para 90 of witness statement) that at this time she sought legal advice because she thought her contract was going to be terminated. The Claimant was also aware her performance/conduct in the role of Deputy would be discussed at the review because the proforma document highlighted areas that would be discussed which included her working relationships with others. In cross examination the Claimant agreed that the purpose of a probationary period was to give an employer time to assess whether the employee had satisfactorily completed the probationary period and was suitable for the role and for an employee to also decide if the job was the right fit for them. Either party could subjectively decide the individual/role was not suitable and give notice to bring the contract to an end.

49 At the probationary review meeting on 19 June 2019 the meeting started with some positive feedback in the area where the Claimant had performed

well which was in relation to the Development Committee meetings. However, in relation to all other areas of work particularly working relationships with colleagues and councillors the feedback was negative. BB and EE confirmed that the Claimant's relationships with 2 locum town clerks and an administrative assistant had broken down resulting in these colleagues leaving their employment. HH had expressing concerns to EE about his poor relationship with the Claimant. The risk to the Council was that it could lose the next Town Clerk, given the small office environment and the Claimant's history of poor working relationships. The common factor cited by all departing employees was the Claimant. The Respondent had formed the view the Claimant was an extremely disruptive influence in a small office environment and intended to terminate the Claimant's employment.

50 The Claimant struggled to accept the negative feedback and became visibly distressed. At this point the only part left to complete was inform the Claimant that the contract of employment was to be terminated. The Claimant had already anticipated that outcome before the meeting. BB and EE agreed to delay completion of the review until the following week because of the Claimant's distress.

Alleged Protected Act

51 The Claimant had indicated her intention to raise a grievance against CC but that was all that she said. She did not suggest her grievance against CC would raise allegations of discrimination. BB believed the Claimant wished to raise a grievance but that was all she knew. BB advised the Claimant that if she wished to raise a grievance, she ought to put it in writing.

52 On 20 June 2019, the Claimant was informed that the probationary review would be completed on 26 June 2019. It was the Claimant case that BB and EE had authorised her to take as much paid time off work as she required so that she could write up her grievance. BB and EE denied this. There is no evidence to support the Claimant's assertion. We preferred the evidence of BB and EE which was supported by the contemporaneous documentary evidence of the notes of the meeting and the subsequent email exchange. There was no reason for them to agree to delay terminating the employment.

53 On 25 June 2019, BB wrote to the Claimant reminding her that the probationary review would be completed the next day. When the Claimant responded stating that "*she had been told that she could take as much time as she needed'*, BB corrected the Claimant's misunderstanding confirming the only reason for the delay in providing the outcome was because the Claimant had been too upset on 19 June 2019 and the next date had been agreed and would be completed as on 26 June 2019. The Claimant knew there was a need to progress matters and that BB needed to report back to the Staffing Committee.

54 The Claimant did not attend the second probationary review meeting on 26 June 2019 but reported a sickness absence she self-certified for 'work related stress'. BB reasonably formed the view that the Claimant was delaying matters to deliberately avoid the outcome. The Claimant complains the failure to arrange a second probationary meeting at a mutually convenient time was unfavourable treatment because of something arising

in consequence of her disability or was a detriment she was subjected to because the Respondent believed she might do a protected act. The only reason the first probationary review meeting was not concluded on 19 June 2019 and was suspended was because the Claimant became distressed. The Claimant was informed the next day that it had been arranged for 26 June 2019 giving her ample time to recover and prepare for the outcome. The Claimant was not unfavourably treated or subjected to a detriment.

55 On 4 July 2019, a meeting of the Staffing Committee took place. From the minutes it was clear that the termination of the Claimant's employment had been discussed and agreed by the Committee on 13 June 2019. However, before that decision could be communicated to the Claimant, she commenced a period of sickness absence which was continuing as at 4 July 2019. BB was therefore authorised to seek HR advice. BB provided the HR adviser with a detailed briefing note setting out the background of the Claimant's employment and the breakdown in relationships with the rest of the team. HR advice was obtained and was considered at the meeting of the Staffing Committee on 16 July 2019. A unanimous decision was taken by the committee that the Claimant's employment should be terminated for the reasons set out in the termination letter. Although the letter was signed by BB and EE, the decision to terminate the Claimant's employment was a decision made by the Staffing Committee of the Respondent.

56 On 19 July 2019 a letter was sent on behalf of the Staffing Committee terminating the Claimant's employment with effect from 23 July 2019 with one weeks' pay in lieu of notice. The termination letter sets out the reasons why the Claimant's employment was terminated. The Respondent had decided the Claimant had "*not fulfilled*" the conditions of her employment. After setting out some of the concerns the letter concludes "*these episodes represent examples on unacceptable conduct which has led us to the inescapable conclusion that you have failed to demonstrate the ability to meet the reasonable expectations required of the incumbent of this vital role.* ***Taking into account the multiple concerns*** *which have arisen (these are by no means limited to those detailed above)* ***your performance in the role has led to the current situation*** *in which there has been an* ***overall loss of trust and confidence*** *in your ability to effectively discharge your duties and this has* ***led to an irretrievable breakdown in your working relationship with the council and its staff*****'.** The Claimant had not satisfactorily completed her probationary period and the Respondent was entitled to terminate her employment. Those were the beliefs held by the Staffing Committee and the reason why they decided to terminate the Claimant's employment. Neither EE or BB were cross-examined about the genuineness of those beliefs nor was it suggested that those were not the real reasons for terminating the Claimant's employment at the end of the probationary period.

57 Given the weight of the evidence, Mr Mortin quite properly conceded that there was a breakdown in working relationships between the Claimant and her colleagues. However, he suggests the Respondent should have investigated the reason why those working relationships had broken down and whether it was caused by the Claimant's Fibromyalgia. The first time this argument was made was in the written closing submissions. The particulars of claim do not admit to a breakdown in working relationships or

allege that was something arising in consequence of disability (see 2.1.1-2.1.6). The case had been brought on the basis that the Respondent's reasons (including the breakdown in working relationships) were not the genuine or real reason for dismissal.

58 The Claimant accepted in cross examination that she had an '*extremely difficult relationship with AA and an extremely difficult relationship with CC*'. Mr Johnston asked the Claimant whether it was a 'coincidence' that two consecutive Town Clerks had experienced similar issues with the Claimant not taking instruction, not accepting authority and not supporting her managers. The Claimant answer was: "*it was not a coincidence it was unfortunate*". What she did not say was that her 'extremely' difficult working relationships with 2 different managers were caused by her Fibromyalgia. It was difficult to see how or why the Respondent ought to have made the suggested causal link between her behaviour and her disability when the Claimant did not make it as part of her claim.

59 Mr Johnston put to the Claimant that the correct 'take away' from the probationary meeting for both BB and EE, was that there was no realistic prospect of any improvement in working relationships and a very real risk of repetition because the Claimant had failed to demonstrate any insight into her behaviour and had not accepted any of the concerns put to her at the probationary review meeting. The Claimant did not disagree with those propositions or suggest that she had demonstrated any insight into her behaviour. Mr Johnston put to her the fundamental issue as he saw it was that the Claimant simply could not accept being 'second fiddle' and wanted to have the 'top job'. The Claimant denied that was the case and said she was '*happy'* being the Deputy. Unfortunately, much of the undisputed evidence does not support that answer. From the beginning to the end of the employment the Claimant struggled to accept being second fiddle and she was 'unhappy' being the Deputy.

Applicable Law

60 Mr Johnston helpfully set out the applicable law in relation to each of the complaints made by the Claimant in his written closing submission which was agreed. Mr Mortin helpfully prepared the lengthy agreed list of issues in the context of the applicable law. The Tribunal are grateful for the assistance and cooperation provided by both counsel during the hearing. Sensibly with such a lengthy list of issues they have minimised areas of dispute where possible.

Equality Act 2010("EqA") Complaints

61 The discrimination complaints are brought under Part 5 of the EqA and specifically section 39 which applies to 'work' and 'employees'. An employer has obligations not to subject an employee to a detriment (39(2)(c), not to dismiss (39(2)(c) and not to victimise. It has a positive duty to make reasonable adjustments (39(5)). A reference in this part to a 'dismissal' includes a reference to termination of employment with or without notice.

62 For the disability discrimination complaint Section 6 (disability), Section 13 (direct Discrimination) Section 15 (discrimination arising from disability) Section 20 and 21(failure to make reasonable adjustments) of the EqA apply. For the victimisation complaint section 27 EqA applies. For

Jurisdiction section 120 EqA applies. For each complaint brought under the EqA the burden of proof provisions in section 136 apply.

63 Section 136 (Burden of proof) provides that:

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

(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 the contravention occurred.

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

64 Case Law has provided guidance on how the burden of proof should be applied. In **Hewage and Grampian Health Board 2012 ICR 1054 SC** Lord Hope endorsed the view of Mr Justice Underhill (then President of the EAT) in Martin -v- Devonshire Solicitors 2011 ICR 352 EAT that "*The burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination-generally the Respondent's motivation…they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the Respondent's motivation and what is in issue is the correct characterisation in law".*

65 If the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination then that is the end of the matter see **Laing -v- Manchester City Council 2006 ICR EAT** (a case involving race discrimination)

66 A reason for dismissal has been described as a "set of facts known to the employer or it may be beliefs held by him which cause him to dismiss the employee" see **Abernethy-v-Mott Hay and Anderson 1974 ICR 323 CA**

67 The Respondent must have knowledge that the Claimant has the protected characteristic of disability at the material time for the Claimant to establish a prima facie case of direct disability discrimination, discrimination arising from disability and a failure to make reasonable adjustments.

68 Section 6(1) of the EqA defines disability and provides that "*a person(P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities". Subsection (2) provides that "a reference to a disabled person is a reference to a person who has a disability*".

69 Section 13(1) EqA prohibits direct discrimination which occurs when *"A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others"*.

70 Section 15(1) EqA prohibits discrimination arising from disability which occurs when a person (A) discriminates against a disabled person(B) if:

- *A treats B unfavourably because of something arising in consequence of B's disability, and*

- *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

71 Section 15(2) EqA provides a defence for an employer (A) if "**A shows that A did not know and could not reasonably have been expected to know that B had a disability".**

72 Section 20 (3) EqA imposes a duty on a person A to make reasonable adjustments "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".

73 Section 21 EqA provides that a failure to comply with Section 20(3) is a failure to comply with a duty to make reasonable adjustments. A substantial disadvantage is something that is "more than minor or trivial" (section 212(1) EqA)

74 Schedule 8 paragraph 20 EqA addresses the limitations on the duty to make reasonable adjustments and provides that " ***A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to***".

75 **In Environment Agency-v- Rowan 208 IRLR 20** the EAT provided guidance on the matters an Employment Tribunal must identify before it can properly make findings of a failure to make reasonable adjustments. Applying that guidance to the particular facts requires the Tribunal to identify firstly, the PCP applied by or on behalf of the employer. Secondly the identity of the disabled comparators and thirdly the nature and extent of the substantial disadvantage suffered by the disabled person.

76 Section 27 EqA prohibits victimisation. Section 27(1) provides that "*A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act"*.

77 Section 27(2) identifies the 4 acts than can constitute a protected act which are: (a) bringing proceedings under the EqA, (b) giving evidence or information in connection with proceedings under the EqA,(c) doing any other thing for the purposes of or in connection with the EqA (d) making an allegation (whether or not express) that A or another person has contravened the EqA.

78 For liability to be established the Respondent must have knowledge the Claimant has done or may do a protected act.

79 The Equality and Human Rights Code of Practice on Employment (2011) ('EHRC') explains that unfavourable treatment means 'put at a disadvantage' (paragraph 5.7). Detriment in the context of victimisation is

anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage (paragraph 9.8).

80 In **Williams -v Trustee of Swansea University Pension and Assurance Scheme and anor 2019 ICR 230 SC** the term 'unfavourable' treatment was considered and it was held that this term in section 15 EqA was deliberately chosen by Parliament and used in preference to detriment because it has the sense of placing a hurdle in front of creating a particular difficulty for disadvantaging a person. It followed that treatment that was advantageous cannot be said to be unfavourable treatment because it was not sufficiently advantageous.

81 For the Tribunal to have jurisdiction to consider the EqA complaints, section 123 EqA applies. It sets out the time limits and provides that "proceedings ***may not be brought*** after the end of: a) the period of 3 months starting with the date of the act to which the complaint relates or (b) such other period as the employment tribunal thinks just and equitable". Subsection 123(3) provides that "conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it"

Employment Rights Act 1996("ERA" Complaints)

82 For the protected disclosure detriment/ dismissal complaint sections 43B, 47B and section 103A ERA apply. Section 43B defines a protected disclosure. It is a "*qualifying disclosure which means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more*" of the relevant failures identified in subsections 43B91)(a)-(f). The relevant failure the Claimant relies on is (b) "that a person has failed to comply with a legal obligation".

83 In **Chesterton Global Ltd-v-Nurmohad 2018 ICR 731** the Court of Appeal provided some guidance on the public interest requirement. It held that even where the disclosure relates to a breach of the workers own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker. The factors that might be relevant.

- The numbers the group whose interests the disclosures served.
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.
- The nature of the wrongdoing disclosed.
- The identity of the alleged wrongdoer.

84 Section 43B (1) ERA can be satisfied even where the basis of the public interest disclosure is wrong/or there was no public interest in the disclosure being made **provided** that the **workers belief** that the disclosure was made in the public interest was **objectively reasonable**. **Was the workers subjective belief objectively reasonable**?

85 Section 47B provides that "*a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure*".

86 Section 103A provides that "*an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure*".

87 In determining whether treatment is done on the ground of making a protected disclosure the test to be applied is whether the making of the protected disclosure was a material cause of the detriment see **Fecitt and Others-v- NHS Manchester 2012 IRLR 64** at paragraph 48: "*Section 47B will be infringed if the protected disclosure materially influences(in the sense of being more than a trivial influence) the employers treatment of the whistle-blower*".

88 For the Tribunal to have jurisdiction to consider the complaints brought under the ERA section 48(3) ERA applies. It provides that "*an Employment Tribunal **shall not consider a complaint** unless it is presented before the end of 3 months beginning with the date of the act or failure to act to which the complaint relates or where the act or failure is part of a series of similar acts or failures the last of them or within such further period as the tribunal considers reasonable in a case where it was not reasonable practicable for the complaint to be presented before the end of that period of three months"*.

89 For the unfair dismissal complaint an employee with less than 2 years' service cannot bring a complaint of ordinary unfair dismissal complaint. In those circumstances the **burden of proof is on the employee** to show an automatically unfair reason for the dismissal for which no period of qualifying service is required. This principle has been held to apply where the inadmissible reason for dismissal is asserted to be a protected disclosure (**Ross -v- Eddie Stobbart Ltd EAT 0068/13**).

Submissions

90 Very lengthy and detailed written closing submissions were provided by both parties which we considered very carefully in our deliberations.

Conclusions

The dismissal

91 Dealing firstly with the dismissal complaints that were the only complaints made in time. What was the reason why the Claimant's employment was terminated by the Respondent? The Respondent's asserted the reason was that the Claimant had failed to satisfactorily complete her probationary period, there had been an irretrievable breakdown in relationships between the Claimant her colleagues and councillors during the probationary period and an overall loss of trust and confidence. The Claimant asserts that those reasons are not the genuine or real reason for dismissal. The real reasons are discriminatory, either because of her fibromyalgia or because of something arising in consequence of her fibromyalgia or because the

Respondent believed she may do a protected act or because she made protected disclosures.

92 We found that the facts known and beliefs held by the Respondent's Staffing Committee when they made the decision to terminate the Claimant's employment were that the Claimant had failed to satisfactorily complete her probationary period, there had been an irretrievable breakdown in relationships between the Claimant her colleagues and councillors during the probationary period and an overall loss of trust and confidence in the Claimant.

93 The decision to terminate the Claimant's employment during the probationary period was made by the Staffing Committee on 13 June 2019. The intention was that BB and EE would communicate that decision to the Claimant at her probationary review meeting on 19 June 2019. At that meeting they explained to the Claimant the reasons why the Staffing Committee had decided her performance was unsatisfactory. The feedback provided was mostly negative highlighting her poor working relationships with colleagues and councillors during the probationary period (see paragraph 49). The Claimant had expected her employment would be terminated. The communication of that decision was then delayed because the Claimant commenced a period of sickness absence. The Respondent obtained HR advice about terminating the employment during the sickness absence. On 16 July 2019 the staffing committee made a unanimous decision to terminate the Claimant's employment for the reasons set out in the termination letter dated 19 July 2019: the Claimant's unsatisfactory performance which had led to "*an overall loss of trust and confidence"* The Claimant had failed *"to effectively discharge her duties"* and there was "*an irretrievable breakdown"* in working relationships (see paragraph 56).

94 Neither EE or BB were cross-examined about the genuineness of their beliefs nor was it suggested that those were not the real reasons for terminating the Claimant's employment at the end of the probationary period. We found that from the outset of her employment the Claimant could not accept being second fiddle to the Town Clerk and she was unhappy being the Deputy (paragraph 59). She had 'extremely difficult' relationships with two consecutive managers who together with a third colleague had cited difficulties working with the Claimant as their reason for leaving. There was a very real risk of repetition because the Claimant had failed to demonstrate any insight into her behaviour and had not accepted any of the concerns that were put at the probationary review meeting. The risk to the Council was that it could lose its next Town Clerk for the same reasons, given the Claimant's history of poor working relationships. The Respondent had reasonably formed the view that the Claimant was an extremely disruptive influence in a small office environment (paragraph 49).

95 It must be remembered that the Claimant was still in her probationary period. She had been given 6 months to prove, to the satisfaction of her employer, that she was suitable for the role. She failed to do so. The Claimant's job description requires her to provide *'comprehensive support'* to have a *'flexible approach"* and to work *'working closely with the Town Clerk and elected members".* (see paragraphs 20 and 21 of our findings of fact). She had failed to demonstrate that she met these requirements of the role

because she struggled with being second fiddle to the Town Clerk and she was not 'happy' being the Deputy (paragraph 59).

96 With those positive findings of fact, and no real dispute about the Respondent's motivation or any doubt about those facts, the Tribunal concluded that the only reason the Claimant's employment was terminated was because the Claimant had failed to satisfactorily complete her probationary period, there had been an irretrievable breakdown in relationships between the Claimant her colleagues and councillors during the probationary period and an overall loss of trust and confidence in the Claimant which made continued employment untenable. Those reasons were the genuine real and only reasons for dismissal. This was not a case where we had to consider the shifting burden of proof because we were able to make positive findings pointing one way. The dismissal was not for any discriminatory reason.

97 The Claimant has also failed to prove that the reason for her dismissal was the making of a protected disclosure and her complaint of automatically unfairly dismissal is not well founded. In those circumstances the Claimant has failed to prove her dismissal was for a discriminatory or an inadmissible reason and her complaints about the dismissal made under sections 13,15,27 EqA and section 103A ERA are not well founded and are all dismissed.

The Protected Disclosure Complaints

98 It was agreed that if the Tribunal found the dismissal was not automatically unfair the pre-dismissal detriment complaints made under section 47B ERA are out of time and the Tribunal had no jurisdiction to consider them. It was agreed that if any out of time detriment complaint is proven then the Claimant will rely on an extension of time on the ground that it was not reasonably practicable for her to present her claim in time and she presented her claim within a further reasonable period thereafter (issue 36 and 37 LOI).

99 For the protected disclosure detriment complaints (and the complaint of automatically unfair dismissal on the grounds of making protected disclosures) to succeed the Claimant must prove she made a protected disclosure. We considered whether the Claimant's disclosures on 24 May 2019 to EE or on 28 May 2019 to CC (see paragraphs 38,39 and 40) qualified for protection. For the disclosure on 28 May 2019 the Claimant sent an email to CC informing CC that II from the Elections Office had called to enquire if there was a casual vacancy. The Claimant had not disclosed any evidence of her communications with II which she relies upon to show there was a relevant failure in relation to the casual vacancy. She admitted the disclosure about the casual vacancy had already been made to her employer by AA on 21 May 2019. She admitted she deleted any emails to II to keep her communications secret from the Respondent and CC because she did not want them to know she had been communicating with II. The Claimant conceded that by concealing those communications neither CC nor anyone else at the Respondent could have known what (if anything) she had disclosed to II and they could not therefore have subjected the Claimant to any detriment for making that disclosure. As a result, the Claimant has not proved she made a protected disclosure to her employer on 28 May 2019.

100 As to the alleged disclosure on 24 May to EE, we found the Claimants genuine subjective believe in making the disclosure about the statutory notices was for personal benefit only (see our findings at paragraph 39). The Claimant was not concerned about the consequences of HH's mistake to the public because all that would have happened was that the meeting would be delayed to later day in that week to rectify that mistake. The Claimant saw an opportunity to use HH's mistake to criticise her manager and portray herself to the new mayor in a positive light and her manager in a negative light for her own personal benefit. She was using this mistake to promote herself to EE and develop a closer relationship with him for her own personal benefit. An example is bypassing her manager by getting EE to authorise her absence from work in June 2019 instead of asking her manager to authorise it (see paragraph 45 and 46).

101 We followed the guidance in **Chesterton** to consider whether the disclosure to EE, whilst being a matter where the interest in question was personal in character, had any features that may make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker. The factors that might be relevant are the numbers in the group whose interests the disclosure served, the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer.

102 This disclosure was about the Claimant highlighting a mistake made by HH which was spotted by the Claimant and corrected by the Claimant and EE with no real consequence to anyone else. The Claimant did not inform her manager about HH's mistake but reported it to EE. The nature of the wrongdoing was that it was an administrative mistake by HH. If it had not been spotted and corrected the consequence was that the Council meeting would have been delayed until later in the same week. It was spotted and the Council meeting took place on time. It was a mistake by HH which did not and would not have stopped the Council from properly completing its business. It was not a disclosure made by the Claimant to prevent any wrongdoing by HH. Although a disclosure can be protected even where the basis of the public interest disclosure is wrong/or there was no public interest in the disclosure being made such conclusions were not supported by our findings of fact. We did not find the Claimant's subjective belief was that the disclosure was made in the public interest was objectively reasonable. The disclosure made to EE was not a qualifying protected disclosure meeting the requirements of section 43B ERA. Having concluded that the Claimant did not make any protected disclosures it follows that her complaints made under section 47B and section 103A ERA are not well founded and are dismissed.

Victimisation Complaints

103 For the pre-dismissal complaint of victimisation to succeed the Claimant must prove that on 19 June 2019, the Respondent believed that she may do a protected act when she indicated she was going to raise a grievance about CC. Based on our findings of fact (paragraph 51) BB did not believe the Claimant may do a protected act. The Claimant only told BB that she wanted to raise a grievance about CC. Nothing was said at the time or subsequently to suggest that the Claimant was intending to make

allegations of discrimination against CC. It is for the Claimant to prove that BB believed she may do a protected act falling within section 27(2)(d) EqA that she was going to make "*an allegation (whether or not express) that CC had contravened the Equality Act 2010"*. We did not find the alleged detriment was made out (see our findings of fact at paragraph 54). Furthermore, the Claimant was not put at any disadvantage because of the Respondent's alleged failure to arrange or invite the Claimant to a second probationary review meeting. The first review had been suspended out of consideration for the Claimant's welfare. The Respondent was then promptly and proactively trying to rearrange the probationary review and it was the Claimant who was trying to avoid the outcome she was expecting of having her contract of employment terminated. The Claimant has not satisfied the requirements of section 27(1)(b) and (2)(d) EqA and her complaint of victimisation is not well founded and is also dismissed.

Knowledge of Disability/Knowledge of Substantial Disadvantage

104 The Respondent's defence was that it did not have the requisite actual or constructive knowledge of disability and substantial disadvantage at the material time for it to liable for disability discrimination. It *"did not know and could not reasonably be expected to know that the Claimant had a disability and was likely to be placed at a substantial disadvantage by any practice of the Respondent" (issue 5 and 9 LOI)*.

105 It was agreed that the complaints of a failure to make reasonable adjustments were brought out of time (the last alleged failure was on 19 June 2019). The Claimant relies upon 5 PCP's she says the Respondent applied to her which placed her at a substantial disadvantage. These were a requirement to work from the office, the practice of assigning tasks and duties primarily through oral instruction, a requirement to comply with absence management process, a practice of managing probationary periods in accordance with the Respondent's internal processes and a practice of managing complaints and grievances in accordance with the grievance policy. The Claimant complains that these PCP's put the Claimant at a substantial disadvantage in the period from 5 February 2019 to 19 June 2019 compared to persons who do not suffer from Fibromyalgia in 5 ways : (1) the Claimant finds it difficult to block out noise and distractions which impact on her concentration and her ability to carry out tasks assigned to her or absorb new information (2) the Claimant struggles to absorb new information unless it is provided in a clear written format or notified in advance: (3) the Claimant needs additional time to consider new information(4) the Claimant's conditions are aggravated by stress which result in her suffering additional pain: (5) the Claimant has to attend a significant number of medical appointments to manage her condition on an ongoing basis.

106 The Claimant contends a number of reasonable adjustments ought to have been made by the Respondent included permitting the Claimant to work from home: not playing the radio at work: reconvening the probationary meeting on a date mutually convenient for the Claimant and permitting the Claimant to have time within her working hours to prepare her written grievance (10.4 LOI).

107 Mr Mortin's advances four reasons why he says the Respondent had actual or constructive knowledge of disability. Firstly, the Claimant's impact statement refers to 'fibro fog'. The symptoms of fibromyalgia are known to include cognitive issues and an inability to process new information and instructions clearly. Unnatural noise impacts on the Claimant's concentration, because it is a well-known symptom of fibromyalgia that the individual suffers from heightened senses. Secondly, the Respondent was fully aware that the Claimant suffered with fibromyalgia since the beginning of her employment because the Claimant completed a declaration of health form on 14 December 2018 confirming this. Thirdly the declaration form contains the diagnosis of Fibromyalgia which has "*a wide range of varying symptoms*" and it confirms the condition is long-term. The Claimant was diagnosed 11 years prior to this. It also confirms that this impairment was managed with medication. Fourthly, the declaration form confirmed that "information about the Claimant's fitness for work will be passed to the Claimant's relevant line manager and HR representative" (Page 166). Mr Mortin submits that even in instances where a disability is disclosed to Occupational Health, but for whatever reason that information is not disclosed to the employer, an employer will not usually be able to rely on a lack of knowledge. The EHRC code makes it clear that in such instances, knowledge is effectively imputed to the employer. It is no defence for the Respondent to say that simply because the Occupational Health advisor did not provide them with the information that they did not have knowledge of it. Mr Mortin submits that the onus is on the Respondent to establish that it was unreasonable for it not to know about the Claimant's disability and he submits the Respondent cannot establish this.

108 Mr Johnston contends that although the Claimant had identified that she suffered from fibromyalgia in the pre employment declaration of health form she did so in a manner which did not give the slightest suggestion that the condition would impact upon the performance of her duties in any respect or had a substantial adverse effect on any other normal day to day activity. She sought to suppress information to minimise and downplay any adverse effects. He submits the sum total of information that was actually provided to the Respondent as a result of the recruitment exercise was (1) the Claimant did not consider herself to have a disability (2) that she had an underlying health condition that was well managed with medication and (3) that she did not require any adjustments in order to enable her to undertake the role of Deputy Town Clerk. During her employment the Claimant did not disclose any information that any issue she was experiencing at work related to her condition or that it was adversely affecting her in any way. The complete absence of any reference whatsoever by the Claimant within the contemporaneous correspondence(or in any of the available notes of relevant meetings including those the Claimant produced) to the fact that she suffered from fibromyalgia or to the effects she now seeks to rely on is described by Mr Johnston as 'striking'. He submits that If the Claimant's condition is as wide ranging as she now alleges particularly in relation to cognitive issues, the contents of her declaration of health form and her application form were 'actually significantly misleading'

109 We agree with Mr Johnson's submissions which were supported by our findings of fact at paragraphs 14-17. For the Respondent to be imputed with the requisite knowledge of disability at the material time all the requirements

of section 6 of the EqA must be met: that the Claimant had a physical or mental impairment that has a substantial and long term adverse effect on the Claimant's ability to carry out normal day to day activities. We found the Claimant had not disclosed to AA or BB or anyone else at the Respondent that her condition of fibromyalgia had substantial adverse effects on her ability to carry out normal day to day activities. The only information the Respondent had received from the third-party conducting the recruitment exercise was that: "*the Claimant has an underlining health condition that is well controlled with medication. No adjustments or restrictions are envisaged to enable her to do the proposed role*."

110 The EHRC code states that an employer must "do all it can reasonably be expected to do to find out whether a person has a disability" (see paragraph 5.15). We conclude that reasonable enquiries were made by the Respondent to find out whether the Claimant had a disability, specifically to "*determine whether any reasonable adjustments or auxiliary aids may be required to accommodate any disability or impairment which a candidate has declared (*see paragraph 16)*.* The Code also makes the important point that knowledge of disability held by an employer's agent or employee such as an occupational health advisor, personnel officer or recruitment agent will usually be imputed to the employer (see paragraph 5.17). It was agreed that information held by the recruitment agent is imputed to the Respondent. Mr Johnston has correctly identified the 'sum-total' of the information that was provided. We agree that before and during the probationary period the Claimant suppressed information about the effects of her fibromyalgia. For those reasons we conclude that at the material time the Respondent did not know and could not reasonably have been expected to know that the Claimant had the protected characteristic of disability and was a disabled person meeting all the requirements of section 6 EqA.

111 We then considered whether the Respondent had actual or constructive knowledge that the Claimant was likely to be placed at any substantial disadvantage in the 5 ways she alleges by the PCP's applied by the Respondent. The nature and extent of the substantial disadvantages the Claimant says she faced during her employment were never disclosed to the Respondent before or during employment for the duty to make reasonable adjustments to be triggered. Specific questions were asked before the Claimant started work for the specific purpose of deciding "*whether any reasonable adjustments or auxiliary aids may be required to accommodate any disability or impairment (*see paragraph 16).The Claimant understood the significance of those questions and her answers. Even if the Claimant did not envisage any difficulties performing the role because of her fibromyalgia before she started the role and difficulties only became apparent later, the Claimant continued to supress information about her Fibromyalgia and its effects and the nature and extent of any disadvantage.

112 An example of a missed opportunity to provide information to trigger the duty to make reasonable adjustments is the medical appointment the Claimant attended on 6 June 2019. The Claimant failed to inform BB or CC when she made the appointment that it related to her disability. She failed to inform them of the nature and extent of the disadvantage she now relies upon of having to attend "*a significant number of medical appointments to*

manage her condition on an ongoing basis". Even when the absence was queried on 13 June 2019, giving the claimant a further opportunity, that information was supressed. The Claimant has been unable to explain why she did not tell the Respondent how she was 'likely' to be placed at a disadvantage by the Respondent's absence management procedures. For those reasons we find the Respondent's defence is made out and it has shown it did not have had the requisite actual/constructive knowledge of disability or substantial disadvantage at the material time and the duty to make reasonable adjustments was therefore not triggered under section 20(3).

113 For the pre-dismissal complaints made of unfavourable treatment arising from disability (section 15 EqA) the respondent has shown it did not have actual or constructive knowledge of disability at the time of the impugned treatment for liability to be established (section 15(2) EqA). The Claimant has also not shown that she was unfavourably treated in the 5 ways alleged (see paragraph 2.1.1 and our findings of fact at paragraph 23, see paragraph 2.1.2 and our findings of fact at paragraph at paragraph 28, see paragraph 2.1.3 and our findings of fact at paragraph 32, see paragraph 2.1.4 and our findings of fact at paragraph 45 and see paragraph 2.1.5 and our findings of fact at paragraph 54). For those reasons the complaints of disability discrimination are not well founded and are dismissed.

Employment Judge Rogerson

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Date 25 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON : 25 January 2022

FOR EMPLOYMENT TRIBUNALS: E Mahon