EMPLOYMENT TRIBUNALS

Claimant: Mrs C McCabe

Respondent: The Gorge Parish Council

Heard at: Birmingham **On:** 21st – 23rd and 26th – 28th April 2021

Before: Employment Judge Hughes, Mr J Reeves and Mr I Morrison

Representation
Claimant: In Person
Respondent: Miss Roberts, Counsel

REASONS

Background and issues

1 The claimant presented a claim on the 6th April 2020 having complied with the Early Conciliation requirements. In summary, she was employed by the respondent as Parish Clerk from 9 January 2018. She took maternity leave in the summer of 2019 and then took a period of unpaid parental leave from the 1 October 2019 to 7 January 2020. The claim was for sex discrimination and being subjected to detrimental treatment because of taking parental leave and the allegations related to the parental leave period. The claimant was actually dismissed on 18 December 2019 and the effective date of termination of employment was 24 December 2019. She was subsequently reinstated on appeal and we understand that any sums owing to her for the period between dismissal and reinstatement have been paid.

2 In its response to the claim (which was accepted out of time), the respondent defended the claims and argued that the claim was out of time by reference to any events that happened on or before 23 October 2019. The respondent's case was that the claimant was dismissed by reason of performance and that this had got nothing to do with taking Maternity Leave or Parental Leave the response was in fact out of time but was accepted out of time by Judge Meichen.

3 There was a Case Management discussion before Judge Meichen on the 18 September 2020 during which the case was set down for a six-day hearing and the list of issues was set out in Judge Meichen's Order. The list of issues is set out after our findings of fact.

4 There was a bundle of documents, R1. Any references in square brackets in these Reasons, are to pages in the bundle unless otherwise stated. The respondent produced a further document, R2, which was the final version of a set of minutes (an earlier version was included in the bundle [283-284]. The respondent's representative provided us with a timeline and written submissions, R3. A more detailed timeline from the claimant was contained in the bundle [225].

5 The claimant had produced a witness statement. The respondent provided written witness statements for the following people: Mrs Heather Oldershaw, Chair of the Parish Council when the claimant was appointed and when she went on maternity leave; Ms Kathrine Petty, interim Parish Clerk during the claimant's maternity leave; Ms Carolyn Healy, a Member of the Parish Council who later became a Cabinet Member for Telford Wrekin Borough Council; Mrs Raemonde Evans who took over as Chair of the Parish Council from Mrs Oldershaw during the claimant's maternity leave (she has since stood down as Chair but still remains a Member of the Parish Council and is also a Cabinet Member of Telford and Wrekin Borough Council); and Mr Lee Proudfoot who at the relevant time was the Vice Chair of the Council, and was part of the Appeal Panel who decided to reinstate the claimant - we understand he is now the Chair of the respondent Parish Council.

6 We heard evidence and submissions on the first five days of the Hearing and we reached a decision with reasons on the last day which we are now handing down orally following our deliberations. There were some issues with the respondent's witness statements (no page numbers and slightly different versions) which were resolved.

Primary Findings of Fact relevant to the issues to be determined

7 The claimant applied for the role of Clerk to the respondent's Parish Council at the end of 2017 and was successful. Mrs Oldershaw and Miss Healy were part of the interview panel. Their evidence was that the claimant was a very good candidate, and they were particularly pleased that she had accounting qualifications because up-to-date accounts are important for Council meetings and for audits. They said that because the claimant had no prior experience working as a Clerk to a Council, it was accepted that she would need support to carry out the role until she was familiar with it. The claimant commenced employment on 9 January 2018. Her job description stated that the Clerk is (amongst other things) responsible for ensuring that Parish Council meets its legal obligations [217]. The claimant was also the Responsible Financial Officer for the Council i.e. responsible for keeping proper financial records, and for administration of the finances, including making sure that audits were successfully completed and the accounts were up-to-date. The Clerk is ultimately the person responsible for ensuring that the respondent complies with its legal obligations, and it was acknowledged that the claimant would need support and training to be able to do so. It is important to note that the Clerk is the only employee, and takes direction from the Councillors about work priorities. We were given an analogy by Councillor Evans which helped explain the roles and responsibilities. She said the Chair of the Council is a bit like the Chairman of a Board of Directors, and the Clerk is a bit like the CEO. We thought that was quite a good way of looking at the division of responsibilities.

8 It was quite clear from the evidence of Mrs Oldershaw and Miss Healy that the expectation was that after a time the claimant would be able to carry out the role without support and, because of her accounting background, be able to use the

Council's accounting system ("EDGE"). They also explained there had been difficulties with the previous Clerk, who resigned because the job was not suitable for him. The consequence was that there was some work outstanding from his tenure. By way of example, the claimant told us that the paper filing system was in disarray, and that it was very difficult to find documents on the Council laptop.

9 At the point when the claimant was appointed, the Councillors were due for re-election the following year, and most of the very experienced Councillors intended to step down. The intention was that by that point the claimant would be fully conversant with the Clerk's role, and would be able to provide advice and guidance to the newly elected, inexperienced Councillors. In our view that was sensible forward planning.

10 A decision was taken to pay for the claimant to attend CiLCA Level 3 training. It is a similar qualification to an NVQ and is specifically aimed at Parish Council Clerks. The course was provided by Shropshire Association of Local Council ("SALC"), and was supposed to be completed in a year. As part of the claimant's terms of employment, she was given one hour a week to spend on CiLCA training and compiling work to submit in support of her application for the qualification. She was also expected to attend some training days at Shire Hall. The training was provided by SALC.

11 It was recognised that the claimant would require support and training on the EDGE system, and on the format used for reports. The then Vice Chair of the Parish Council, Councillor Maureen Bragg, was able and willing to provide assistance with the accounting system, and had done so to previous Clerks; and Mrs Oldershaw was to help the claimant to properly compile Agendas and Minutes for Parish Council Meetings plus other documents such as those required for the Annual Parish Meeting (which is a public meeting, by contrast to monthly Council meetings where the public can only observe. Mrs Oldershaw was also available to provide guidance on the general business of the Council. Mrs Healy explained that at various points she had provided the claimant with input and advice about prioritising and managing tasks.

12 The claimant's contract of employment contained the following relevant provisions [205 onwards]: The appointment was subject to satisfactory completion of a period of probationary service of not less than six months; an appraisal after three months; and, any performance concerns other than matters of a disciplinary nature would be addressed by working with the claimant to provide the necessary training, mentoring and support to ensure agreed performance standards would be met in a reasonable time frame (paragraph 10). Paragraph 13 concerned annual leave, and paragraphs 14 and 15 contained provisions about sickness absence and sick pay. Paragraph 20.1 provided that during the probationary period either party could terminate the Contract by giving one week's notice in writing. After the probationary period had been completed, the claimant was required to give one month's notice, and the respondent to give four weeks' notice in writing for service of up to four years (and thereafter statutory notice). Paragraph 17 stated that the claimant could apply for maternity or adoption leave. The contract was silent about maternity pay. The claimant explained that maternity pay is governed by an Annex to the Green Book and that in order to qualify for maternity pay (as opposed to statutory maternity pay ("SMP")) it was necessary to have completed twelve months' service. In this case, at the point when the claimant did take maternity leave, she had not worked for twelve months, and was therefore only entitled to SMP.

13 The claimant was engaged to work sixteen hours a week plus to spend one hour on CiLCA training. She was expected to be in the Parish Council office at certain times because there were drop in sessions for the public. She was also required to work in the evening if there was a Parish Council Meeting, to take minutes and to provide any guidance required by the Councillors. The meetings were monthly, apart from during the summer.

14 On 15 March 2018, the claimant had an interim appraisal meeting with Councillor Bragg, who at that point was Vice Chair and also Chair of the Personnel Committee [227]. It was recorded that the claimant was enjoying her role, felt she had grasped the key elements of the work, was enjoying learning about the role of the Clerk, and felt that the training was supporting her. The appraisal notes also stated the claimant understood her work priorities, such as producing minutes promptly, and undertaking actions decided at Council meetings. In the 'Appraiser comments' section, Councillor Bragg said, "Congratulations to Collette [the claimant] on the speed at which she has picked up the range of tasks required for a Clerk and her enthusiasm for the training". The notes went on to say that targets had been discussed and that because it was a very busy time of the year, the claimant was to follow the eight week guidelines from EDGE to complete the end of year finances and to prepare for the Annual Parish Meeting, in addition to the usual priority work. We noted that if the guideline to complete the end of year financial report for the year ending 31 March 2018, the report would be due by the end of May time.

15 Councillor Bragg recorded that the biggest concern was that the claimant was actually having to spend additional time unpaid in order to complete her work. She stated that whilst it was agreed that some of that was due to the claimant having to get to grips with a new area of work, it was still necessary to support her. The claimant was asked to complete a detailed diary of each days' work over the next four weeks to show the time taken for each task.

16 Overall, it was a very positive appraisal. As a result of the concern over working hours, a recommendation was made to increase the claimant's hours to nineteen per week plus an hour for training. The decision was ratified by the Parish Council at a meeting on 9 April 2018 [265]. The minutes of the Personnel Committee recorded that it was agreed that the claimant would be working eight hours in the office on a Tuesday, six hours in the office on a Wednesday and three hours in the office on a Thursday morning, with the additional two hours to be used for monitoring emails working at home, and that the hours would be flexible.

17 It became clear from the evidence of the claimant and Miss Healy that being required to work on Thursday mornings became a big issue, because the claimant wanted to work from home. That problem continued and eventually the claimant asked to be able to go back to working sixteen hours a week, and doing any incomplete work unpaid. The Personnel Committee did not recommend that and did not agree to that, so the claimant remained on 19 hours a week, and Thursday mornings continued to be an issue. The claimant's evidence was that she had not been given a set working pattern when she started, and felt that the requirement to work Thursday mornings was being imposed on her. We accepted that, because if the claimant had been told about it when she was offered the job, the issue would have been resolved then.

18 There were some ongoing issues over the claimant's ability to keep on top of the finances. We thought these were somewhat exaggerated by the respondent's representative in the Hearing before us. On 15 May 2018 Councillor Bragg sent an email to Councillor Healy and others saying (amongst other things): "She has not done the finance! [90]. On 17 May 2018 an issue arose about which was the correct financial document to circulate at the Annual Meeting [93]. The latter concerned the fact that the claimant had done a detailed budget breakdown (as she would for Council meetings) but the version that was for public consumption was supposed to be revised to remove certain information. Mrs Bragg had to help to sort that out. However, it was hardly surprising that the claimant did not know she had to revise the information, given that this was her first Annual Meeting. In fact, it was recorded soon afterwards that the meeting was a great success [95]. Mrs Oldershaw told us that because it was the claimant's first meeting, she was understandably nervous, but that it had gone very well. In an email dated 23 May 2018 Mrs Bragg said that a cheque needed to be sent to a company called Galore Lights and queried whether it could appear in the July bank statement [100]. All of the above appeared to be routine financial queries, and not a great cause for concern, contrary to the case the respondent attempted to persuade us of.

19 On 18 June 2018 Councillor Oldershaw sent an email to the claimant which was copied to Councillor Bragg. The title was: "Most urgent. Read this first". It stated that the first thing the claimant needed to do on arrival in the office on Tuesday was to act on several emails Councillor Bragg had sent about the audit documents. The claimant replied to ask what document she should use in respect of variances relating to Annual Accounts [105]. The bundle contained a breakdown of variances [256 -257]. In evidence to us, the claimant said she had compiled it, but was unable to say whether she had sent it as an attachment to the annual accounts sent to the Auditors. When the claimant went on maternity leave (see below), Councillor Bragg became involved in correspondence with the Auditors over variances, but by 26 September 2018 Mrs Oldershaw received a message from them saying that the report would be completed; the variance issue did not have any consequences for the Council; and it did not affect their opinion of the Council or the Council's financial management throughout the year.

20 As stated, we did not accept that the claimant's management of the accounts and finances was as bad as the respondent wanted us to believe. However, we did accept that it was not perfect. The claimant had not picked up the intricacies of the EDGE system as quickly as had been hoped; and that some of the financial information was not produced in the format the Councillors expected. When it came to the end of year accounts, it appears that the necessary information had been inputted into EDGE, but the claimant was not able to close down the end of year account for 2017/2018. The consequence was that she was unable to input income and expenses going forward and instead kept the information on a spreadsheet, rather than the EDGE system. She did not contact the company that produces EDGE to find out how to close the end of year account until July.

21 At this point in time, Councillor Bragg was going in about once a week to help the claimant with finances. Councillor Healy told us that it seemed to her that the claimant preferred to spend time dealing with emails instead of dealing with matters the Councillors considered to be priorities, such as updating the accounts or producing minutes and circulating them very quickly after meetings. That said, Councillors Healy and Oldershaw acknowledged this was the first time the claimant had to finalise the end of year accounts, to deal with both internal and external audits, and to prepare documents for the Annual Parish Meeting. We were satisfied

that at this point the Councillors were not concerned about the claimant's performance, and were happy to provide the claimant with such support as she might need.

22 The respondent's case was that the claimant was dismissed for performance issues. Ultimately, for the reasons stated above, and below, we did not accept that.

23 On the 22 June 2018 there was an informal meeting between Councillors Oldershaw, Healy and Bragg. It was intended to be about Councillor Healy's commitments, but then became a discussion about the claimant. Mrs Oldershaw made a private note as an aide memoire. She told us that the note was taken contemporaneously and we accepted that [232 – 233]. The discussion came about because Councillor Bragg was due to carry out the claimant's Probationary Review Appraisal Meeting and wanted some input from other Councillors. The note mostly recorded Councillor Oldershaw's opinions. It stated that after discussing issues such as problems with the accounting software, and minutes not being distributed a timely way, the three Councillors agreed that they would prefer to extend the claimant's probationary period to the end of October [232].

24 The appraisal meeting took place on 28 June 2018 [229 – 231]. An appraisal form had been completed by the claimant and comments had been appended by the appraisers - two members of the Personnel Committee, Councillor Bragg and Councillor Jake Bennett. The claimant gave her take on how she had performed as follows: "Great. I feel I have done everything required of me and I hope I have made a good impression. I was happy to do more hours in my own time to ensure things were completed and often spent time googling to try to be more informed and educated. During May especially I got through the Internal Audit, the Annual Parish Meeting, the Annual Council Meeting, and GDPR, as well as juggling all the usual tasks." There was then a section for the appraisers to set objectives. It stated that the main objectives for the next six months were: to get on top of the accounts, financial Regulations, and Standing Orders; improve awareness of the annual calendar of Regulatory requirements; and to improve both time and task management. The appraisers made some suggestions about how the latter could be achieved. In summary, the appraisal did not record dissatisfaction with the claimant's performance, but made it clear that the appraisers wanted to see improvement during the following six months.

25 There was a section to be completed by the appraisers after the meeting [231]. This stated: "It is agreed that Colette has settled into the role of Clerk, and she is developing a good rapport with Councillors, Officers and members of the community. She is enjoying the training and will be using her access to SALC to support [her] work". It then recorded that there had been a discussion about how to prioritise time and task management, and how the Council might assist, and that objectives for August included: closing the 2017/2018 financial accounts; populating the 2018/2019 accounts; learning how to produce relevant financial documents for meetings from EDGE; and updating the Standing Orders. For reasons we shall come to, the Appraisal was never finally signed off. As we understood it, the intention was to meet the claimant again, sign the appraisal off, and for the Personnel Committee to make a recommendation to the full Council about the claimant's probationary period.

26 As noted, the appraisal report did not suggest that the claimant was under-performing or that there were areas of any great concern. In fact it was quite the opposite – it was positive and envisaged the claimant continuing in post for the

next six months, with the next performance review to take place in November 2018. We thought it telling that when Mrs Evans became Chair, and saw this Appraisal, she expressed surprise at its positivity. That was clearly because she had a very poor opinion of the claimant at that point (see below), but it clearly was not the opinion of the appraisers in June 2018. We inferred that if the process had been completed, the Personnel Committee would have recommended confirming the claimant in post, not extending the probationary period (see also the last sentence of paragraph 27 below).

27 When the claimant gave evidence she told us that she thought she was told she had passed her probation, or words to that effect. That was not the case. For example, the bundle contained a copy of a text message from Councillor Jake Bennett sent to the claimant much later on, saying: "Let's be honest, in that Review Meeting if you remember, some Councillors were pushing for the probation extended. When we signalled this as a possibility to you, your face dropped and, if you remember, I said this is not the way to motivate someone and we should get you onboard and recommend giving you some support and measurable objectives". In fact that is mirrored by a sort of postscript to the notes referred to above made by Councillor Oldershaw [232]. She added the following: "It is my understanding that Colette [i.e. the claimant] was unhappy about the proposal to extend probation. The appraisers went to the full Personnel Committee to discuss it, and the Personnel Committee decided not to extend her probation".

28 In summary, at this point, if things had gone according to plan, the Personnel Committee's recommendation to confirm the claimant in post would have been discussed at the next Parish Council meeting. There was a difference of views about whether to extend or confirm. Councillor Oldershaw's evidence was that she thought the decision would have been to extend, because that was her view and it would carry weight because she was the Chair. She also expressed the view that although Councillor Bragg was Chair of the Personnel Committee which had decided to recommend confirming the claimant in post; she would have voted the opposite way at the full Council meeting. That was speculative – in reality we have no way of knowing what would have happened.

29 On the 4 July 2018 the claimant notified the Parish Council that she was pregnant. She said: "I am writing to advise you of my pregnancy. The expected week of childbirth is the week commencing 25 November 2018. I would like to go on Maternity Leave to begin on 11 September, and I would like to take my 64 hours remaining annual leave allowance on August 9 and August 21 to September 6, meaning my last day in the office will be 8 August [111]. Although the claimant had in fact given the respondent more notice that was legally required, the attitude of key Councillors, such as Councillor Oldershaw, changed towards her. She, and some of the other respondent's witnesses, expressed disappointment that they had not been informed sooner, and clearly felt that the claimant had let them down. This was compounded by the fact that her maternity leave would jeopardise their plan for a smooth handover at the elections the following year.

30 On 24 July 2018, the claimant met Councillor Bragg to discuss arrangements for her maternity leave. Her evidence was that Councillor Bragg told her that her announcement had come as a shock to the Council; and made reference to the fact that the claimant already had two young children. The claimant told us that she was so taken aback that she did not know how to reply. We did not hear evidence from Councillor Bragg, but we had no reason to doubt the claimant's account. We accepted that she was made to feel that her pregnancy was a nuisance and an

inconvenience. This was an example of a sea change in the views the Councillors held about her. It was consistent with evidence given by the respondent's witnesses in their witness statements. For example, in paragraph 8 of her witness statement, Councillor Oldershaw said it was: "Very disappointing that after all the efforts [the respondent] had made to accommodate the claimant's requests for more hours and for flexible working, that her last act before she left the office to go on annual leave was to announce her pregnancy". Councillor Oldershaw also wrote a postscript to her aide memoire: "Clerk never completed the appraisal and announced she was five months pregnant just two hours before going on what turned out to be almost permanent leave (annual, sick and maternity)". She added that this meant that the claimant was considered to be still in her probationary period and that this would be discussed on her return to work.

31 In paragraph 10 of her witness statement, Councillor Healy expressed the view that although the claimant taken the job in good faith after a short time she decided it wasn't really what she expected and lost interest; and that on realising she was pregnant she: "Stuck it out to be able to get Maternity Pay", adding that she had no proof of this – it was simply her opinion.

32 To us, the above opinions were clear evidence that the claimant announcing her intention to go on maternity leave had caused a sea change in the way that the Councillors, especially the most influential ones, viewed the claimant on a collective basis. There was expressions of disappointment and a subtext that the claimant was in some way playing the system. It was also telling the person who became Interim Clerk when the claimant was on maternity leave, Miss Katherine Petty, had never actually met the claimant and had only exchanged emails and phone calls with her was able to describe her in a witness statement in very strong terms. Specifically, in paragraph 10, she stated: "In my working life I have been in a supervisory managerial position for over 25 years I have managed a number of staff and I have dealt with some very difficult and sensitive situations. In my opinion Colette [the claimant] has no interest in her post, and in the short term she was actively employed did not complete her duties properly. In my day-to-day dealings with her I found she did not answer enquiries unless they served her purposes, she was demanding very clearly about what she felt to be her rights, but had no concept of her responsibilities towards her employer". To say that Miss Petty had formed a very dim view of someone she had never in fact met is something of an understatement.

33 On 24 July 2018, the claimant sent a query to TaxAssist (the respondent's payroll provider) concerning her annual leave entitlement. In the Hearing before us, the respondent made much of the fact that due to a dispute over the leave entitlement, TaxAssist allegedly said they were not prepared to deal with the claimant anymore. The only evidence we had of exchanges between the claimant and TaxAssist, were emails about calculation the claimant's remaining annual leave entitlement. The content was not offensive or rude, and outcome was that the Manager of TaxAssist admitted an error had been made and that the claimant's calculations were right. It was suggested by the respondent, that the emails demonstrated that the claimant was not committed to her job. Specifically, Miss Petty's evidence was that the claimant was more interested in her annual leave than her job. The proposition that the claimant was in the wrong because she was asserting her legal rights in employment law to maternity pay, holiday entitlement and (further down the line) additional maternity leave and parental leave, very clearly demonstrated the respondent's collective, but misguided, view about her assertion of her legal rights.

34 In one of the emails she sent to TaxAssist, the claimant made reference to the CiLCA, and said that she was ahead with her portfolio and intended to complete it within a year, and before her baby was born [118]. The claimant explained that she was later told by Councillor Bragg that she should not undertake work during maternity leave. The consequence was that the claimant was unable to complete the course work. Unfortunately, what she did not do, and definitely should have done, was to contact the course provider to find out if she could defer completion of the course until she had returned to work. Doubtless, she would have been allowed to do so. Because the claimant took no steps to do so, the respondent had to pay for her to repeat the course. We were not impressed by her attempt to argue that somebody else should have taken responsibility for doing so.

35 On 24 July 2018, the claimant sent a query to EDGE about how to close down the end of year accounts [124 to 125].

36 On 26 July 2018, Councillor Bragg wrote to the claimant about her maternity leave entitlement, and confirming that the expected date for her return to work in the week commencing September 2019. She asked the claimant to notify the Council at least 21 days in advance of her proposed return date, in order to ensure effective handover of work. Councillor Bragg referred to having keeping in touch days ("KIT days"), and proposed she could get in touch with the Interim Clerk (Miss Petty) to arrange this [126]. On the same day, the claimant sent an email to Councillor Bragg explaining that her son was unwell and that she would be unable to make up the hours and/or was not clear when she could find the time, and suggested the hours could be deducted from her pay. She said that she had been told by EDGE to phone them to talk through the end of year accounts. However, the claimant then went on sick leave, which meant she was unable to close off the end of year accounts, and Councillor Bragg had to do it [129].

37 In summary, although the claimant had intended to be at work until August 2018, the combination of her child's sickness and her own sickness, meant she was off work from this point. After that, she was on annual leave, and thereafter on maternity leave.

38 Councillor Bragg wanted to clarify the implications of some of the sick leave period having been originally booked as annual leave. This led to an exchange of emails which we shall come to soon.

39 In August 2018, Miss Petty took up the position of Interim Clerk. She had been a Council Clerk for many years and had recently retired. It was intended that she would cover the claimant's maternity leave, and that there would be a handover when the claimant returned to work. Miss Petty had previously worked with Councillor Evans. They are close friends.

40 There were then a series of emails which in our view clearly demonstrated the impact that the claimant being unwell, then taking annual leave, then taking maternity leave, and then deciding to take additional maternity leave, had on the way she was viewed by the Councillors. This was also the point at which Mrs Evans (who later became a member of the Parish Council i.e. a Councillor) became involved, because she was asked for advice because she has Human Resources background. She had never met the claimant.

41 On 21 August 2018 where Miss Petty emailed Councillor Bragg about the sick leave/annual leave issue [131]. She said: "I can have an informal word with a friend, Rae Evans she used to work in HR and she will know what to do, or if it might be advisable to seek advice from a specialist. I am seeing her tonight so I can mention it. She is very discreet but if you would prefer me not to say anything then I think it would be best to write to Colette [the claimant] confirming the TaxAssist time frame". On 22 August, Miss Petty sent a further email saying that she had had "a quiet word with Rae Evans, and she advises that you write a really nice letter to Colette. It is important to show, should it ever be needed, that the employer has been more than reasonable and had done everything possible to accommodate her needs" [132].

42 Councillor Bragg replied the same day to say she had drafted a letter and would be grateful for Miss Petty's comments "as to whether it is "nice" enough" [133]. Miss Petty replied saying it would look a bit strange if the tone of Councillor Bragg's communications suddenly changed, but that perhaps the wording could be softened just a bit, because the letter was quite direct. She said: "A bit of pussyfooting around wouldn't hurt". Councillor Bragg replied that she would explain her tone when she next met Miss Petty.

43 On 14 September 2018, the claimant responded about the sick leave/annual leave issue, and said Councillor Bragg should go with the dates she had proposed, and that it could be resolved on her return to work. Although the Councillors' opinions about the claimant had changed by this point, the claimant had absolutely no idea of this, as could be seen from her emails. For example, on 30 November 2018 she sent a photograph of her newly born son and said they were looking forward to seeing the Christmas lights switched on the following day [140].

44 Elections for the new Parish Council took place early in May 2019. Only one Councillor from the previous Council stayed on - Councillor Avon Harden. The elections resulted in three appointments. There were then some co-options and the Council did not reach its full complement until September 2019. Councillor Evans was elected and was then appointed as Chair of the Council and also of the Personnel Committee. The fact that she was appointed to those two roles, so soon after becoming a councillor, was unsurprising because she has extensive experience in Local Government and had in fact worked as a Clerk herself. However, given that the new Council lacked experience, it inevitably meant that Councillor Evans' opinions carried great weight.

45 At some point in May 2019, Councillor Oldershaw (as outgoing Chair) had a handover meeting with Councillor Evans. During that meeting, Councillor Oldershaw expressed concern about the level of support which the claimant would be able to provide to the new Parish Council on her return to work from maternity leave.

46 On 4 June 2019, Miss Petty wrote to the claimant suggesting that she might wish to come in and meet the new Parish Councillors and setting out the dates of the next two Council meetings (18 June and 23 July). The claimant was due back in September and there was no meeting in August. Miss Petty also suggested the claimant might wish to drop into the office to discuss a handover and asked her to provide dates when she was available, pointing out that it was possible for the claimant to do this on a KIT day.

47 On 25 June 2019 the claimant wrote to the Councillors requesting annual leave up to the point when she was due back from maternity leave. She also asked to use one of her KIT days to arrange a meeting to meet the Councillors and to resolve the annual leave/sick leave discrepancies (i.e. the issue that remained unresolved when she went on maternity leave). Finally, she said she wanted to take a period of unpaid parental leave from 14 October 2019 to 5 January 2020, with a proposed return to work date of 7 January 2020 [148]. Miss Petty (as Interim Clerk) forwarded it to Councillor Evans (now Chair) with the words: "It begins…". Councillor Evans responded the same day to say: "OK great! We are going to have to call a Personnel Committee Meeting. Do we have members for it yet?" [147]. She also asked if Miss Petty would continue in post until January. Miss Petty replied to say she intended to leave on 11 September because she was really not enjoying the work and added: "Even if I did stay on I am fairly sure Colette would come up with something else to delay her return – I am guessing stress". She went on to say the claimant had been as she described it 'badgering' the payroll company (TaxAssist) (this was the email chain we touched on earlier, in which TaxAssist acknowledged the claimant was correct about her annual leave entitlement. We thought the tone of the email was significant.

48 Then Miss Petty emailed (former) Councillor Bragg as follows: "Don't worry !!! I am not going to drag you in on this but you will have some emails that we will probably need …. you will have gathered that the game playing has started again …." [150].

49 On 5 July 2020, Miss Petty emailed Councillor Evans. The subject heading was: "The usual!" She proposed that Councillor Evans and former Councillor Oldershaw should take some legal advice about the claimant, and said: "I think we need to make more of the unsatisfactory work performance before she went on leave and Heather [Oldershaw] knows all about that". Later that day Councillor Evans replied to say that she agreed that the focus should be on the claimant's performance. She added that the solicitor was "a bit woolly on parental leave", and that he would have a think and provide guidance about the 'level of risk'. She said: "I think challenge is how to get her in to dismiss her! Have a good holiday in the knowledge that I think we are the way to a plan (barring stupidity on the part of my fellow Councillors)" [150].

50 In many ways the emails speak for themselves. The tone was unprofessional; there was a plan to dismiss the claimant; and it was obvious (despite protestations to the contrary from Councillor Evans in her evidence to us), that she had a plan, she intended to execute it, and she did not expect any opposition from her fellow Councillors. It was also plain that Miss Petty shared that agenda and was going out of her way to further it. It was very clear that performance would be the pretext for dismissing the claimant, despite the fact that her performance had not been an issue before she announced her intention to go on maternity leave. As regards the timing, it was evident that the plan was triggered by the fact that the claimant was intending to take further time off. We infer that this was because there was a view that the claimant was playing the system.

51 Sadly, viewed objectively, those emails cannot be interpreted in any other way. Although Miss Petty and Councillor Evans accepted in evidence that the tone was unprofessional and not suitable for an exchange between the Chair and Clerk of the Council, their explanations for the content were not otherwise credible. Councillor Evans clearly had a very dim view of her fellow Councillors despite not having met most of them by this point.

52 On 28 July, Councillor Evans informed Miss Petty that she had met with a Human Resources Advisor from Telford and Wrekin Council who had expressed wariness with the proposed plan. Councillor Evans also reference to the fact that the claimant's appraisal had been positive, and expressed surprise [152].

53 Councillor Evans then compiled a report about the claimant [235-240]. In summary, she explained the history of the claimant's probationary period and the fact that it had never been resolved; she stated that if there were to be a decision to terminate the claimant's contract on the basis of failure to perform adequately, the 'safest way' to do so would be when she had less than two years' employment; but went on to say that this should not be during a period of maternity leave. She then set out options for the Council to consider going forward as follows: Option 1 - given the above information do we want to terminate the Clerk's contract?; Option 2 - there are two approaches to terminating the contract (i) undertake the probationary review "based on the information we have and the statements from previous Councillors, terminate the contract with 1 week's notice" or (ii) undertake a protected conversation with [the claimant]; or Option 3 – "If we decide to retain the Clerk, she will need to be closely supported and managed at least initially.. and who has the knowledge and time and is able and prepared to do this?". From this it was quite clear that Councillor Evans was steering the Council to terminate the claimant's contract, as could be seen from the way that Option 3 was worded. The options did not address the question of whether, if the claimant was retained, she would be confirmed in post, or the probationary period would be extended almost two years into her employment. Therefore, and in summary, the report advocated dismissing the claimant at some point between the end of her maternity leave and her having two years' service.

54 In her report, and her evidence to us, Councillor Evans suggested the claimant's performance issues were not limited to those referred to in our findings of fact above, or indeed to the claimant's actions in her role as Clerk. By way of example, Councillor Evans was insistent in telling us there had been a concern about the claimant because she was said to have made some derogatory comments about Broseley Parish Council on a Facebook page which is publicly accessible, and which the claimant administrates. Broseley is the area where the claimant lives. The comments occurred in March 2018 i.e. before the respondent knew the claimant was pregnant; they were investigated at the time by the then Parish Council; and there was found to be no cause for concern about whether the claimant's comments were in conflict with her role as Clerk [77, 78 and 80]. Resurrecting this matter at the point when she did, and trying to persuade us that it had any relevance whatsoever, demonstrated Councillor Evans's wholly negative view of the claimant. We did not accept her explanation that the comments could have caused reputational damage to the Parish Council – the issue was investigated at the time, and no action was thought necessary. In short, this was a complete red herring. Furthermore, there was evidence in the bundle that on 25 October 2019 (when on maternity leave), the claimant had been asked by Broseley Parish Council if she would step in and do their minutes for a Council meeting which was being held in the absence of their Clerk. She informed the respondent of the request, and thereafter did help out with the minutes. This demonstrates that there clearly was no issue whatsoever, and it does Councillor Evans no credit that she raised this before us in an attempt to discredit the claimant.

55 The report was tabled at the Personnel Committee meeting on 19 August 2019 [R2 was the final version of the minutes]. The Chair was Councillor Evans and the

other members were Councillors Anderson and Stokes. It was minuted that they discussed the report and agreed that the evidence demonstrated that the Clerk had failed to perform to the standards required in spite of being given significant training and support by the Parish Council, and that the Council's best interests would best be served if the relationship was terminated. It was also recorded that the reason could be that the probationary review and CiLCA training had not been successfully completed; or that it could be done by holding a protected conversation. The minutes did not record retention as an option. In her evidence before us, Councillor Evans was at pains to say that it was not her decision, or the decision of the Personnel Committee – these were merely recommendations for approval by the whole Council. She suggested that other members of the Parish Council could have come up with other options, such as extending the probationary period, or confirming the claimant in post. That was hardly likely, given that those options were not put to the whole Council and that (with the exception of Councillor Holden) the members were newly appointed

56 An Extraordinary General Meeting ("EGM") was held on 28 August 2019. There was no record of the discussions about the claimant's role. We were told by Councillors Evans and Proudfoot, that the Parish Council had approved Councillor Evans to authorise expenditure on legal and HR advice. We also concluded that approval was given for the claimant to be invited to a probationary review meeting with a view to terminating her employment. There would not usually have been a meeting in August. We inferred that an EGM was called because of the desire to be in a position to dismiss the claimant at some point between the end of her maternity leave and her reaching two years' service. This was based on the erroneous belief that the claimant would not have additional protection during a period of parental leave.

57 By a letter dated 9 October 2019, Councillor Evans asked the claimant to attend a probationary review meeting [157]. By this point she was on parental leave. The letter stated that the records had shown that the probationary review process had commenced but it was not completed, and that: "You are therefore required to attend a meeting to review your progress in the role of Parish Clerk where a decision on your continued employment will be made". It went on to set out the matters for discussion which were described as: general failure to manage and maintain core Council functions in a timely manner; failure to close the financial accounts for 2017/2018; failure to populate the 2018/2019 accounts; failure to update standing orders; and failure to prioritise completion and circulation of minutes the day after meetings. All of the above had, of course, been part of the previous appraisal process, which had not come close to recommending termination of employment. The only additional matter was failure to complete the CiLCA course or to seek an extension. The claimant was advised of her right to be accompanied. The letter concluded by warning the claimant that: "Failure to attend the meeting without good reason is deemed to constitute a failure to follow a reasonable management instruction and can amount to gross misconduct which, if proven, can warrant summary dismissal".

58 The claimant's evidence, which we accepted, was that it was an immense shock to receive the letter, because she thought she had successfully completed her probationary period, and because at that point she had no reason to suppose that any of the Councillors had anything other than a positive view of her. The first point was valid because the claimant's probationary review was positive and the period was not extended. The second point was valid because all of the negative

emails and comments came after the claimant was on maternity leave, and she was unaware of them.

59 The letter, and the timing of it, demonstrated the agenda to dismiss the claimant. Furthermore, the tone of the letter was very threatening. Dismissal was clearly contemplated, but had not been mentioned before. The reference to gross misconduct was not only threatening, but also misplaced, given that the claimant was on parental leave and could not be compelled to attend a meeting, merely invited to do so.

60 At this point, Councillor Evans was seeking to amass further evidence against the claimant. For example, on 12 October, she sent an email to Miss Petty asking her to confirm in writing issues they had already discussed, such as changing the bank mandate [159].

61 The probationary review meeting took place on 30 October 2019 [notes 291-294]. The claimant was represented by Mr Gwylliam Rippon from the Society of Local Council Clerks. Councillor Evans chaired the meeting and was assisted by Ms Janice Coombes, a HR Business Partner from Telford and Wrekin Council. In response to the issues raised in the letter inviting her to the meeting, the claimant made a number of points, which were: she had inherited a backlog from the previous Clerk; she had received an email from a Councillor to thank her for her work; the probationary review meeting had been positive; she had been told she had passed and there was no mention of the period being extended; thereafter there was no communication either way; she had learnt from a Broseley Town Councillor (Councillor Taylor) that the respondent was looking to dismiss her; that she had done nothing to merit dismissal; and that if there were any concerns, she had not been made aware of them or given an opportunity to put them right. All of those points were relevant and had merit.

62 This resulted in Councillor Evans undertaking further investigations about a number of points [241-243]. Firstly, she recorded that Councillor Taylor denied saying anything to the claimant, but she also reminded her fellow Councillors that personnel issues are confidential and must remain so. Although it is not strictly necessary for us to decide whether Councillor Taylor had tipped off the claimant, it is fair to say that it seemed very likely, because the claimant came by the information somehow. The other matter Councillor Evans investigated further was what Councillors Bragg and Bennett recalled about the performance review meeting, and what assistance Councillor Bragg had given the claimant with compiling financial information. As to the latter, Councillor Bragg said: “I did provide Colette [the claimant] with significant support with inputting and production of financial information, as I did for the previous and subsequent Clerks. We had appreciated none of these Clerks had any in depth experience of this financial package and had organised appropriate training support with EDGE. I was also prepared to help once she been shown how to input information and produce a summary. She was competent to input data up to the end of the financial year. I did help her prepare the Internal Audit as with other Clerks, but she met with the Internal Auditor alone and he was satisfied with the evidence”. She said the 2018/2019 accounts had been a concern because the data had not been input. Neither Councillor gave a negative account of the performance review meeting. From Councillor Bragg’s information, she provided no more support to the claimant than to other Clerks, and it appeared she was relatively happy with the way that the claimant was performing until she went on maternity leave, and which meant Councillor Bragg had to finalise the end of year accounts.

63 There was a Council Meeting on 19 November 2019, at which it was unanimously resolved that the Chair (Councillor Evans) was authorised to continue to undertake the claimant's probationary review on the Council's behalf, with a view to not confirming her in post and terminating her contract depending on the evidence that might emerge during the review process, and that a compromise agreement should be considered and offered if appropriate.

64 Attempts were made to set up a second review meeting to go through the outcome of the further investigations findings, but these ultimately proved futile, in part because of the claimant's availability and in part because of the availability of her representative. It was clear from the contemporaneous emails that Councillor Evans viewed this as delaying tactics by the claimant in order to accrue two years' service.

65 A meeting was set up for 17 December 2019, but on the morning the claimant informed the respondent that she was unable to attend because she could not get childcare. The meeting may or may not have taken place in her absence. There was then (on the same day) a closed session Council meeting. It was recorded that Councillor Evans reported that having considered the points raised by the claimant, she had invited her to a further meeting which the claimant had 'declined to attend'; that the meeting was held in her absence; and that the claimant had failed to respond to a proposed severance agreement. Councillor Evans proposed that the Council dismiss the claimant with one week's pay-in-lieu of notice, with her final day of work being 24 December 2019. That proposal was unanimously agreed [295-297]. The two-year time point issue is abundantly clear from this – the claimant's start date was 9 January 2018. She was dismissed on Christmas Eve while on parental leave. In our experience, few employers would elect to dismiss an employee just before Christmas.

66 On 17 December 2019, Councillor Evans sent a letter (hand delivered and by email) confirming the decision [188-189]. It stated: "I am clear you did not meet the standards we expected so I have decided to terminate your contract as of the 24 December 2019 on the grounds of poor performance" (our emphasis added). In paragraph 15 of her witness statement, Councillor Evans also stated: "I made the decision to dismiss the Clerk". We thought this was a Freudian slip. Despite Councillor Evans's protestations to us that she was not the decision maker, in reality she was, and was confident that her fellow Councillors would rubber-stamp her decision.

67 The claimant put in an appeal. The appeal committee was chaired by Councillor Proudfoot, who was then the Vice Chair of the Parish Council. Having heard from the claimant, a decision was taken to reinstate her - quite rightly in our view. Councillor Proudfoot said in his witness statement: "Mrs McCabe presented a very convincing argument in person that the employer's assessment of her poor performance did not match her recollection of it, and that she was shocked by the decision to dismiss her". He said they wanted to give the claimant the benefit of the doubt; recognised she had been provided with support; but that that when they looked at the evidence, it was not fully clear as to where concerns over poor performance by the previous Councillors had been explicitly communicated to her, which had created ambiguity. Councillor Proudfoot also explained that when the decision to dismiss was taken, the Councillors did not have sufficient time to digest the information, and contrasted this to the situation on the appeal where they took time and care to do so. He also said they had never met the claimant until then,

and that she had come across very well. Finally, for the sake of completeness, he confirmed that as far as he is aware there have been no concerns about the claimant's performance since she was reinstated. She was reinstated with backdated pay.

68 Finally, it is material to note that it was not until she was reinstated and had access to the Council's laptop, that the claimant saw the emails between Councillor Evans and Miss Petty, referring to her in disparaging and unprofessional terms. She also found emails which suggested attempts had been made to delete those emails e.g. an email from Miss Petty to the new Interim Clerk saying she thought she had deleted the folder from the laptop, but had retained a copy on a memory stick to "be on the safe side", and that it might be best to wait until she had double-checked before deleting the folder [165]. Councillor Evans told us that they had taken the view that the memory stick could be destroyed once they were satisfied the claimant was not going to take the Parish Council to the Employment Tribunal.

69 We can only question the legality of seeking to destroy official documents. The Parish Council is publicly elected and publicly accountable.

70 The other point to be made about the emails, is that they were a smoking gun. The claimant's evidence was that she had been happy to be reinstated and to return to her job and put the above events behind her. However, when she found the emails, they confirmed her suspicion that there was an orchestrated plan to dismiss her which was connected to asserting her right to maternity leave and parental leave. In essence, they confirmed her worst fears. We accepted that this was extremely upsetting, and caused her to bring this case. It might fairly be said that the respondent is the author of its own downfall in that regard.

Remedy findings in respect of personal injury

71 The claimant produced medical evidence in the form of medical records. She did not produce a psychiatric report. The medical records suggested that as a result of the events described above, she had suffered from mild anxiety and depression and had been prescribed various kinds of medication in order to try to alleviate the symptoms, including Diazepam and Fluoxetine [336-337]. At some points the claimant did not take medication at all because of being pregnant. We concluded there was some limited evidence that she had sustained personal injury i.e. psychiatric injury as a result of the respondent's actions.

72 The claimant contended that an infected sebaceous cyst had been caused by the respondent's behaviour. Whilst there was evidence to show she did have an infected cyst [337], there was no medical evidence that suggested it was caused by the unlawful acts. The claimant also argued that she was experiencing mouth pain and problems with her gums [344]. There was no dental or other medical evidence that this was caused by the respondent. See also our findings and conclusions on remedy below.

The Law

The Framework of the Equality Act 2010

73 The relevant legislation in respect of the allegations of direct discrimination is contained in the EA10. The legislative intention behind the EA10 was to harmonise the previous legislation and modernise the language used. Therefore, and in general terms, the intention was not to change how the law operated unless the harmonisation involved codifying case law or providing additional protection in respect of a particular protected characteristic. Because of that, much of the case law applicable under the predecessor legislation is relevant, as has been confirmed by the higher courts on many occasions.

Section 39(2) provides that:

> "An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B; or
>
> (d) by subjecting B to any other detriment."

74 Section 39(4) provides the same protection in respect of victimisation and section 40 concerns unlawful harassment in the field of work. Section 120 EA10 confers jurisdiction on an Employment Tribunal to determine complaints relating to the field of work. Section 136 of the EA10 provides that: "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". This provision reverses the burden of proof if there is a prima facie case of direct discrimination or victimisation. The courts have provided detailed guidance on the circumstances in which the burden reverses[1] but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two-stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred.

75 Sex is a protected characteristic as defined by section 4 of the EA10. Sections 39 and 40 of the EA10 prohibit unlawful discrimination against employees in the field of work. In summary, the EA10 provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. In addition to the statutory provisions, Employment Tribunals are obliged to take into account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights.

Harassment

76 Harassment is defined in Section 26 of the Equality Act 2010 as follows:

[1] Barton v Investec [2003] IRLR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA

"(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

(a) the perception of B;

(b) the other circumstance of the case;

(c) whether it is reasonable for the conduct to have that effect.

77 It is also relevant to note that Section 212 EA10, which deals with general interpretation, provides at section 212(1) that " 'detriment' does not, subject to subsection 5, include conduct which amounts to harassment." Subsection 5 is not relevant because it applies where the act does not prohibit harassment in respect of a particular characteristic, such as pregnancy or maternity. The harassment provisions do apply to gender reassignment and sexual orientation (section 26(5) EA10). Consequently, where detrimental treatment amounting to harassment is alleged, that should be considered before considering whether the act complained of amounted to direct discrimination, because it cannot be both. That does not, of course, prevent a Claimant from pleading in the alternative, and it would usually be prudent to do so.

78 The wording of section 26 makes it clear that a distinction is to be drawn between conduct with "the purpose of… " which will amount to harassment as a matter of law, and conduct with "the effect of… " In the latter case the test is partly subjective ("the effect on B" and, arguably, "the other circumstances of the case") and partly objective ("whether it is reasonable for the conduct to have that effect").

Direct discrimination

79 Direct discrimination is defined in section 13(1) of the EA10 as "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".

80 In the predecessor legislation, the words "grounds of" were used instead of "because of". However, subsequent case law has confirmed that the change in wording was not intended to change the legal test. This means that the legal principles in respect of direct discrimination remain the same. The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which has since been upheld:

(a) In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was.[2] In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.[3]

(c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.[4] The wording in s136 of The EA10 has not changed the way the burden of proof operates – the claimant still has to show a prima facie case of discrimination.[5]

(d) The explanation for the less favourable treatment does not have to be a reasonable one.[6] In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation.[7] If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

(e) It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is

[2] By reference to Nagarajan v London Regional Transport [1999] IRLR 572 HL
[3] By reference to Nagarajan and also Igen v Wong [2005] IRLR 258 CA
[4] By reference to Igen
[5] By reference to Efobi v Royal Mail Group Ltd [2019] EWCA Civ 18
[6] By reference to Zafar v Glasgow City Council [1998] IRLR 36 HL
[7] By reference to Bahl v Law Society [2004] IRLR 799 CA

acting on the assumption that the first hurdle has been crossed by the employee.[8]

(f) It is incumbent on an Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.[9]

(g) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was.[10] However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.[11]

81 If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between the two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).[12]

Time limits

82 Section 123(1) provides that a complaint must be brought within the period of three months from the date of the act complained of, or such other period as the employment tribunal considers just and equitable. If acts extend over a period i.e. form part of a continuing course of conduct, limitation is judged by reference to the last act. The test is broad but C must show a link (see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 EWCA). If an act is out of time, there is a wide discretion to extend time, but the Claimant must show time should be extended on a just and equitable basis (see Robertson v Bexley Community Centre [2003] IRLR 434 EWCA). However, that is essentially a question of fact for the Employment Tribunal (see Lowri Beck v Brophy [2019] EWCA Civ 2490).

[8] By reference to Brown v London Borough of Croydon [2007] IRLR 259 CA
[9] By reference to Anya v University of Oxford [2001] IRLR 377 CA
[10] By reference to Shamoon
[11] By reference to Watt (formerly Carter) v Ahsan [2008] ICR 82 EAT
[12] See for example Shamoon and Nagarajan v London Regional Transport[199] IRLR 572 HL

Leave for family and domestic reasons

83 Section 47C(1) Employment Rights Act 1996 (as amended) ("the ERA") provides that an employee has the right not to be subjected to detriment by any act, or any deliberate failure to act, by an employer done for a prescribed reason. Section 47C(2) specifies that a prescribed reason is one prescribed by Regulations made by the Secretary of State and which relates to, amongst other things, ordinary, compulsory or additional maternity leave (47C(2)(b)) and parental leave (47C(2)(c)). That regulation making power was exercised in the Maternity and Parental Leave etc. Regulations 1999, which set out the entitlement, duration etc. of such leave. it is well established case law that "detriment" covers a wide range of treatment, but there must be something in the character of it that enables the complainant to reasonably complain about it.[13] Put another way, a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his disadvantage. This would not include an unjustified sense of grievance.[14] The claimant also alleged that the respondent had attempted to prevent her from taking parental leave (section 80 ERA).

Discussion and conclusions

84 In the interests of brevity we have not summarised the arguments put forward by the parties. In large part, they turned on our analysis of the evidence and what factual findings we should make. There were four allegations classed as direct sex discrimination and/or detrimental treatment for taking parental leave. These were:

(a) Councillor Taylor informing members of the Broseley Town Council on or around the 7 October 2019 that the respondent intended to terminate the claimant's employment.
(b) The letter dated the 9 October 2019 from Councillor Evans informing the claimant that her probationary period had not been completed and making five allegations relating to conduct or capability.
(c) Insisting on having meetings with the claimant from 9 October 2019 and refusing to delay these until she was due to return to work from parental leave on 7 January 2020.
(d) Dismissing the claimant by letter dated 18 December with notice to expire on the 24 December 2019.

85 Our starting point is to confirm that factually we found the above allegations to be proven. Indeed, with the exception of (a), the respondent did not dispute they were factually correct. The treatment was clearly less favourable, because it related to the claimant's gender, specifically her status as a mother. It was also detrimental. In this case, the timeline, the emails, and the actions taken were clearly and evidently influenced by those factors. We have explained our reasoning on this in detail in our findings of fact, and it is unnecessary to reproduce it here. In summary, there was a sea change in attitude as a result of the decision to take maternity leave; and her decision to take parental leave was a factor in the plan to dismiss her. It was not possible to predict what would have happened if the claimant had returned from maternity leave without taking parental leave – the two were operative causes of the unlawful treatment.

[13] Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL
[14] Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL

86 The claim under section 80 ERA was not well-founded. The claimant's argument (as modified in the hearing before us) was that by seeking to call her into meetings when on parental leave, the respondent was attempting to prevent her from taking it. This allegation failed on the facts. By setting up meetings when the claimant was on parental leave, and threatening her with dismissal if she did not attend, the respondent certainly disrupted her parental leave, but she was not prevented from taking it.

87 The claimant alleged that the respondent's attempts to get her to attend meetings from 9 October 2019 onwards, the respondent harassed her and this was related to her sex. We accepted the conduct was unwanted, and we thought that in part it related to her gender. Therefore technically allegation (c) succeeded as an allegation of harassment, although in reality we thought the better view was that the respondent had treated her less favourably and detrimentally because of a combination of her gender and taking parental leave. Therefore, although on one analysis this succeeded as a harassment complaint, it did not really add to our existing conclusions.

88 The respondent had raised time limitation arguments but these were, in large part, sensibly abandoned by Miss Roberts and, in any event, the argument would fail because on the facts there was a continuing course of discriminatory conduct, with the last acts being in time.

Remedy

89 We explained to the claimant that her schedule of loss was unrealistic because some heads of claim were not applicable in this case. Also, other losses claimed e.g. personal injury and aggravated damages were truly excessive. We explained that the Employment Tribunal does not double count and that the principle is to compensate, not to punish. We also explained the principle of causation and how this relates to damages awarded. We gave a steer as to the typical amounts awarded to compensate discrimination, which are considerably less than the sums which are usually reported in the media. Those sums tend to be associated with very high earners. By contrast, the claimant had a part time job and her earnings were modest.

90 We gave the parties time to talk if required; the claimant left it to us to decide the proper amount to award.

91 We shall deal with the amounts claimed and out findings about them in the following paragraphs.

92 The claimant claimed loss of income for ten weeks, despite being reinstated with back pay. She told us this was because she felt that she had lost the benefit of her unpaid Parental Leave. In reality, this was a claim for injury to feelings because there was no loss of earnings.

93 The claim for loss of pension benefits was withdrawn.

94 The claimant claimed for prescription charges, but we had little evidence to show the medication was the result of the respondent's actions, save for a note in

the medical records that she had been prescribed medication for anxiety and depression. We decided not to award financial compensation for prescription charges.

95 We concluded there were no financial losses.

96 We will turn to the non-financial losses. There was a claim for personal injury damages. Clearly the claimant could not claim personal injury damages for the sebaceous cyst or for problems with her teeth. In relation to injury to feelings, the claimant will get an element of compensation which overlaps with personal injury damages. Therefore, the question for us was whether there was some psychiatric injury which was separately compensable. There was no psychiatric report confirming the existence of a psychiatric injury. As noted above, in the medical records we were provided with there was a note that stated the claimant been prescribed drugs for anxiety and depression. We decided the evidence was too limited to make a separate award for personal injury damages. We concluded that this could properly be encompassed when setting the correct award for injury to feelings. Consequently we did not award personal injury damages.

97 We shall now turn to injury to feelings. Counsel for the respondent argued the case fell within the lower Vento band.[15] We rejected that proposition. The fact is that there was a sustained course of very worrying actions by the respondent, during maternity leave, a period when the claimant should have been enjoying the time with her family. We concluded the case fell within the middle Vento band. We were in agreement that the appropriate amount to award was £23,000.

98 There was a claim made for aggravated damages. We decided that there was a proper case for an aggravated damages award, over and above the injury to feelings award. We were careful not to double compensate. The first reason for this award was the emails which demonstrated the existence of a plan to get rid of the claimant (see paragraphs 47-51). She was described in derogatory and sarcastic terms. Her later discovery of the emails confirmed her worst fears, and would have caused further distress and worry, particularly at a time when she was back at work and trying to put the past behind her. The second aggravating feature was the respondent defending this case once the emails had come to light. In our view, a trial which was undoubtedly distressing for the claimant, was not necessary. If (which we do not know), the real issue was the claimant's refusal to reduce the amount claimed in her schedule of loss, then the respondent could and should have admitted liability and disputed the amounts claimed. That would have been a reasonable course of action, and would have avoided a lengthy trial. It is well established that aggravated damages can flow from the way litigation is conducted. In this case, as we have already noted, there would have been no litigation if the emails had not been sent, and left for the claimant to find. We decided the correct sum to award for aggravated damages was £4,000.

99 We decided not to award interest, for a number of reasons. The first is that if we did award interest it would be for a very long period of time whereas, in reality, the claimant was reinstated and the respondent tried to put matters right. Secondly, the fact that this case took so long to get to a Hearing was due to the impact of Covid on the Employment Tribunal's listings and (until CVP) ability to hear longer

15 See Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA plus the Presidential Guidance resulting from Da'Bell-v-NSPCC [2010] IRLR 19 EAT & Simmons v Castle [2012] EWCA Civ 1039, which is updated annually and sets out the current range of each Vento band.

cases. Thirdly, the only rate we can award is 8%, which is is completely out of step with the kind of recovery that you would get on an investment. Finally, we thought that if we were to award interest, it would amount to a penalty (or the equivalent of a penalty) to the respondent; and a windfall to the claimant.

100 The schedule of loss included a sum in respect of the ACAS uplift. We decided it was not appropriate to uplift compensation, because the respondent did comply with the ACAS Code, or at least with the letter of the ACAS Code if not the spirit of it. We also took into account the fact that the respondent is run by Councillors who are volunteers. Finally, we took into account the fact that the decision on appeal was to reinstate the Claimant and pay her for the period when she was suspended to when her dismissal was reversed.

101 The claimant also made a claim for preparation time. This is not in fact compensation. A preparation time order ("PTO") is an award of costs to an individual who represents themselves. The threshold condition is that there must be grounds to consider making a PTO. In this case there were grounds to make a PTO because of the Respondent's unreasonable conduct in these proceedings. The next stage is that the Employment Tribunal has a discretion to make a PTO or to refuse to do so. There is also a discretion as to the amount to order. The Employment Tribunal Rules provide for a set amount per hour (which increases by £1 per year). The time which can be claimed for does not cover time spent during the hearing itself – just preparation. We decided that there were grounds to make a PTO. We told the parties that we wanted to hear representations about whether to make the PTO and, if so, in respect of the amount sought which was 200 hours at the (then) rate of £40 per hour.

101 The claimant sought a declaration that there had been discrimination, which we made.

102 The claimant wanted an apology which we had no power to order, but could recommend. The claimant also asked for a recommendation that the respondent should review its policies and procedures, and provide suitable training for Councillors on their responsibilities as an employer.

103 The parties took some time to discuss the claimant's proposed recommendations, and to consider their submissions on the remaining aspects of the proposed PTO.

104 We shall first deal with the recommendations. The respondent was prepared to undertake to provide a written apology by 28 May 2021, which seemed to us to be a reasonable timescale. The respondent asked us to recommend that the Gorge Parish Council (i.e. the respondent) reviews its policies and procedures by 30 September 2021, which we thought was a reasonable timescale. The respondent asked us to recommend that the Gorge Parish Council (i.e. the respondent) provides suitable employer training for Councillors by 30 July 2021, which we also thought was a reasonable timeframe.

105 Finally we shall return to the PTO. On behalf of the respondent, Miss Roberts argued that we should not made a PTO, because the respondent is a local authority and any money ordered would be public money. As to the amount, she said that most of the preparation was undertaken by the respondent who prepared the bundle, and pointed out that the claimant was the only witness. Miss Roberts

also submitted 200 hours was excessive and suggested 4 or 5 hours for preparing the witness statement and a similar amount for preparing for trial.

106 The claimant's submissions were that the PTO should be made. She observed that the respondent may well have insurance which would cover the amounts awarded, including any amount awarded in a PTO. Miss Roberts very fairly stated that she did not know whether that was the case. The claimant submitted that even though a PTO does not cover attendance at Hearings, it took a great deal more time to prepare than the respondent was contending for. She explained that she had to conduct legal research on the internet; find minutes of meetings on the respondent's website; chase up disclosure; prepare a witness statement; and prepare questions to put in cross examination.

107 Having heard the submissions, we decided we should exercise our discretion to make a PTO. We concluded 200 hours was excessive, and that 10 hours was too low, and was unrealistic bearing in mind that the claimant is a litigant in person. We concluded that it was reasonable to award 35 hours preparation time at £40 per hour i.e. £1,400.

108 The claimant has asked for written reasons, and these are our written reasons. The judgment, which was promulgated shortly after the reasons were given orally, is at Appendix A.

Employment Judge Hughes
Date 3 August 2023

Appendix 1

Judgment

Our judgment (which was promulgated at the time) is reproduced here:

1 We declare that the claimant's claims of direct sex discrimination, harassment related to sex, and being subjected to detriments for taking parental leave contrary to section 47C Employment Rights Act 1996 (as amended) are well-founded.

2 The claimant's claim that the respondent unreasonably postponed, prevented, or attempted to prevent her from taking parental leave contrary to section 80 Employment Rights Act 1996 (as amended) is not well-founded and is hereby dismissed.

3 The respondent is ordered to pay the sum of £23,000.00 injury to feelings and £4,000.00 aggravated damages to the claimant. The total compensation awarded is £27,000.00.

4 We make no award for interest because of the relatively short time period before the claimant was reinstated, and because the present rate of 8% is so in excess of current rates of return on investments.

5 The respondent is ordered to pay the sum of £1,400.00 to the claimant in respect of preparation time.

6 It is hereby recorded that the parties have agreed that the above sum is to be paid on or before 28 May 2021.

7 This Employment Tribunal recommends that the respondent provides suitable Employer Training to Parish Councillors on or before 30 July 2021.

8 This Employment Tribunal recommends that the respondent reviews its employment policies and procedures on or before 30 September 2021.

9 It is hereby recorded that the respondent undertakes to provide an apology to the claimant on or before 28 May 2021.