EMPLOYMENT TRIBUNALS

Claimant: Mr G Roberts

Respondent: Penrhyndeudraeth Town Council

Heard at: Caernarfon

On: 24-28 February 2025 and in chambers on 9 April 2025

Before: Employment Judge Rh Mcdonald
Mrs Rh Hartwell
Mrs Y Neves

REPRESENTATION:

Claimant: Representing himself
Respondent: Mr S Roberts (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

2. The complaint of victimisation is not well-founded and is dismissed.

REASONS

Introduction

1. This was the final hearing of the claimant's claim against the respondent, his former employer. The hearing took place before a full Tribunal panel in person at Caernarfon on 24-28 February 2025. It was agreed that the hearing would deal with liability only.

2. The claimant represented himself. The respondent was represented by Mr Roberts of counsel.

3. For the reasons explained under the heading "Adjustments to the hearing" below, after hearing the parties' evidence we reserved our decision. We directed that the respondent confirm in writing by no later than the 5 March 2025 the legitimate aims it relied in relation to the s.15 case. Mr Roberts had identified those aims at the start of Day 2 at our request. It did so by 11 March. We directed the parties to provide written submissions by 21 March 2025. The parties were allowed to send written replies to the other party's submissions by 4 April 2025 but were not required to do so. Both parties provided written submissions. The respondent provided a Reply to the claimant's submissions. The claimant did not provide a Reply to the respondent's submissions.

4. The Tribunal deliberated in chambers on 9 April 2025. The Employment Judge apologises to the parties for the delay in finalising this judgment resulting from an extended period of ill-health absence from the Tribunal.

The Issues in the case

5. The claimant filed his claim form in this case on 9 October 2023. In it he brought complaints of ordinary and automatic unfair dismissal (section 94 and s.103A of the Employment Rights Act 1996), discrimination arising from disability (section 15 of the Equality Act 2010) and victimisation (section 27 of the Equality Act 2010).

6. The claim form was rejected on 1 November 2023 because the particulars of claim attached to it related to a golf club rather than the respondent. That was rectified and on 23 November 2023 Regional Employment Judge Davies accepted the claim. It was treated as having been received on 01 November 2023. The complaints of ordinary and automatic unfair dismissal were dismissed by a judgment dated 23 February 2024. That was because they were brought outside the required time limit when it was reasonably practicable to have brought them in time. That meant the complaints we were deciding were those of discrimination arising from disability and victimisation only.

7. The issues in the case were identified in a List of Issues included in Employment Judge R Russell's case management order from the preliminary hearing held on 23 February 2024. That List of Issues is attached as an Annex to this Judgment. Issue 3.5 in that list did not arise because the respondent accepted that the claimant had done protected acts.

8. We have added to the List of Issues the legitimate aims relied on by the respondent in defending the complaint of discrimination arising from disability in breach of s.15 Equality Act 2010.

<u>The claimant's applications to amend</u>

9. During our discussions of the issues on the morning of Day 1, Mr Roberts pointed out that the claimant had not applied to amend his claim to add the allegations at 2.1.2 and 3.2.2 (failure to respond to his letter before action). Employment Judge T

Vincent Ryan had noted at the second case management preliminary hearing held on 22 April 2024 that such an application was needed.

10. We heard that application to amend at the end of the morning of Day 1. We heard submissions from the claimant and from Mr Roberts for the respondent. Having taken into account the guidance in **Selkent Bus Company Limited v Moore [1996] ICR 836** and **Vaughan v Modality Partnership UKEAT/0147/20/BA** we decided that the balance of injustice and hardship was in favour of allowing the application. In particular, we concluded that the respondent was not prejudiced in defending the allegation, having already dealt with it in its written witness evidence. We granted the application. Neither party requested written reasons.

11. At the start of day 2, Mr Roberts pointed out that the claimant also needed to apply to amend to add allegations 2.1.3 and 3.2.3 (flawed investigation). We heard submissions from the parties. We decided that the balance of injustice and hardship was in favour of allowing the application. We again concluded that the respondent was not prejudiced in defending the allegation, having already dealt with it in its written witness evidence. We granted the application. Neither party requested written reasons.

12. The end result of granting those applications to amend was that the final List of Issues before us included all 4 of the allegations at 2.1.1-2.1.4 and 3.2.1-3.2.4 from Employment Judge Russell's original list.

Use of Welsh and English in the hearing

13. The claimant and all the respondent's witnesses speak Welsh. The claimant had requested that the Tribunal hearing his case have the ability to hear evidence in Welsh. Two members of the Tribunal were Welsh speaking and we had the benefit of the assistance of interpreters throughout the hearing. We are, as ever, very grateful to them for their assistance.

14. All the written witness statements, including the claimant's, were in English. On Day 1 we discussed whether the claimant preferred to give his evidence in Welsh or in English. The claimant indicated he would give his evidence in English but would like the option to give his evidence in Welsh if he came under stress. He also said he would prefer to ask his cross-examination questions to the respondent's witnesses in Welsh. The claimant gave his evidence on Day 1 in English. On Day 2 he gave his evidence in Welsh translated into English by interpreters. To reduce the mental processing burden on the claimant in giving his evidence in Welsh a second interpreter attended from Day 2 to translate Mr Roberts's questions from English into Welsh.

15. On Day 1 the Employment Judge also emphasised the respondent's witnesses' right to give their oral evidence in Welsh if they preferred. The respondent's witnesses chose to give oral evidence in English apart from Cllr Vaughan-Jones who gave his evidence in Welsh.

16. Both parties provided their written submissions in English. Neither requested the written judgment in Welsh.

17. Ms Llwyd, one of the interpreters, disclosed that she had a historical professional connection with Cllr Vaughan-Jones. She had not had significant contact with him for around 5 years. That was explained to the parties and they both confirmed they had no objection to Ms Llwyd continuing to act as interpreter.

Preliminary Matters

18. We dealt with a number of issues both on Day 1 prior to hearing evidence and during the evidence itself. The claimant had emailed the Tribunal on 15 and 20 February 2025 to raise concerns about a failure by the respondent to disclose relevant minutes of proceedings and a failure to consult him in preparing its Chronology. In his email of 20 February, the claimant said that in light of those circumstances he believed the Tribunal could not hold a fair trial under Article 6 of the European Convention on Human Rights ("Article 6"). He asked the Tribunal to "consider drawing whatever negative inferences in my favour it sees fit". In his email of 15 February 2025, the claimant also set out the adjustments he requested that the Tribunal make to the way it conducted the final hearing to take into account his disability.

Potential witness order application

19. At the start of the hearing the claimant said he wanted the opportunity to cross examine Councillor Sian Llewelyn. The respondent confirmed that it was not calling her as a witness. The Tribunal explained that the claimant could apply for a witness order but pointed out it was very late in the proceedings for the claimant to do so. The employment judge explained that if a witness order was made, Cllr Llewelyn would be treated as the claimant's witness so he would not have the opportunity to cross examine her. Having considered, the claimant confirmed he did not want to apply for a witness order.

Disclosure of minutes of meetings

20. In his email of 15 February 2025, the claimant raised concerns that the respondent had failed to disclose all minutes of its meetings which were relevant to the issues in the case. During our discussions on Day 1 he explained that his concern was with the minutes of the "closed"/non-public parts of meetings at which matters relating to his employment had been discussed and/or decided. The claimant said it was a statutory requirement for there to be minutes of all the respondent's meetings, and the Tribunal could not disapply that requirement. The Tribunal made the point that regardless of what the statutory requirement was, the minutes could not be produced if they did not exist.

21. Mr Roberts said the respondent was not clear which minutes the claimant was seeking. The claimant provided details of what he was seeking. Having taken instructions, Mr Roberts confirmed at the start of Day 2 those meetings had been by way of informal conversations and there were no minutes of them.

22. The claimant had suggested that the absence of the minutes prevented the ability to hold a fair hearing in accordance with Article 6. We concluded that a fair hearing could take place. The claimant could ask the respondent's witnesses about the absence of minutes in cross examination. He could make submissions about the

significance of the absence of those minutes and any negative inference we should draw from it.

Chronology

23. On 20 February 2025 the claimant emailed the Tribunal to inform it that the respondent had not consulted him about the Chronology it had prepared for the final hearing. We discussed those concerns on Day 1. The Employment Judge explained that the Chronology was not evidence but there to help the Tribunal orientate itself when it came to the timeline of events. If our findings of fact differed from what was set out in the Chronology, our findings of fact prevailed. The Claimant confirmed that subject to that reassurance, he did not object to the Chronology.

Adjustments to the hearing, including those arising from the claimant's application on Day 3 to adjourn the hearing

24. The claimant has been in touch with his Community Mental Health Team ("CMHT") for a number of years. He attached to his email of 15 February 2025 a letter from the CMHT dated 20 February 2024 which explained the impact of the Tribunal proceedings on him. In his 15 February 2025 email he confirmed that his requested adjustments were (i) additional processing time when answering questions (including clarification or repetition of questions when required) and (ii) to be allowed a short break to "settle down" his thoughts if his mental functioning became overwhelmed with repetitive and intrusive thoughts. We agreed to make those adjustments.

25. During his cross-examination evidence on Day 2 the claimant complained that Mr Roberts for the respondent was asking him the same questions repeatedly. The Employment Judge explained to the claimant that the respondent had the right to cross examine him and that that would inevitably involve putting matters to him with which he did not agree. We asked Mr Roberts to ensure that he allowed the claimant to answer his initial question before asking any follow up questions. While acknowledging that it can be helpful for an advocate to put a cross-examination question in context, we asked Mr Roberts in this case to avoid having a long preamble to his questions and to keep those questions specific and short. That was to reduce the risk of the claimant becoming overwhelmed.

26. At various points during the hearing, the claimant asked for clarification of the next steps in the process, which the Employment Judge explained. Mr Roberts raised no objection to that.

27. Towards the end of the afternoon of Day 2 the claimant became upset and told us that he was having difficulty in processing the questions he was being asked. In his words, "the tank was empty" when it came to his mental resources. He said that was because he was again being asked the same questions repeatedly. He was also very upset by Mr Roberts putting to him in cross-examination that he was "the employee from hell". We agreed to finish the claimant's evidence at that point (around 3.30 p.m. on Day 2).

28. We discussed with the parties whether it would be helpful to have shorter evidence sessions and more breaks when we reconvened on Day 3. The claimant indicated that what would be helpful would be shorter, more targeted questions and a

lack of preamble. We reminded Mr Roberts that the respondent had accepted that the claimant was a disabled person by reason of various mental health conditions and asked him to take that into account in the way he asked his cross-examination questions. We suggested that it might be easier if, rather than Mr Roberts reading out passages of documents before putting questions to the claimant, the claimant be given time to read the relevant passages himself before being asked more succinct questions. We again explained to the claimant that we needed to ensure fairness to both parties and that Mr Roberts was entitled to ask questions which challenged the claimant's version of events.

29. At the start of Day 3 the claimant said he did not feel well enough to go on. He said that the "employee from hell" comment had been playing in his mind and he could not stop it intruding. He felt very distressed and had been to see the CMHT overnight. He was visibly upset and broke down in the hearing. We explained we would take a break and then allow the claimant to tell us whether he was applying to adjourn the hearing. After the break the claimant confirmed he was applying for an adjournment so he could be subject to a psychiatric evaluation as to whether he could continue.

30. Mr Roberts confirmed that the respondent did not object to the adjournment. He helpfully confirmed that he would no longer proceed with his cross examination. That was on the understanding that matters in dispute were not, by not being challenged in cross-examination, being conceded by the respondent. He expressed sympathy for the claimant and explained that he had been putting the respondent's case to the claimant. We accept that was the case and do not find that Mr Roberts's approach was, viewed objectively, unnecessarily hectoring or aggressive. We also accept that the claimant experienced genuine distress as a result of it.

31. We agreed to adjourn the hearing to enable the claimant to seek advice and support from the CMHT. We confirmed that unless there was a firm decision that the claimant was <u>not</u> able to continue we would reconvene at 10 a.m. on Day 4 to consider next steps.

32. We gave the claimant a letter to pass to the CMHT explaining the situation and asking for any advice it could provide about whether the claimant could continue with the hearing. In the letter we explained what the remainder of the hearing would involve and suggested examples of adjustments the Tribunal could make. We also asked the CMHT whether it would be more beneficial for the claimant to go ahead with the hearing rather than postponing the rest of the hearing, indicating that if the hearing was postponed it was unlikely it would be reconvened for some months because of the difficulty in getting the same Tribunal panel together again.

33. At 4:08 p.m. on Day 3 the CMHT emailed the Tribunal a handwritten letter from a Registered Mental Health Nurse. It confirmed that the claimant had attended the Emergency Department because he was distressed by the respondent's cross examination of him. However, the claimant wished to continue with the hearing and that the RMHN agreed that should be the case. They confirmed that the adjustments

we suggested in our letter would be reasonable adjustments to support the claimant in doing so.

34. Those adjustments were:

(a) Any further evidence the claimant gave from the witness table being given in shorter sessions of 30 minutes

(b) The claimant writing out his questions for the respondents' witnesses and they being read out by the Judge, or the claimant's wife

(c) Hearing short oral submissions but then giving time for the claimant and the respondent to put their full arguments in writing (e.g. 21 days) with the Tribunal meeting after that to make its decision.

35. We adopted those adjustments. In relation to (b), the claimant cross-examined witnesses when he felt able. When he did not, the Employment Judge read out the cross-examination questions which the claimant provided in writing.

36. In relation to (c), the Employment Judge took time at the end of the hearing to explain to the claimant what was expected by way of written submissions. In particular, he stressed that the submissions needed to address those issues from the List of Issues which were still in dispute. The Tribunal went through that list with Mr Roberts who helpfully clarified the respondent's position in relation to each issue so the claimant was clear which were still in dispute.

37. We are satisfied that, those adjustments having been made, the claimant was able to fully participate in the proceeding.

Evidence

38. The hearing bundle consisted of pages numbered 1-632 ("the Bundle"). References in this Judgment to page numbers are to the page numbers in the Bundle.

39. A number of the evidential documents in the Bundle were provided in both Welsh and English. During the hearing the respondent provided a 45 page document with English translations of the remaining documents which appeared in the Bundle in Welsh only.

40. The following documents were added to the Bundle during the hearing without objection from either party:

a. On Day 2, the claimant's formal grievance letter dated 29 March 2022 ("the 29 March Grievance"). This was the second protected act (the first chronologically) relied on by the claimant in his victimisation complaint (3.1.2 in the List of Issues).

b. On Day 3, an email from Kath Kidd, of DAS Law (the respondent 's legal advisers) dated 4 September 2023 ("the Kath Kidd email") providing legal

advice on the claimant's letter before action dated 27 August 2023. The respondent waived any privilege in the email.

c. On Day 4, the respondent provided a copy of the investigation meeting questions which were emailed to the claimant on 9 March 2023 as part of the investigation process.

41. Regrettably, the Bundle was in places hard to follow, with headers which would showing the dates on which emails were sent being omitted and documents not included in chronological order. Other communications between the parties were referred to but not included (e.g. emails of 20 and 23 July 2021). We have done our best with the evidence before us.

42. In terms of witness evidence, we heard cross-examination evidence from the claimant on days 1 and 2. After the adjournment on Day 3 the claimant answered Tribunal questions on the morning of Day 4.

43. We heard evidence from the following respondent witnesses on the afternoon of Day 4:

a. Gwyn Vaughan-Jones, a councillor of the respondent from 10 November 2022 and a member of the Staffing Committee which made the decision to dismiss the claimant ("Cllr Vaughan-Jones").

b. Meryl Roberts, the chair of the respondent council from June 2021 and the claimant's principal contact with the respondent during his employment ("Cllr Roberts").

44. On Day 5 we heard evidence from the remaining respondent witnesses:

a. Nia Jones, a councillor of the respondent from July 2022 and a member of the Staffing Appeal Committee which considered the claimant's appeal against dismissal ("Cllr Jones").

b. Wendy Rees, who carried out the investigation and advised on the dismissal and appeal process ("Mrs Rees").

Findings of Fact

Background facts

45. The claimant was diagnosed with Tourette's Syndrome and has suffered from anxiety, depression, obsessive thoughts and phobias from an early age. The respondent accepts that the claimant is a disabled person for the purposes of the Equality Act 2010.

46. The respondent is a Town Council. The claimant was employed as the Council Clerk and Responsible Financial Officer from 1 August 2011 until his dismissal on 14 July 2023.

47. The respondent is subject to a regulatory and legislative framework set out in the Local Government Act 1972 and the Public Audit (Wales) Act 2004. It is required

to publish an annual return incorporating accounting statements and an annual performance statement. That report is subject to audit by the Auditor General for Wales ("AGW").

48. The councillors are volunteers who fulfil that role alongside their other work and family or other commitments. The Ombudsman Wales Code of Conduct ("the Code of Conduct") establishes standards for local councillors, outlining their responsibilities and the process for handling complaints against them. Complaints about breaches of the Code of Conduct are made to the Public Services Ombudsman for Wales ("the Ombudsman").

49. The claimant was the respondent's only employee. At the times of the matters in dispute in this case Cllr Roberts was the Chair of the respondent and the primary contact point between the claimant and the respondent. She had been a councillor since 2017 and became Chair in June 2021. The vice-chair from June 2021 was Cllr Sian Llewelyn ("Cllr Llewelyn"). She had been a councillor since May 2020.

50. The respondent relies on external sources for advice on matters such as employment disputes. It was a member of One Voice Wales ("OVW"), the national representative organisation for Community and Town Councils throughout Wales. That enabled the respondent to access support and guidance on a range of legal matters including employment matters. It accessed Occupational Health Services through Gwynedd Council.

<u>The claimant's role and responsibilities</u>

51. The claimant's contract of employment was dated 10 July 2012 (pp.119-130). His responsibilities as Clerk were set out in an annex to that contract. In summary, he was expected to advise and provide the respondent with the information necessary to make its decisions. He was responsible for ensuring that the respondent's instructions in terms of its functions as a local authority were carried out and that all relevant notices and minutes were prepared. He was accountable to the respondent for the effective management of its resources. As its Responsible Financial Officer, he was responsible for maintaining the respondent's records including preparing accounts for external independent audit by the AGW. He was responsible for ensuring bills were paid and correspondence dealt with. The list of his specific responsibilities included ensuring that statutory and other provisions governing or affecting the respondent's administration were implemented and ensuring its responsibilities for risk assessment were properly met.

52. His contract stated that his hours of work were 18 hours per week, which included 2 hours per week to deal with his responsibilities relating to the Millenium Park and Minffordd Cemetery. The claimant worked from home when not attending meetings at Neuadd Goffa Penrhyndeudraeth. His notice entitlement was one week's notice for each complete year of service up- to a maximum of 12 weeks. He was paid at an hourly rate with incremental increases subject to performance and qualifications. His initial hourly rate was £9.59.

53. Clause 16 of the contract set out the claimant's sick pay entitlement. After completing 5 years' service (which he had by the time of the events we are dealing with) that entitlement was to 6 months' full pay and 6 months' half pay. Clause 15

entitled the respondent to require the claimant to be examined by an independent medical practitioner and to obtain a report from that practitioner about the prognosis for a return to work and any recommended treatment.

54. Clause 20 dealt with dispute resolution. It provided that if the claimant had a complaint relating to his employment he should discuss it with the chair of the respondent.

Events up to October 2021

55. We find that relations between the claimant and the respondent started to deteriorate from around 2019. The claimant was absent from work for a period of around 2 months in July-August 2020 due to work related stress. We find that in the past the respondent's meetings and proceedings had to a large extent been led by and dominated by the claimant. He was accustomed to councillors following his advice. By 2021, the dynamics of those meetings (and the respondent's proceedings more generally) were changing. Councillors (and in particular Cllr Llewelyn) were more likely to question the claimant's advice and challenge his role in meetings. As chair, Cllr Roberts also sought to take a more active role in leading the respondent and chairing meetings.

56. We find the claimant was sincerely concerned to ensure that the respondent conducted its proceedings "by the book". We find the claimant's firmly-held view was that his interpretation of how relevant laws and guidance applied and how the respondent should operate was correct. We find he did not take easily to being challenged, being asked to clarify his advice or being told that his advice would not be followed. He viewed the failure to follow his advice as the respondent failing to support him. It led to his experiencing increased stress and anxiety. Where in his view the respondent (or specific councillors) did not comply with relevant laws or regulations, the claimant saw his role as being to report them to the relevant external regulatory body. By 2021 he was perceived by some councillors (particularly those who were relatively newly appointed) as hindering rather than facilitating the respondent in serving its community.

57. By June 2021 the claimant was also unhappy about his pay, the burden placed on him by his role and its intrusion into his personal time. At the respondent's AGM on 8 June 2021 the claimant asked that the respondent's Staffing Committee meet to consider that. On 21 June 2021, before the Staffing Committee had met, the claimant raised a written grievance about his pay and workload. This was a time when restrictions were still in place because of COVID. One of the claimant's complaints was that he was being required to deal with urgent incidents posing a risk to the health and safety of the public. In his grievance he complained that he was being contacted about such matters on his personal phone 7 days a week including in the evenings. His requested outcomes were a review of his job description and salary. He also requested measures to reduce the burden and resultant stress. Those measures included removing his personal phone numbers from circulation and provision of a separate business line for respondent-related calls with the facility to record messages. The claimant attached a copy of the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") to his grievance.

58. Relations deteriorated quickly early in July 2021. The respondent's next council meeting was due to be on 8 July 2021. There was a discussion on or around 30 June 2021 about whether it should be held remotely, in person or by way of a hybrid of the two. The claimant's advice was that it should be held remotely to comply with COVID restrictions then in place. Some councillors challenged his advice, setting out their reasons why a hybrid meeting was preferable and consistent with COVID restrictions then in place. The claimant was self-isolating because he was recovering from surgery and the proposal was that he would attend remotely. There was also a discussion about the correct forum and process for carrying out the risk assessment for holding the meeting in person or as a hybrid meeting.

59. The claimant took advice from OVW. On 30 June 2021 he reported to the councillors by email that OVW had not only confirmed his advice was correct but that he had a duty to report the matter to Gwynedd Council's COVID officer/the Welsh Government. He asserted that the respondent had not complied with its obligations towards him under regulation 3 of the MHSW Regulations 1999 and that he would contact the "regulatory department" the following day to report the matter formally as a breach of employment law.

60. Cllrs Llewelyn and Northey emailed back to set out their position and rationale for preferring a hybrid meeting. Cllr Medwyn Williams emailed to suggest they follow the claimant's advice. The claimant responded by saying that his email had not been an invitation to open discussion. He said comments about holding a meeting which could not be held for legal reasons were grounds for a complaint of breach of the Code of Conduct and that "he hoped that closed the matter". Cllr Llewelyn responded to explain that what she, as a councillor, was doing was seeking clarification because the information provided by the claimant did not seem to her to mean the council could not meet in person or on a hybrid basis. She said the claimant was welcome to put in a complaint about her if he wished

61. The Staffing Committee met on the 1 July 2021. Its members were Cllr Roberts, Cllr Llewelyn and Cllr Menna Jones. It was due to report back about the claimant's grievance to the council meeting on 8 July 2021. The claimant was not present at the Staffing Committee meeting. On 2 July, before any outcome had been communicated to him, the claimant made a Subject Access Request for the minutes of the committee meeting and copies of all documents relied on to make its decision, including copies of anything from an external body. In a subsequent email the claimant made it clear that he would be raising a formal complaint following receipt of that committee's decision. He did not make clear what that complaint was going to be about. In broad terms, the committee agreed to recommended to the full council that it adopt the steps proposed by the claimant to address his concerns. (Those recommendations were considered by the full council at its meeting on 14 October 2021).

62. Some days before the 8 July meeting, the claimant tried to arrange a virtual meeting to discuss matters. He emailed Cllr Roberts to say that although things had been said which should not have been, he did not want to make a formal complaint if he didn't have to. He initially suggested he and Cllr Roberts hold an informal meeting with the 4 new council members at which everyone could have a chance to air their views. Although the evidence before us was not entirely clear, it appears he then asked one of the councillors to set up a virtual meeting of the whole council on 5 July. It was set up at short notice and it appears not all councillors were able to join. At 8.30 p.m.

the claimant emailed to say he would wait until 10 p.m. before considering cancelling and submitting a formal complaint. He followed that up by emailing to say that as not enough councillors were able to join the meeting for it to fulfil its purpose he wished to cancel and take the route of a formal complaint. He said he would give more details at the regular meeting on 8 July.

63. On 6 July 2021, Cllr Llewelyn emailed a document to her fellow councillors setting out "matters of concern" about the way the claimant had acted. She noted that the ACAS Code said that an employee should only raise a formal grievance where it had not been possible to resolve it informally. She referred to the claimant's email at 8.30 p.m. on 5 July and wrote (in Welsh but translated)

> **"A CLERK MUST NOT THREATEN HIS EMPLOYER WITH FORMAL COMPLAINTS NOR GIVEN IT ULTIMATUMS"**

64. She asked more experienced colleagues whether she was seeing matters in the wrong way. She went on to say she could not see the threats of formal complaints and the necessity for the respondent to comply with the claimant's suggestions (failing which he would not act on their decisions as he would regard them as unlawful), as nothing less than bullying, plain and simple. She said serving Penrhyn community must have take priority but that was being dominated by requests that ate into their time. She suggested that they decide on steps that (in translation) "brings this abusive pattern to an end".

65. Cllr Llewelyn copied her email to the claimant so he was fully aware of her position. He responded on 7 July to say he would be discussing it with his insurance company and his solicitor. He said they clearly could not discuss the Staffing Committee notes now. He said that he had spoken to Paul Egan ("Mr Egan") of OVW who had advised him about his grievance options. The claimant said he did not feel comfortable attending the 8 July council meeting with such a cloud hanging over him. He requested that the respondent postpone the meeting until the following week as part of its duty of care towards him. He also said that Cllr Llewelyn should be referred to the monitoring officer for breach of the Code of Conduct. He also made a second SAR request, this time for a copy of all emails and other communications since 1 June 2021 between Cllr Llywelyn's and her fellow councillors expressing her concerns about the claimant.

66. The respondent decided not to postpone the council meeting on the 8 July 2021. The claimant emailed on the evening of the meeting to say that his symptoms were too severe for him to attend and carry out his duties. He said he would wait to hear whether the respondent would take up Cllr Llywelyn's suggested course of action or (as he put it) follow proper procedures by referring the matter to the monitoring officer for breach of the Code of Conduct.

67. The claimant was signed off work due to stress at work from 9 July 2021. That absence continued until 4 December 2021.

68. On 9 July 2021 the claimant submitted a formal complaint of defamation of character, failing to report a breach of the Code of Conduct, and failure to follow employment law in relation to Cllr Llewelyn's letter of 6 July 2021. He also said he was waiting for a response to his 2 SAR requests. On 18 July 2021 the claimant submitted

a further formal grievance, sending it to all the respondent's councillors. In it he alleged that the respondent was in breach of employment law, the Code of Conduct and its health and safety obligations. He alleged there were failings in relation to relevant regulations and codes of practice in the council meeting held on 8 July together with a failure to carry out a risk assessment. He said the failure to address his 21 June 2021 grievance without unreasonable delay breached the ACAS Code as did the failure to allow him to attend a meeting (accompanied) to explain his grievance. He said that Cllr Llewelyn had accused him of being a bully for not (as he characterised it) carrying out the "unlawful decisions" of the respondent. He alleged that by failing to report her conduct to the Monitoring Officer or Ombudsman the respondent had breached its duty of care towards him. He noted that he had 3 months from 9 July 2021 (the last exchange he had had with Cllr Lllewelyn) to take a case to the employment tribunal and that he would work with ACAS regarding mediation.

69. Although not all communications were in the Bundle, it is clear that the claimant continued to correspond regularly with the respondent during his ill-health absence. For example, on 6 August 2021 the claimant wrote to complain that he had still not received a response to his SARs of 2 and 7 July. He said that he would add that failure to the complaint he had made to the Ombudsman and that he had also forwarded his complaint to the Information Commissioner's Office ("ICO"). By way of further example, it appears that on 20 and 23 July 2021 Cllr Roberts wrote to the claimant to confirm the respondent was seeking to address his 21 June grievance 2021. He responded on 6 September 2021 with an email seeking disclosure of detailed information and copies of documents relating to the respondent's actions. He continued to allege that the respondent was in breach of employment law, data protection law, the Code of Conduct and the rules governing its proceedings.

70. On 11 August 2021 the claimant began ACAS Early Conciliation. He issued an employment tribunal claim on 9 September 2021 under case number 1601481/2021 ("the September 2021 Claim").

<u>Events in October 2021 – the outcome of the claimant's 16 June 2021 grievance, further grievances and complaints and advice from OVW</u>

71. The 8 July 2021 council meeting was recorded on Zoom. At some point, the recording was provided to the claimant. He took offence at comments made by 3 of the councillors about him. He complained to the Ombudsman that they had breached the Code of Conduct. The Ombudsman decided there was no case to answer.

72. On the 13 October the claimant emailed a number of members of the Senedd, an MP and councillors a letter headed "Democracy in Penrhyndeudraeth". In it he alleged that his absence as clerk was a consequence of the respondent's non-compliance with employment law. He attached a copy of the September 2021 Claim. He referred to his public interest disclosure to Audit Wales. He raised concerns about what councillors said in the Zoom recording of the 8 July 2021 meeting and confirmed he was willing for the recording to be shared with the public. He shared that email with a member of the public, albeit one who was a former councillor.

73. On 14 October 2021 the claimant raised a further grievance. He wrote again on 18 October 2021 to raise further complaints. The central allegation related to his salary not having been paid. The claimant had been sent a cheque for his pay but the bank

would not honour it because of issues relating to changing the bank mandate. The respondent had sought to change the mandate so that cheques would not need to be signed by the claimant (who had by that point been off sick for 3 months). It appears that it was the claimant himself who had raised queries about the mandate with the bank, triggering an investigation by it (p.576).

74. At the full council meeting on 14 October 2021 the respondent approved the recommendations made for responding to the claimant's 21 June 2021 grievance. The steps agreed (subject to the claimant's agreeing to them) included reducing his hours to 14 hours per week to reflect his no longer being responsible for the Millenium Park and Minffordd Cemetery; annual salary reviews and increases in line with inflation; and annual appraisals to be conducted each September with the Chair and the Staffing Committee. The claimant's concerns about his being contacted out of hours were to be addressed by providing a work mobile phone. That number would be made public instead of the claimant's personal number and the claimant would put an out of office on his email outside working hours making clear what his working hours were. There was an increased monthly allowance for electricity and wifi.

75. The claimant continued to write frequently to the respondent raising complaints about various matters. Cllr Roberts confirmed in an email on 18 October 2021 that the respondent would be happy to arrange a meeting to discuss his grievances as soon as he was well enough to return to work. She also said the respondent would consider arbitration to resolve the dispute between them. The claimant's response was that the issue of his pay had to be resolved "now" not when he was well enough to return to work.

76. Although it had been receiving advice from OVW throughout the dispute with the claimant, the respondent had resolved at the 14 October council meeting to contact Lyn Cadwallader ("Mr Cadwaller"), Chief Executive of OVW. It seems to us that there were concerns that OVW had also given advice to the claimant about the matter. As a result Cllr Llewelyn wrote to Mr Cadwallader on 19 October explaining that the respondent felt that the dispute had grown out of all proportion and had "reached a point of no return". She explained the respondent felt it needed to approach the very top of OVW because it needed solid guidance as to what to do next. She said that the respondent had received reports that the claimant was forwarding all emails of complaints he had made against councillors and the respondent to a member of the public and had been openly disputing the respondent's bank mandate in the bank branch in Porthmadog. She said that there was clearly a breach of trust and asked whether this was "solid ground for instant dismissal" (p.569). Mr Cadwallader asked Mr Egan to advise the respondent.

77. On 20 October 2021 the claimant sent an email headed "Clerk's No Confidence in [the respondent]" to a member of the public. It was addressed to "Dear Residents" and asked them to circulate the letter "in the public interest". In it he explained that he was taking an employment tribunal claim against the respondent and accused it of failing to comply with its Health and Safety obligations and of breaching the ACAS Code. He said that his salary was costing taxpayers £900 per month. He referred to the complaints he had made to Audit Office, Senedd members and alleged the respondent had failed to respond to SARs and FOI requests. He reported he had not been paid and that the bank was investigating. He also made allegations of failures by the councillors in the administration of a trust fund relating to a football pitch in which

£41,000 was invested. He said that the Chair had asked external advisors "whether my requests were a sackable offence". (It is not clear how the claimant knew the content of such communications between Cllr Roberts and external advisers).

78. Cllr Llywelyn passed the email to Mr Egan the same day asking for advice for the respondent on what she referred to as a "desperate, desperate situation". She also asked the Head of Legal Services at Gwynedd Council for advice. Councillors were genuinely concerned that the contents of the claimant's email could put councillors at risk of harm from residents angered by the allegations he made about the situation costing taxpayers £900 per month.

79. Cllr Roberts, Cllr Llewelyn and Mr Egan met on the 22 October 2021 so that he could advise them on how to respond to the claimant. Mr Egan helped prepare a letter to the claimant. He also advised that the claimant's entitlement to sick pay would reduce to half pay from November 2021 because of his 2 months' sickness absence in 2020. He explained that the entitlement to sick pay was calculated by reference to a rolling 12 month basis.

<u>Events in November 2021 – the proposed medical review meeting and steps preparing for the claimant's return to work</u>

80. The letter on which Mr Egan had advised was sent to the claimant on 1 November 2021. It requested that the claimant remotely attend a medical capability meeting, proposing 10 or 15 November. The letter explained the intention of the meeting was threefold. The first was to discuss setting up an OH appointment which could advise on the claimant's medical condition and when he might be ready for a phased return to work. It would also advise on any reasonable adjustments required when he was well enough to return. The second was to discuss and clarify the claimant's grievance so they could resolve that grievance to assist in his recovery. The third was to assure the claimant that the respondent was doing its best to manage processes normally undertaken by him. It asked him to acknowledge that could be problematic given they relied on his expertise in supporting it. The letter also asked the claimant to refrain from raising external complaints about the respondent because of the damage that might cause to its reputation. It said that it felt certain that causing such damage was not the claimant's intention.

81. Although the letter quoted the relevant sick pay entitlement provisions in the Green Book, it did not expressly say that the claimant's sick pay would reduce to half pay from November 2021. We find that was primarily because, however accurate that statement would have been, doing so would prompt further complaints from the claimant. The letter explained that Mr Egan would attend the meeting to take notes and provide HR support. It advised the claimant of his right to be accompanied to the meeting and asked him to let Mr Egan know direct of his preferred meeting date and the details of any chosen companion.

82. The claimant chose not to attend the medical capability review meeting. It appears that in an email letter of 1 November 2021 he raised concerns that OVW was not independent. He also appears to have questioned the basis of the respondent's entitlement to refer him to an independent OH advisor and to have asserted that his action in making his complaints known to the community and the media was a public interest disclosure.

83. On 2 November, Cllr Llewelyn emailed Mr Egan to chase up his advice on the next steps the respondent should take. She also reminded him about their discussion about the claimant's sick pay entitlement reducing from November. She had asked at their meeting "how on earth" they could notify the claimant of that as it could encourage more "(unintentionally) threatening behaviour, wanting to whistleblow etc". We find that was a wholly understandable concern. Mr Egan had said he would put the position in writing as a means of supporting the respondent when implementing the reduction and she asked for that written confirmation.

84. On 9 November 2021 the claimant emailed the respondent to say that he would be returning to work on 16 November 2021. He said the fit note would include some recommendations from his GP. In the same email he referred to an issue regarding the supposed exclusion of an individual from the Christmas lights evening, warning that was "extremely serious" and could lead to a discrimination complaint.

85. That email from the claimant was the last straw for Cllr Parry, who tendered her resignation as a councillor. She said she was sick of the allegations and complaints including the complaint against her to the Ombudsman which had been dismissed as without merit.

86. Cllr Roberts wrote to the claimant on behalf of the respondent on 12 November 2021 to arrange a return to work meeting. Mr Egan had provided advice on the draft. The letter confirmed the intention to refer the claimant for an OH review to identify how the respondent could support him at work. It suggested he could use some of his accrued annual leave to enable a phased return. It explained why the respondent considered Mr Egan's involvement appropriate and reiterated its previously stated intention to resolve the claimant's grievance when he was well enough to return to work. The letter also said that the claimant making his complaints known to the community and the media was inappropriate action on his part given the respondent could not effectively respond because of his sickness absence. It noted the reference to the claimant having made a claim to the employment tribunal (the September 2021 Claim would not have actually been served on the respondent at that point because of its initial rejection). While acknowledging the claimant's prerogative to make such a claim the letter expressed the respondent's disappointment with that approach and its willingness to resolve the grievance. It expressed the view that Councils operated best when councillors and the Clerk worked as a team respecting each other's roles and responsibilities and assured the claimant that it was committed to trying to ensure that together they could move to that preferred position.

87. A return-to-work meeting was held on 24 November 2021, attended by the claimant, Cllr Roberts and Cllr Medwyn Williams. It was agreed the claimant would return to work on a phased basis. At the meeting the respondent expressed its disappointment that the claimant had chosen to try and besmirch the respondent's name in public. He was told that it expected him to cease that behaviour on his return to work and in future. The OH referral form was completed it was agreed that OH would be asked to provide a risk assessment form tailored to the claimant.

88. The following day the claimant wrote to the respondent raising concerns that the respondent had not responded to his SARs, indicating that if he did not receive a satisfactory response he would refer the matter to the ICO.

Events from December 2021 to 11 January 2022- the first OH review, the claimant's return from sickness absence and the withdrawal of the September 2021 Claim

89. The claimant began his phased return to work on 4 December 2021. An OH Assessment was carried out by phone on 17 December 2021 by Mared Eswen Jones, OH Advisor at Gwynedd Council (p.535-536). The claimant told her that the cause of his stress was the respondent's failure to address issues he had raised about the running of the respondent, leaving him feeling unsupported in the workplace. The OH Advisor's advice was that the claimant was fit for work with adjustments in place to support him. She advised that it was likely that the claimant was a disabled person for the purposes of the Equality Act 2010 so that the respondent had a responsibility to consider reasonable adjustment to support him.

90. In summary, the recommendations were:

a. to carry out a stress risk assessment to identify stressors with a view to making reasonable adjustments to support the Claimant in the workplace

b. that a Wellness Action Plan be devised giving a useful tool to do this.

c. regular supervision meetings to provide ongoing support.

d. that the respondent was strongly advised to reach an early resolution with the claimant over issues he had at work.

91. On 1 January 2022 the claimant raised a formal grievance about detriments he alleged he had been subjected to for making protected interest disclosures. He said he was making a claim for compensation and had contacted ACAS to initiate Early Conciliation. ACAS contacted the respondent on 5 January 2022, making clear that this was a separate matter to the September 2021 Claim.

92. The claimant wrote again on 4 and then on 9 January 2022. In those letters he provided details of the September 2021 claim and his proposed whistleblowing tribunal, chased up copies of the minutes of the closed sessions of council meetings in November and December and a copy of the respondent's engagement letter with OVW for provision of employment advice.

93. On 11 January 2022 the claimant wrote to the respondent to confirm he was withdrawing the September 2021 Claim and the proposed whistleblowing claim. He said that was on medical advice, balancing the outcome of the tribunal claims against the risk of his stress returning. He noted that there were council elections in May 2022 and that there was probably not enough time for the council to implement the OH recommendations in the limited time available before then. He expressed the hope that the newly elected councillors could address the recommended reasonable adjustments in the post-election AGM in May 2022.

The council meeting on 13 January 2022 and the risk assessment meeting on 31 January 2022

94. The claimant attended the council meeting on 13 January 2022. One item discussed was the proposed use of land owned by the respondent for allotments. The claimant queried whether the respondent would incur costs relating to that, e.g. for a

pollution survey or in relation to any planning permissions. The council's decision was that rather than the respondent providing allotments it would gift the land for allotments. Those taking on the land for allotments would be responsible for any related costs.

95. On 31 January 2022, the claimant met Cllr Roberts and Cllr Northey to discuss the 17 December 2021 OH report. It had also been intended to discuss the claimant's appraisal, but it was agreed that would need to wait for the election of the new council in May 2022. It would need to decide on the objectives against which the claimant's performance was to be measured.

96. The claimant had been provided with an HSE risk assessment template. He had completed it in advance of the meeting. The "hazards" he identified were, in essence, a list of those matters about which he felt aggrieved. It included Cllr Llewelyn referring to his behaviour as bullying in July 2021, the failure to pay him in October, the proposed change to the bank mandate and alleged breaches of its freedom of information and GDPR obligations. It is clear that by this point the claimant had access to the correspondence between the respondent and OVW when the respondent was seeking its advice. He quotes directly from it in the risk assessment, the "hazards" identified including Cllr Llewelyn's asking in her 19 October 2021 email whether the claimant's conduct was grounds for instant dismissal and her email on 2 November 2021 relating to implementing the reduction in the claimant's sick pay. The "hazards" also included the respondent failing to comply with the claimant's request to review his salary but instead agreeing an inflation-based salary increase. We find that most of the meeting was taken up of the claimant going through his list of allegations against the respondent, leaving little or no time to do anything beyond that.

97. The claimant prepared draft minutes of the meeting and sent them to Cllrs Roberts and Northey on 2 February 2022. They recorded the claimant's wish to find a way forward. The minutes recorded recommendations to be considered by the full council. The central recommendation was that the respondent was to acknowledge it was in the wrong in relation to the matters the claimant listed and to confirm that it withdrew all allegations (e.g. the allegation of bullying behaviour) against the claimant. The respondent was to follow the ACAS Code in relation to all future disputes with the claimant. If it did that, the claimant would accept that the dispute between them was over. In essence, the claimant was willing to move on, but only if the respondent accepted that he was in the right in relation to all aspects of the dispute between them.

98. The minutes also recorded a recommendation that in future personnel matters were to receive more attention and be subject to regular reviews. The claimant was to provide copies of his employment contract, the ACAS Code, the Code of Conduct and other documents setting out the responsibilities and rules applying to the Staffing Committee and the respondent. The draft minutes said that if the respondent chose not to accept the recommendations, the claimant's dispute would have to be referred to an independent body.

<u>February 2022- the outcome of the council meetings on 10 and 15 February 2022, the claimant's further sickness absence</u>

99. The respondent held its monthly council meeting on 10 February 2022. The claimant attended. One of the agenda items was to approve the minutes of the

previous meeting on 13 January 2022. There was disagreement with the way the claimant's draft minutes recorded the discussion about the allotment land. The minutes drafted by the claimant recorded that he had advised of the need for a planning permission application with associated reports and for the respondent to set aside a sum to cover those costs. His draft minutes recorded that the council had "decided not to accept the Clerk's advice" and instead gift the land for allotments. The council decided at the 10 February 2022 meeting that the minutes did not accurately reflect the discussion they had had on 13 January 2022. It resolved to amend them. In particular, it was agreed to remove the statement that the council had "decided not to accept the claimant's advice" because that was not the councillors' view of what had happened during that discussion. The claimant was very unhappy about that decision. On 11 February 2022 he wrote to Cllr Roberts expressing concerns about the impact of events on his mental health.

100. The risk assessment and how to address it were discussed at a meeting of councillors held by Zoom on 15 February 2022. The councillors present decided that the allegations made by the claimant against the respondent in his risk assessment were so serious that it was not possible to address them at the meeting. Instead, the meeting decided to share the allegations with OVW to ask for written guidance on the way forward. It was again agreed to address the request for advice direct to Mr Cadwaller to ensure the respondent received guidance from the highest level within OVW.

101. Cllr Roberts wrote to Mr Cadwallader on 21 February 2022 enclosing the claimant's risk assessment. Having explained the background she said that the belief of the attendees at the 15 February 2022 meeting was that the claimant's "constant complaints and accusations are hindering us from our duties as town councillors". She asked for OVW advice in writing.

102. On 23 February 2022 the claimant emailed Cllr Roberts to ask for the minutes of the 15 February meeting, saying his mental health was fragile and he wanted to know what had been discussed. Cllr Roberts sent him the minutes on 27 February.

103. In the meantime, on 26 February 2022 the claimant emailed the councillors to say his mental health had deteriorated since the council meeting on 10 February 2022. He had not had the respondent's response to the 17 December OH Report nor the minutes of the meeting on 15 February. He said that because of all the negative comments about him (which he said breached the Code of Conduct) he "no longer felt safe" among them. He said he would be submitting a self-certified sickness absence form for 28 days.

104. His email went on to allege there were more breaches of legislation, regulations and codes of practice in 2021-2022 than in any previous year and suggested that the residents had been subjected to unnecessary costs, including costs due to his absence. He referred to the allotments issue and said he was sure the respondent's actions would be subject to a lack of confidence on the part of the AGW and residents, and an issue for any respondent councillor considering running for a seat on Gwynedd Council. He annexed requests for rectification of personal data relating to the decision to amend the wording of the minutes of the 13 January meeting. He closed his email by saying that he had had a good relationship with Mr Egan for about 10 years and

suggested that comments made in an email from Cllr Llywelyn to Cllr Roberts about Mr Egan (which did not appear to be in the Bundle) were libellous.

105. The claimant started a period of 28 days sickness absence due to "Stress, anxiety, depression at work" from 27 February 2022.

Events from March 2022 to 8 June 2022 - the claimant's sickness absence, the council meeting on 28 March, the 29 March grievance, April 2022 tribunal claim and the claimant's further sickness absence

106. On 4 March Cllr Roberts acknowledged the claimant's emails and told him the respondent would respond within the month. She urged him to get some rest to speed his recovery. On 9 March 2022 the claimant notified the respondent that he had contacted ACAS in relation to bullying and work-related stress. He did not attend the regular council meeting on 10 March. At that meeting, it was decided to approve the minutes of the February meeting but remove a section from the claimant's draft in which the claimant recorded his objection to the amendment of the January minutes and his version of the discussion at that meeting.

107. On 26 March 2022 the claimant emailed the respondent to say he had referred the lack of response to his 26 February 2022 rectification request to the ICO. He requested all the information provided to each councillor to enable them to make an "informed decision" at an emergency meeting called for 28 March. He also said that after discussing with ACAS he proposed to present a formal complaint against the respondent.

108. At the 28 March emergency meeting the councillors present discussed the advice received from OVW. That advice appears to have been given in a virtual meeting between Cllrs Robert, Cllr Llewelyn and Mr Egan. The advice had been to "pursue employment through Gwynedd Council". The minutes recorded that "the strong feeling among council members is that the relationship and trust between the Clerk and the Council have broken down and that the Clerk's employment should be terminated."

109. It was resolved to contact insurers to ask whether they would insure the respondent on any legal matters resulting from any such action. It was also decided to seek Gwynedd Council's advice on the claimant's allegations that the respondent was not complying with its GDPR obligations in relation to the claimant's data. The meeting noted that the claimant had referred one councillor to the Ombudsman again and that there was no basis for the claimant to file an official complaint about correcting the minutes of the 13 January meeting.

110. The councillors added an appendix headed "Opinion of Councillors" to the minutes of that meeting. It read:

> **"Loss of councillors: One of the councillors noted that [the respondent] has lost several councillors, some experienced and hardworking and some others providing enthusiastic new blood within three years. Three of those within the last year. The reason for this being the constant disputes arising from the Clerk and this has hindered the council's work in serving the taxpayers of Penrhyndeudraeth. Everyone agreed that this was the reason behind this."**

111. On 29 March 2022 the claimant raised a grievance ("the 29 March Grievance") alleging that the respondent had failed to make the reasonable adjustments recommended by the 17 December 2021 OH Report. Specifically, he alleged that the respondent had failed to carry out a stress risk assessment and failed to take steps to address the stressors identified in that assessment. Although chronologically it comes first, that grievance is the second protected act relied on by the claimant in his victimisation complaint (Issue 3.1.2).

112. The claimant started Early Conciliation via ACAS (for the third time) on 30 March 2022. The ACAS EC Certificate was issued on 19 April 2022.

113. Although the claimant's sickness absence ended at the end of March 2022, it does not appear he attended the 14 April council meeting. The minutes of that at 8.7 (May 2022 Election) record that:

> **"It was noted that there will not be an election…. 8/10 councillors are not returning. Only 2 have put their names down to be councillors in the new term. One councillor noted that the Clerk had not sent him the paperwork to put his name forward and that he was uncertain of the process. Those who were present of the remaining 7 wish to declare : the main reason for not returning is that the relationship and trust between [the respondent] and the Clerk has broken down completely, due mainly to the numerous complaints made against [the respondent] by him since July 2021."**

114. The claimant brought an employment tribunal claim against the respondent on 24 April 2022 under case number 1600453/2022 ("the April 2022 Claim"). In it he complained that the respondent had breached s.21 Equality Act 2010 by failing to comply with the duty to make reasonable adjustments. He alleged that the respondent had a practice ("a PCP") of not giving codes of practice, relevant regulations and relevant law sufficient consideration and attention. He also alleged it had a PCP of not giving OH reports and their recommendations sufficient consideration and attention. Finally, he alleged that there was a failure to provide an auxiliary aid, namely an agreed list of actions to implement the OH report. His bringing of the April 2022 Claim is the first protected act relied on by the claimant in his victimisation complaint (Issue 3.1.1).

115. The Claimant began a further period of sick leave on 8 June 2022. The initial fit note certified him as unfit for work until 4 July 2022. The reason given was "Work-related stress aggravating anxiety and depression". The fit note recorded that the claimant "feels that his condition has been aggravated by the failure to adopt the recommendations of his Occupational Health report."

<u>Events from 9 June 2022 to 31 July 2022- Mrs Rees's involvement, the claimant's further grievance and the second OH</u>

116. The respondent had decided to delay taking any steps in relation to the claimant's employment until after the May 2022 elections. The advice from OVW and Gwynedd Council was that the respondent should take professional advice and Mrs Rees was suggested for that role.

117. Mrs Rees was engaged to provide HR advice and assistance. She has significant and substantial experience in human resources matters. We found her a clear and measured witness and her evidence reliable. We accept her evidence that

her brief was to assist the respondent with HR matters. Specifically, she was to advise and assist on implementing the decision at the 28 March 2022 meeting to explore terminating the claimant's employment.

118. Cllr Roberts and Cllr Llewelyn briefed Mrs Rees at a meeting on 24 June 2022. We find that her advice was that all attempts should be made to rescue the employment relationship. To that end, she advised the first step should be to set up a return-to-work meeting with the claimant when his current period of sickness was due to end. She also advised that the respondent should explore mediation with the claimant.

119. Based on that advice, Cllr Roberts texted the claimant on 29 June 2022 to set up a return-to-work meeting when his then current fit note expired. The claimant responded on the same day to say his preferred method of communication was email to his personal email address given they were approaching the employment tribunal hearing. (That referred to a case management preliminary hearing in the April 2022 Claim). He emphasised that he was not refusing to attend a return to work meeting but that he remained unwell and that it was likely a further fit note would be issued when his current one expired. He said that "the discrimination and [the respondent's] decision to terminate my employment had further respondent aggravated anxiety and depression". (The respondent had not at that stage taken any steps to terminate the claimant's employment, so the claimant must be referring to the decision recorded in the minutes of the 28 March meeting.)

120. The reasons for absence in the 8 June fit note were repeated in the next fit note dated 4 July 2022 which certified the claimant as unfit for work until 15 August 2022.

121. On 12 July the claimant sent the respondent a "formal grievance for defamation" (p.302-304). He quoted paragraph 8.7 from the 14 April minutes and referred to the respondent's decision at its meeting on 28 March 2022 to "use the breakdown of relationship and trust as its reason to terminate my employment". He set out the law on defamation and asserted that the publication of the record in the minutes was a libel. He also quoted the ACAS Code and said he trusted that the respondent would follow it.

122. Cllr Roberts responded by email on 19 July. She confirmed the claimant's grievance would be heard by the respondent's Grievance Committee. Noting that the claimant had sent the grievance while signed off sick she asked whether he was well enough to attend a grievance hearing or preferred to wait until he returned to work. The claimant confirmed by return that he would rather wait until his next medical review. Mrs Rees continued to advise the respondent but at this point communications were between the claimant and the respondent direct, usually via Cllr Roberts.

123. On 26 July 2022 the ICO upheld the claimant's complaint that the respondent had failed to respond to the rectification request he had made on 26 February 2022 within a calendar month. It required the respondent to revisit the request and provide the claimant with all the information he was entitled to as soon as possible or within 14 calendar days. Cllr Roberts responded to the ICO on 23 August 2022.

<u>Events in August 2022 – the claimant's continued absence and second OH review</u>

124. The claimant's next fit note dated 10 August 2022 certified the claimant as unfit until 7 September 2022. It repeated the reasons in the previous fit notes but added "However this is now progressing with employment tribunal".

125. A case management preliminary hearing in the April 2022 Claim took place on 4 August 2022. It confirmed the final hearing was listed for 9-11 December 2022 but listed a preliminary hearing for the week of 5 September 2022 to discuss whether the case was suitable for judicial mediation.

126. In advance of the case management hearing the claimant had made an SAR to Mr Egan and asked for copies of any advice OVW had given the respondent in a form which could be released to the claimant. Mr Egan replied on 15 August to say there was no such advice but provided a copy of the email exchanges he had had with the respondent since 15 February 2022.

127. The respondent referred the claimant for a second OH appointment. It took place by phone with Mared Eswen Jones on 30 August 2022. In her report of the same day (pp.320-321) she reported that the claimant felt his depression was deteriorating, leading to his having to seek clinical help multiple times since January 2022. She advised that the claimant was eager to return to work. The recent reduction of his sick pay to half pay was a cause of additional stress and worry.

128. The report advised that the claimant may be fit to complete some aspects of his role with adjustments in place to support him. Specifically, the claimant felt he could complete some of the financial/accounting work involved in his role. Ms Jones advised that the recommendations made in her 17 December 2021 report were still pertinent. She suggested that the respondent arrange a meeting with the claimant as soon as possible to discuss the stress risk assessment further and to agree any actions required to support him. She also "strongly advised" early resolution of the situation to move forward and prevent further deterioration of the claimant's stress symptoms. She advised that maintaining open and clear communication was also likely to be of benefit.

129. Ms Jones explained that she had not arranged a review meeting with the claimant. She noted that a Judicial Mediation meeting was due to take place and that the claimant would know more and feel better after having the mediation.

<u>Events in September to 7 November 2022 – the claimant's sick pay and the meeting on 7 November</u>

130. The case did not proceed to judicial mediation. On 7 September 2022 the claimant was certified as unfit for work until 7 October 2022. The reasons given were the same as those in the 10 August 2022 fit note.

131. On 30 September 2022 the claimant was certified as unfit for work until 9 December 2022. The reasons given were "Depression NOS - Aggravation of underlying Menal health condition. Work related stressors."

132. A further case management preliminary hearing on 10 October 2022 confirmed the April 2022 Claim would be heard on 3-6 April 2023. There was due to be a

preliminary hearing on 7 December 2022 to decide whether the claimant was a disabled person for the purposes of the Equality Act 2010.

133. On 12 October Cllr Roberts emailed the claimant to ask if he was feeling well enough to meet to discuss the 30 August 2022 OH Report and the stress risk assessment. The claimant initially replied to Cllr Roberts to express a willingness to do so the following evening. However, later that afternoon he emailed the respondent to say that in his view the issue was one which he should discuss with the relevant committee (which we understand was in his view the Staffing Committee) rather than with the Chair. He said he would be pleased to discuss dates with the committee.

134. The claimant raised the issue of his sick-pay entitlement coming to an end after November 2022. He asked whether he would be paid and whether his employment would continue after that. The respondent discussed that in closed session after the monthly council meeting on 13 October 2022. It decided it was not a reasonable adjustment to restore the claimant's sick pay to full pay. The meeting confirmed that the claimant continued to be employed but that his sick pay entitlement would be extinguished on 8 December 2022. An update about the hearing dates for the April 2022 Claim was also provided at that meeting.

135. On 27 October 2022 the claimant wrote to the respondent again, asking that his email be forwarded to all councillors. In it, he said that he had been referred to Mental Health Services. The claimant appeared to object to the Cllr Roberts wanting to meet him in the capacity of his "line manager". Quoting from "The Good Councillor's Guide" he said he was employed by the respondent as a whole, answered to the council as a whole and that the council must not allow delegation to a single councillor, not even the Chair. He said that if he were to be contacted about an employment matter, the respondent must advise him of the relevant procedure followed including confirmation that the decision to contact him had been made at a properly constituted council or committee meeting.

136. Cllr Roberts responded on 1 November 2022 to point out that she was the claimant's contact point with the respondent and to explain that she was trying to resolve matters by holding an informal meeting between a line manager and member of staff. Having taken advice from OVW that was not a matter which needed referring to the respondent's Staffing Committee. We find that this was throughout, Cllr Roberts tried to take positive steps to resolve the issues with the claimant on a pragmatic basis. The claimant's response was more often than not to focus on process at the expense of pragmatism.

137. On 4 November 2022 the claimant replied agreeing that a meeting might be useful to try and find a way forward. He marked his letter "without prejudice" and explained that he was concerned not to compromise the April 2022 Claim by engaging in discussions. The meeting was set for 7 November 2022. Cllr Roberts explained in advance that Mrs Rees would also attend because she was helping the respondent with HR matters. The claimant confirmed that he did not want to bring anyone to the meeting.

138. Cllr Roberts had hoped to use the meeting to go through the OH Report to identify what steps the respondent could take to enable the claimant's return to work. We accept that this was a genuine attempt on her part to enable the claimant to return

to work. However, we find that the claimant instead insisted on going back over his allegations against the respondent in the tribunal claim. We find that during the meeting he raised his voice, pointed his finger and threatened Cllr Roberts and the respondent with press exposure. He then, in Cllr Roberts's words "stormed out" of the meeting (p.371).

Events from 8 November 2022 to the end of January 2023 – the claimant's sick pay grievance, ACAS early conciliation and the respondent's decision to carry out an investigation

139. On 13 November 2022 the claimant raised another formal grievance. In it he said the reduction of his sick pay to nil was a failure to make a reasonable adjustment. He also alleged that the way the respondent had handled his request to reinstate his pay was "ultra vires". He notified the respondent that he had again contacted ACAS to initiate early conciliation.

140. Cllr Roberts acknowledged the grievance on 14 November and suggested they meet on 17 November to discuss the matter informally. She had wanted to discuss the issue of the claimant's pay on 7 November but wasn't able to because of the claimant's abrupt departure from that meeting. The claimant followed up his grievance with 2 emails on 15 November 2022. The first requested copies of the minutes of the meeting at which the decision not to reinstate full sick pay was made. The second set out a summary of the case-law on reasonable adjustments and sick pay. Cllr Roberts emailed the claimant the following day to confirm that OVW's advice was that sharing the minutes of the meeting at that point was premature. She reiterated the offer to meet to try and resolve the claimant's grievance informally. The claimant's response was that "ACAS will be discussing with the Committee on my behalf" (p.332). We understand that to mean that the claimant wanted to deal with matters via the ACAS early conciliation process he had initiated on 13 November.

141. On 24 November 2022 the claimant emailed the respondent to request a further referral to OH. He said that engaging in discussions with the respondent caused him stress and explained that was why he had left the meeting on 7 November "abruptly". He requested that the OH referral consider adjustments required for any discussions going forward.

142. The ACAS early conciliation initiated on 13 November 2022 came to an end on 25 November 2022 (p.8). The claimant told the ACAS conciliator to close the conciliation. The claimant's view was that the decision not to reinstate his full pay was invalid and could be quashed because it was not made at a properly constituted meeting. He said he proposed to add it to the April 2022 Claim. On the 25 November the claimant emailed the respondent to say he was making a claim to the employment tribunal (about his pay). He made an SAR request for all information related to the meeting at which the decision was made and asked for clarification of the legal power used to make it.

143. The end result of those exchanges was that the claimant never took up the respondent's offer to discuss his 13 November grievance at an informal meeting. Although he indicated he would instead pursue it via ACAS and then via his tribunal claim there was no evidence before us that he did so.

144. At the preliminary hearing on 7 December 2022 a consent order was made confirming that the claimant was a disabled person for the purposes of s.6 of the Equality Act 2010.

145. On 12 December 2022 the claimant was certified as unfit for work until 10 April 2023. Again, the reason given was "work-related stress aggravating anxiety and depression. He feels his condition is aggravated by a failure to adopt recommendations of OH Report." (p.545).

146. The respondent engaged the services of a Locum clerk from November 2022 until January 2023.

147. The claimant was still off sick when the council meeting on 12 January 2023 took place. The respondent discussed next steps relating to the claimant in closed session. Mrs Rees attended to advise. It was resolved to task her with carrying out an investigation. The Terms of Reference were:

> "1. An allegation that the relationship between [the claimant] as Clerk of the Council and the Council has broken down beyond repair; and
>
> 2. Whether [the claimant's] employment can continue based on [his] long-term sickness."

148. On 25 January 2023 the CMHT wrote a "to whom it may concern" letter reporting that the conflict with the respondent was having a negative effect on the claimant's mental health. It referred to the added stress of delayed deadlines in the April 2022 Claim and hoped the respondent was taking into account the profound effect of that on the claimant's mental health.

<u>Events in February and March 2023 – the start of Mrs Rees's investigation.</u>

149. On 27 February 2023 Mrs Rees wrote to the claimant by email to invite him to an investigation meeting (pp.363-364). She said that, as the claimant was aware, she had been commissioned by the respondent to conduct an investigation. She set out the Terms of Reference she had been given. She explained that the investigation into the breakdown of the relationship would be conducted in accordance with the ACAS Code and the investigation into his long-term sickness absence would be conducted in accordance with the ACAS guide to conducting workplace investigations alongside the respondent's sickness absence policy. She attached copies of those documents for the claimant's reference.

150. Mrs Rees offered 7 or 9 March 2023 as dates for the investigatory meeting. She acknowledged that the claimant was signed off work. She said that if the claimant did not feel able to attend the investigation meeting, she would instead send him the interview questions in writing. The claimant could then make his representations in writing to her within one week. She asked the claimant to send any evidence he had relating to the 2 issues to her either by email or as part of his written representations.

151. The claimant did not respond so on 3 March 2023 Mrs Rees sent him a follow up email. The claimant responded by email the same day. He said he had referred the issuing of the notice of investigation to the tribunal and would await the tribunal's

decision and further instructions. In the meantime, he asked Mrs Rees to send him her interview questions.

152. Mrs Rees sent the interview questions to the claimant by email on 9 March 2023. They were set out in table form with numbered boxes. Boxes 1-8 explained the role of the investigator and outlined the investigation process, confirming that the investigation report would be presented to the respondent's Staffing Committee which would decide on next steps. Boxes 9-24 (the last mistyped as "34") set out questions for the claimant to complete. 9-15 asked for the claimant's views on his working relationship with the respondent and what could be done to improve it. 16-24 asked about the claimant's long-term sickness absence and what could be done to enable him to return to work. The questionnaire asked the claimant to explain why he had not been willing to discuss the OH recommendations at the meeting with Cllr Roberts (on 7 November 2022) and whether he would be fit to return to work when his then current fit note expired in April 2023. Mrs Rees asked the claimant to insert his answers in the document and return it to her (with any relevant evidence) by close of business on Tuesday 14 March. He did not do so.

153. In the meantime, Ms Rees interviewed Cllr Roberts on 1 March, Cllr Gareth Jones on 3 March (pp.553-555) and Cllr Llewelyn on 7 March. She used the same interview question format as that sent to the claimant. The typed-up versions of the interviews were signed off by Cllr Roberts and Cllr Llewelyn on 10 and 11 March respectively (pp.368-382).

154. On 14 March the claimant emailed Mrs Rees and Cllr Roberts. He clarified that his request to be sent the investigation questions was not him confirming that he wanted to respond in writing. He said he was still awaiting a response from the respondent's solicitor. He said he was struggling with the effect of preparing for the final hearing (in the April 2022 Claim) and would ask the CMHT to provide a statement about the current state of his mental health. He said that, in accordance with the respondent's procedures he would send emails to the respondent's official email address and asked that all responses be sent to through the Clerk. Up to that point, the email exchanges between the claimant and Mrs Rees had been via her email address.

155. Mrs Rees responded the same day to say that the matters she was investigating were separate to the April 2022 Claim. That meant there was no reason to wait for a response from the Tribunal or the respondent's solicitor in that case. She noted the claimant said that he was not requesting to respond to the investigation in writing. She asked him to clarify by return whether he intended to meet face to face. If not, she asked for his response to the investigation questions in writing by 21 March 2023. She emphasised the importance of the claimant's input into the investigation but said that if he was unable to provide that input in the next 2 weeks she would need to conclude the investigation without his input.

156. The claimant responded by email that evening. He said that he was not refusing to take part in the investigation. He maintained that the 2 issues Mrs Rees was investigating were linked to the ongoing April 2022 Claim. He said that given health and safety legislation, the respondent's duty of care and the PSED, the respondent should not disturb him with issues which they knew to cause him stress. He said he was not able to provide his input into the investigation until after the final hearing of

the April 2022 Claim. That final hearing was at that point less than 3 weeks away. The claimant provided a letter from the CMHT dated 14 March 2023 supporting his request for the investigation to be delayed until after that final hearing because of its impact on his mental health.

157. On 16 March 2023 Mrs Rees emailed the claimant to agree that it was best to stay the investigation until after the conclusion of the final hearing in the April 2022 Claim. She noted that the hearing was listed for 3 days and was immediately followed by the Easter weekend. She asked the claimant to confirm by close of business on 11 April 2023 whether he wanted to meet or preferred to provide his responses to the investigation questions in writing. She sets a deadline of 14 April to provide responses in writing if that was the claimant's preferred option. She proposed holding the investigation meeting either on 18 or 20 April. She stressed that it was important to stick to those timeframes. She explained that she considered it vital for the claimant's involvement in the investigation to commence quickly after the final hearing because it was important for the issues between him and the respondent to be resolved as soon as possible. She pointed out that was something that was recommended in the OH reports. We accept it was.

<u>Events in April and May 2023 - the outcome of the April 2022 Claim and the appeal against it,</u>

158. The April 2022 Claim was heard on 3-5 April 2023. The Tribunal gave oral judgment dismissing all the claimant's complaints of failures to make reasonable adjustments. The written judgment with reasons was sent to the parties on 11 April 2023.

159. Cllr Roberts emailed the claimant to check-in with him after the tribunal hearing. That email was not in the Bundle but the claimant's lengthy email in response on 10 April was. In it, the claimant confirmed his intention to ask the Tribunal to reconsider its judgment in the April 2022 Claim. He also said that his symptoms had worsened since the Tribunal judgment and he would focus on consultation with his GP and the CMHT. The email is not always easy to follow, raising various points such as asserting that the meeting on 31 January 2022 was ultra vires and referring extensively to the provisions on health and safety detriment in s.44 of the Employment Rights Act 1996. The claimant said he would be obtaining a further fit note and that he would in due course be submitting a formal notice under s.44 "not to return to my appointed position in law as Proper Officer and Responsible Financial Officer work in the context of issues of the [2002 April Claim] Tribunal case."

160. On 18 April 2023 the claimant was certified unfit for work until 17 May 2023. The reason given was "work related stress aggravating anxiety and depression".

161. On 21 April 2023 Mrs Rees emailed the claimant (p.391). She noted the claimant had not responded to either of the deadlines in her email of 16 March. She reiterated the importance of resolving matters as soon as possible. She said that in the absence of a response from the claimant she had no option but to conclude her investigation without his representations and submit her report to the Staffing Committee.

162. The claimant responded to Mrs Rees the same day to confirm that he was intending to submit an appeal against the judgment in the April 2022 Claim on 24 April 2023. He said he would address the respondent's decision on completion of Mrs Rees's investigation when he received the same.

163. On 30th April 2023 the claimant emailed the respondent (but not Mrs Rees) to confirm he had lodged his appeal in the April 2022 Claim. He also said his mental health had deteriorated further and that he was under the care of the CMHT due to his vulnerability and risk of deeper depression. He also requested that the respondent comply with the PSED when communicating further with him. He included a quote from the Court of Appeal's decision in **R. (re Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345**. He did not specify how he said the PSED had not been complied with or clarify specifically what he said it meant when it came to the way the respondent communicated with him.

164. On 9 May 2023 the CMHT wrote a "to whom it may concern" letter confirming that it was supporting the claimant. It said that the stress of the April 2022 Claim, the appeal against the judgment in that case and the investigation had escalated his levels of anxiety, resulting in him being on the maximum dose of anti-depressant (p.404). It is not clear when or whether that letter was sent to the respondent or to Mrs Rees.

The Investigation Report

165. Mrs Rees's completed Investigation Report was dated 17 May 2023 (pp.405-421) ("the Report"). The Report refers to the claimant as "GR" and the respondent as "CTP". In relation to Issue 1 (the breakdown of working relationship) her findings were set out at para 5.1:

> **"There is evidence that the relationship between CTP and GR has broken down including:**
>
> **(a) the nature of the working relationship is such that if the Council do not operate to GR's instruction GR complains to various regulatory bodies. GR displays intransigent and determined criticism of the Council and individual councillors**
>
> **(b) GR has refused to engage constructively with attempts by the Council to address his issues e.g., discuss recommendations of OH reports, reasonable adjustments to enable the Council to return him to work safely, meetings to discuss his grievances**
>
> **(c) Councillors have left office and/or not sought re-election because of GR's behaviours**
>
> **(d) GR's behaviours has brought the situation to a deadlock**
>
> **(e) the Council's belief that they have exhausted all avenues to rescue the employment relationship and have done everything it could reasonably have been expected to do to remove any disadvantage, substantial or otherwise, affecting GR in the execution of his duties whilst at work"**

166. Her findings on Issue 2 (the claimant's long term sickness absence) were set out at para 5.2:

"There is evidence that there is little prospect of GR being able to return to work including by his own admission:

(a) Long term sickness is defined as a period exceeding 4 weeks

(b) Notwithstanding 5 months sickness absence in 2021, GR's current sickness period runs to over 11 months

(c) GR's current sick note ends on 17 May 2022. However GR has informed the Council that he will be serving the Council notice that he will not be returning to his position in the context of ET issues.

(d) GR has not taken responsibility for actions to improve his attendance and support his return to work in accordance with Point 2.6 of the CTP Sickness Policy

(e) GR has not engaged with the Council to discuss OH recommendations and potential reasonable adjustments to enable the Council to return him to work safely"

167. Paragraph (c) referred to the notice the claimant said in his email of 10 April he intended to serve under s.44 of the Employment Rights Act 1996.

168. At para 3.11 the Report recorded the attempts made by Cllr Roberts to meet with the claimant to discuss the 30 August OH Report and what had happened at the 7 November 2022 meeting. The claimant's behaviour at that meeting was characterised as "worrying". The Report explained that because of the claimant's behaviour, Cllr Roberts had not had an opportunity to discuss the OH recommendations with him.

169. We find those findings accurately reflected the evidence provided during the investigation by Cllrs Robert, Cllr Llewelyn and Cllr Jones. The Report included a section setting out the factual background. That referred to the April 2022 Claim and to the claimant having brought then withdrawn the September 2021 Claim. The Judgment from the 2022 April Claim was included as an appendix to the report. Mrs Rees quoted relevant findings from the judgment. The Report included a list of the grievances brought by the claimant. That list did not include the 29 March Grievance (para 3.2). The appendices to the Report also included the claimant's employment contract, examples of his copies to external bodies and the OH Report form 30 August 2022.

170. Mrs Rees's conclusion and recommendations were that:

"Based on the evidence in the report and report findings, it is evident that there is no realistic nor reasonable prospect that GR will either engage constructively with the Council to explore rescuing the employment relationship or to facilitate his return to work.

I therefore recommend that GR should be invited to a formal meeting in which the following will be considered:

(a) Whether the employment relationship should be terminated on the basis that the relationship between the Council and the Clerk (GR) has irretrievably broken down beyond repair; and / or

(b) Whether the employment relationship should be terminated on the basis of the Clerk's (GR) long term ill health."

171. We accept Mrs Rees's evidence that that was her independent and impartial conclusion based on the evidence she saw and heard. We find those conclusions accurately reflected the state of the relationship between the parties.

Events in June 2023 – claimant's request for a further OH report and the meeting invitation

172. The claimant requested an up to date OH review. On 6 June 2023 the respondent wrote to Mared Eswen Jones of Gwynedd Council asking to arrange one. She responded on 19 June to advise that from OH's point of view they did not see that the claimant would benefit from a further OH appointment. The OH advice remained the same as in previous OH reports, i.e. to resolve the workplace issues as soon as possible. She suggested they revisit those previous reports and seek to reach agreement on a way to move forward.

173. Cllr Roberts was at this point facing very difficult personal circumstances due to the sudden and unexpected illness and death of a close family member. Mrs Rees wrote to the claimant on her behalf to ask for the return of the council laptop so it could be used by the temporary Clerk the respondent had engaged to carry out the claimant's duties in his continued absence.

174. The Report was considered by the respondent's Staffing Committee, chaired by Cllr Marples. It resolved that the claimant should be invited to a meeting to discuss its findings. On the 21 June 2023 Mrs Rees emailed the claimant a letter from Cllr Marples as chair of the Staffing Committee inviting him to a formal meeting on 28 June 2023 to consider his ongoing employment by the respondent. The letter advised that the meeting would consider whether the employment relationship should be terminated on the basis that the relationship between the claimant and the respondent had irretrievably broken down beyond repair and/or on the basis of his long-term ill health. The claimant was advised of his right to be accompanied at the meeting. Given his ill-health he was offered the opportunity to make representations in writing rather than attending the meeting. He was asked to confirm his preference by 22 June and to submit any written representations by 28 June (pp.434-435).

175. On 22 June Cllr Roberts emailed the claimant to ask again to return the Council's laptop so the temporary clerk could fulfil his duties. She informed the claimant that unless he returned the laptop within the next 7 days the respondent would have to refer the matter to the police.

176. In a separate email of the same date, she responded to the claimant's request for a further OH review. She relayed Ms Jones's advice that the claimant would not benefit from a further assessment and that the OH advice was to seek a prompt resolution to the current situation as recommend in previous reports. She invited the claimant to let her know if he did now wish to discuss the previous OH recommendations.

177. The claimant responded by email the same day to Cllr Marples. He said that the email of 21 June with its "unreasonable deadlines" had caused him panic attacks

and severe anxiety. He said he considered the approach to be harassment. He said that he would be going against medical advice from the CMHT were he to attend a meeting or provide written representations. He referred to his appeal against the April 2022 Claim judgment, his having referred matters to the Equality and Human Rights Commission regarding the PSED and said he would address the Committee's written decision after receipt. In response to Cllr Roberts's email about the laptop, he said:

> **"I have just received an email from the Chair threatening Police action which is most alarming THE COUNCIL'S LAPTOP WITH ALL CTP DOCUMENTS, FILES, BURIAL REGISTERS ETC WILL BE READY FOR COLLECTION EARLY NEXT WEEK."**

178. He closed his email by informing the respondent that the ICO had agreed to look again at what he referred to as his "unanswered requests" to the respondent and asked that the respondent ensure a response within the ICO guidelines.

179. Cllr Roberts acknowledged that email on 26 June. She thanked the claimant for confirming return of the laptop and hoped he was starting to feel better. She said that as far as the respondent was aware, they had responded to all requests from him or the ICO. She asked the claimant to let her know what specifically he believed remained unanswered.

180. In light of the claimant's email, the members of the Staffing Committee agreed to postpone the hearing**.** Mrs Rees emailed the claimant on 27 June on behalf of the Cllr Marples. The email denied that the invite sent to him was an act of harassment or that the time for response was unreasonable. It noted the advice from the CMHT but pointed out that as the respondent was making a decision regarding his ongoing employment, it had to ensure that he had ample opportunity to present his evidence and be involved in the process. The email confirmed that the meeting would be postponed until 4 July 2023. The claimant was given until 3 July to send his written representations if he preferred to engage in that way. The email made it clear that the meeting would go ahead on 4 July and that if the claimant did not attend or provide written representations by 3 July 2023, the Staffing Committee would make its decision in the claimant's absence on the evidence it had available to it.

181. On 3 July the claimant emailed Mrs Rees to say that when the respondent had made its decision on 4 July 2023, he wished for certain circumstances to be taken into account in relation to his right of appeal and timescales. Those circumstances were that the medical advice had not changed, that due to the impact of work-related stress, he would be seeing a consultant Tourette specialist on 6 July 2023, and that he would be attending Ysbyty Gwynedd on 17 July 2023 for an Anaesthetic Assessment prior to surgery scheduled in July 2023.The claimant did not provide written representations beyond that.

<u>The Staffing Committee meeting on 4 July 2023</u>

182. The decision to terminate the claimant's employment was made by the respondent's Staffing Committee at a meeting on 4 July. The members of the committee were Cllr Marples, Cllr Vaughan Jones and Cllr Iolo Lewis. Mrs Rees also attended to advise on the process and take notes. The claimant did not attend.

183. The minutes of the meeting were in the Bundle (pp.443-444). They are relatively brief. Our findings about that meeting are primarily based on witness evidence from Cllr Vaughan Jones and Mrs Rees in their statements and in oral evidence, including under cross examination. We found them both to be credible witnesses and their evidence reliable.

184. We find the meeting lasted about 2 hours. The 3 councillors had been appointed to the Staffing Committee in May 2023 so were new in that role. We find that they relied on Mrs Rees for advice on the protocol to follow in reaching their decision.

185. We find that they relied on the Report and its Appendices as the principal source of information about the matters they were considering. Those appendices included the claimant's grievances, examples of his complaints to the ICO, Ombudsman and Audit Office and SARs and the judgment in the April 2022 Claim. They also included the respondent's Capability Policy, examples of the claimant's sick notes and the 30 August 2022 OH Report.

186. The appendices did not include the exchange of emails about obtaining a further OH appointment in June 2023 because that happened after the Report was finalised. However, the committee had a copy of the claimant's email of 3 July 2023 which confirmed that the medical advice had not changed.

187. The claimant criticised the absence from the Report or its appendices of letters from the CMHT, he referred specifically to those on 25 January 2023 (p.80), 14 March 2023 (p.384) and 9 May 2023 (pp.403-404). We accept Mrs Rees's evidence that she did not include the first 2 because they related to the April 2022 Claim or the process of the investigation rather than the substance of the Report. The 25 January 2023 letter (p.80) related to failures by the respondent to meet tribunal deadlines in relation to the April 2022 Claim and the added stress that was causing the claimant. The 14 March letter from CMHT (p.384) was a request to delay starting the investigation procedure until after the hearing of the April 2022 Claim. The third letter on 9 May 2023 (p.403-404) was a "to whom it concerns" letter from CMHT confirming that the investigation, having to attend the tribunal and appealing the April 2022 Claim decision were extremely stressful for the claimant and putting a further strain on his mental health. We accept Mrs Rees's evidence and that of Mr Vaughan-Jones that those were matters of which the Staffing Committee were well aware both from the Report and from the emails which led to the Committee initially postponing its meeting. None of the letters included a prognosis suggesting a timeline during which the claimant was likely recover and be able to return to work.

188. Cllr Vaughan-Jones confirmed that the Committee was not provided with copies of the EHRC Code or materials about the PSED and so did not expressly consider them in reaching its decision to dismiss.

189. We find that the members of the Staffing Committee were aware of both the protected acts relied on. Cllr Vaughan-Jones confirmed in his evidence that was the case. However, we accept his evidence that neither was specifically discussed or played a material part in the Committee's decision to dismiss.

190. We find the Committee considered the evidence in the Report and concluded that it was clear that the relationship between the claimant and the respondent council

had irretrievably broken down. We find it also concluded that the evidence showed that the claimant was not engaging constructively with the respondent at all. We find that was a conclusion it was eminently entitled to reach on the materials before it.

191. When it came to the claimant's long-term absence, the committee noted that the claimant had been away from work for over a year. We find it concluded that there was no reasonable prospect of him returning to work in a timely timescale. The claimant had not submitted any evidence to suggest he may be able to return to work. To the contrary, his email of 3 July 2022 indicated that his ill-health was ongoing. We find the Committee did not consider that there was any alternative to dismissing the claimant.

192. Based on those findings, the Staffing Committee decided unanimously to terminate the claimant's employment. That decision and the reasons for it were confirmed by a letter from Cllr Marples dated 14 July 2023. We find Mrs Rees drafted the letter based on her minutes of the meeting then sent it to the members of the Committee for approval. The letter confirmed that the claimant's employment was terminated with immediate effect from the date of the letter. He would be paid in lieu of his 11 weeks' notice entitlement together with his accrued holiday entitlement.

193. The letter of dismissal also confirmed the claimant's right to appeal and the Staffing Committee's decision to extend the deadline for appeal until 28 July 2023. The committee had decided to extend the deadline to take into account the claimant's upcoming medical appointments referred to in his email of 3 July 2023.

Events in July-August 2023 - the claimant's appeal

194. In July the claimant continued to correspond with Cllr Roberts and the ICO about what he saw as the respondent's non-compliance with requests for data and for rectification of data.

195. The deadline for appeal was 28 July 2023. The claimant emailed Mrs Rees and the respondent on 25 July 2023. He said the dismissal letter caused him such anxiety and mental health distress that the consultant anaesthetist had decided to postpone the surgery he was due to have. He confirmed he was in discussions with ACAS and would be bringing a claim of unfair dismissal, disability discrimination and victimisation against the respondent. He also queried the calculation of his final payment. He did not express an intention to appeal the decision to dismiss.

196. Mrs Rees responded on 26 July to confirm the respondent would check the accuracy of the payments and to ask the claimant to return any of the respondent's property which he had to Cllr Roberts within 7 days.

197. The claimant initiated Early Conciliation via ACAS on 26 July 2023. The ACAS certificate was issued on 31 July 2023.

198. On 31 July the claimant emailed Cllr Marples asking for clarification of the Staffing Committee's reasons for its decision to dismiss. He characterised the reason given for dismissal as "some other substantial reason" ("SOSR"). He alleged that the termination letter did not set out the reasons why the breakdown in relationship amounted to an SOSR. He asserted that the reason recorded for the breakdown in

relationship on 14 April 2022 were his numerous complaints about the respondent since June 2021. He said those complaints consisted of formal grievances, whistleblowing to AGW, references to the ICO and complaints to the Ombudsman about a councillor's conduct which the claimant characterised as assertions of statutory rights. He asserted that the dismissal was unfair because the investigation took too long. He said there was also no reference to the EHRC Code or the PSED in the Staffing Committee's decision nor in the list of documents which informed that decision.

199. On 16 August 2023 Mrs Rees wrote on behalf of the Staffing Committee to confirm that the claimant's email would be accepted as his grounds of appeal against dismissal. That was despite its being received outside the extended appeal period granted. She confirmed that the appeal would be heard by the Staffing Appeal Committee on a date to be confirmed.

200. The claimant did not respond to Mrs Rees but instead wrote to Cllr Marples (asking her to copy the email to the other members of the committee). In that email dated 18 August 2023 (p.459-460) he referred again to the due regard duty in the PSED. He asked for Cllr Llewelyn's documented evidence to support what he said were her "defamatory allegations" about him in her investigation interview with Mrs Rees. He specifically referenced her comments that he was an "unreasonable man", was "too big for his boots" and that the respondent had lost 10 members because of the claimant. He noted what Cllr Roberts said in an earlier email about losing the data on her laptop but said that the respondent printed copies of documents for his personnel file. He asked for copies of those or "otherwise answer all requests from scratch". In an email dated 24 August, Cllr Roberts responded to the ICO and personal data issues raised by the claimant.

201. On 21 August 2023 Mrs Rees responded to confirm the Staffing Appeal Committee would meet on 4 September 2023 (p.461). She told the claimant who was on the committee and that she would also attend the meeting to take notes and to advise on process. She invited the claimant to attend but assumed he would not wish to do so given he had not attended any previous hearings. As an alternative to attending he was given a deadline of 30 August 2023 to provide written representations. Mrs Rees confirmed that if the claimant did not attend or make written representations the committee would make a decision based on the evidence available to it. She urged the claimant to speak with the CMHT and to seek legal advice about his involvement in the process.

<u>The JR letter before action</u>

202. On 27 August 2023 the claimant sent the respondent a "letter before claim for Judicial Review" (p.556-565)("the JR Letter"). In it he alleged the respondent's decision to dismiss him was ultra vires both because it was not made in accordance with the relevant legal framework and because the respondent had failed to comply with the PSED and the EHRC Code in reaching its decision. He also alleged the respondent did not follow a reasonable and fair procedure in dismissing him. Specifically, he said Mrs Rees was not truly independent and the investigation took too long. The letter quoted extensively from the EHRC Code and caselaw and required a response by 15 September 2023. It criticised the respondent for not conceding that he was a disabled person in the April 2022 Claim until December 2022.

203. The respondent referred the JR Letter to its legal advisers. They responded to Mrs Rees by way of the Kath Kidd email on the morning of 4 September 2023. It advised that the claimant would not be able to pursue Judicial Review in respect of the decisions to dismiss him. The advice given was:

> **"As such there is no need for you to respond to [the claimant's] letter before action to his threat of JR. My view is to let him try and submit the matter for JR and if we are then asked to respond, we can respond at that stage."**

204. The respondent did not respond to the JR Letter.

The Staffing Appeal Committee's decision on 4 September 2023

205. The Staffing Appeal Committee met on 4 September 2023. The members of that Committee were Cllr Sarah Roberts, Cllr Victoria Burfield and Cllr Nia Jones. Cllr Sarah Roberts should not be confused with Cllr Roberts referred to elsewhere in this jugdment. Mrs Rees attended to advise and take notes. Her minutes were in the Bundle at pp.467-469. We base our findings about what happened at the appeal meeting on them and the witness evidence of Mrs Rees and Cllr Jones.

206. We find that prior to the meeting Mrs Rees had taken legal advice about the relevance of the EHRC Code and the PSED.

207. Cllr Jones accepted she did not read any documents before or during the meeting. She explained that she had not had time to do so before the meeting. She could not recall seeing the EHRC Code. She confirmed she had not read the Report. We did not have evidence about whether the other members of the committee had done so. On balance, we find that the committee members relied heavily on Mrs Rees during the meeting. We find that was the case both in relation to the advice about the potential relevance of the Code and the PSED and in relation to the evidence in the Report.

208. We find the meeting lasted around 2 hours. We accept Cllr Jones's evidence that the committee waited a while before deciding to go ahead with the meeting in the claimant's absence. We also accept her evidence that the committee did not consider there was any benefit in postponing the meeting because there was no indication that the claimant might be fit to attend in the future.

209. We find the committee considered the claimant's "grounds of appeal" set out in his emails of 31 July 2023 and 18 August 2023. On balance, we find that the focus at the meeting was on Mrs Rees explaining the evidence which had led to the decision to dismiss rather than exploring issues of compliance with the Code or PSED. Cllr Jones's evidence was that she did not know about the April 2022 Claim or the 29 March grievance. We note that the April 2022 Claim is referenced (albeit in passing) in the outcome letter. However, we accept Cllr Jones's evidence that she did not read that outcome letter before it was sent. We found her a credible witness and accept her evidence that she was not aware of the protected acts. We also accept her evidence that neither of those protected acts played a part in the Staffing Appeal Committee's decision not to uphold the claimant's appeal. We find the primary reason for the decision, to her mind, was because the claimant had been absent from work for such a long time and wasn't willing to constructively engage with the respondent.

210. The Staffing Appeal Committee set out its decision in a letter dated 12 September 2023 (pp.470-473). We find the letter was drafted by Mrs Rees but accept that it accurately reflected the committee's overall conclusions. On balance, we find that the conclusions in it relating to the Code and PSED essentially adopted the legal advice received and conveyed by Mrs Rees. There was no evidence that those legal questions were discussed in depth by the committee members at the meeting. We find it entirely understandable that volunteer councillors should rely on advice from the HR practitioner engaged to advise them on those issues and the legal advice she sourced about them.

211. The committee's conclusions were that:

a. The decision to dismiss was taken in accordance with the EHRC Code (specifically chapter 19). There was no likelihood of a return to work in the near future and it was clear from the Report that the relationship between the claimant and the respondent had broken down beyond repair.

b. The PSED applied to decisions which the respondent took in relation to the public it served rather than in relation to its employees. However, the decision to dismiss was fair even applying the due regard approach in the PSED.

c. When it came to the claimant's contention that the "numerous" complaints he had made were formal grievances, whistleblowing or otherwise protected acts, the appeal committee decided that it was not the fact of those complaints which persuaded the Staffing Committee that the relationship had broken down. Instead, it was the claimant's failure to engage with the respondent to enable them to try and address the numerous complaints he had made since June 2021 that led to the irretrievable breakdown.

d. In relation to the complaint that the investigation took too long, the committee noted the numerous attempts to engage the claimant in the process. It noted that there had been steps taken to delay proceedings at the claimant's request, e.g. to enable him to focus on the final hearing in the April 2022 Claim. In those circumstances, the committee concluded that the delay had caused the claimant no prejudice and did not render the decision to dismiss unreasonable or unfair.

e. When it came to the claimant's allegation in the 18 August email that Cllr Llewelyn had made remarks amounting to victimisation, the committee noted that it was minuted at the meeting on 28 March 2022 that the respondent had lost councillors due to disputes with the claimant. Notwithstanding that example, the committee considered there was sufficient evidence in the Report to demonstrate the efforts made by the respondent to seek to address the claimant's complaints and his lack of engagement with the same. even if those remarks were disregarded. The committee denied victimisation on the respondent's part.

212. The claimant filed his claim form on 9 October 2023.

<u>Evidence relevant to the objective justification of the decision to dismiss</u>

213. We find that the respondent was heavily dependent on its clerk. As we have said, the councillors were all volunteers. They had neither the skills nor the time available to fulfil the role of clerk on anything other than a short-term basis. That required knowledge of technical requirements such as the length of notices required of meetings and the processes involved in filing returns and reports. It also required time to be able to fulfil the role, both in terms of attending and minuting meetings and dealing with practical aspects of administering the council's affairs such as paying invoices.

214. We find that Cllr Roberts was able to fill in on a short terms basis but found it a struggle. It placed her under great strain. When the claimant's absence became extended the respondent had to engage locum clerks to cover. We accept the respondent's evidence that it was difficult to attract a sufficiently qualified person because those candidates tended to be looking for permanent, longer-term roles. The uncertainty about when and whether the claimant would return to his role meant the respondent was not able to offer that sort of role. As a result, the 2 locum clerks who were engaged did not stay in post for long.

Relevant Law

215. S.39 of the Equality Act 2010 prohibits discrimination and victimisation. So far as material to this case it provides as follows:

> **39 Employees and applicants**
>
> **(2) 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;**
>
> **(d) by subjecting B to any other detriment.**
>
> **……**
>
> **(4) An employer (A) must not victimise 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 any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment.**

<u>The EHRC Code</u>

216. The Equality and Human Rights Commission has issued a Code of Practice on the employment provisions of the Equality Act 2010 ("the EHRC Code"). Para 1.13 of the EHRC Code explains its status:

> **"1.13 The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings."**

217. Chapter 19 of the EHRC Code is headed "Termination of Employment". Para 5 of that chapter explains that:

> **"Where an employer is considering dismissing a worker who is disabled, they should consider what reasonable adjustments need to be made to the dismissal process (see Chapter 6). In addition, the employer should consider whether the reason for dismissal is connected to or in consequence of the worker's disability. If it is, dismissing the worker will amount to discrimination arising from disability unless it can be objectively justified. In these circumstances, an employer should consider whether dismissal is an appropriate sanction to impose."**

218. The chapter goes on to give an example of a disabled worker requiring a limited amount of time off work to attend medical appointments related to disability. A combination of the worker's time off for disability-related medical appointments and general time off for sickness results in the worker consistently exceeding his employer's 20-day trigger point for action under its absence management policy. As a result, the worker receives a series of warnings and is eventually dismissed. The EHRC Code says this is likely to amount to disability discrimination and that it is very likely to have been a reasonable adjustment for the employer to ignore the absences arising out of the worker's disability or increase the trigger points that would invoke the attendance policy.

<u>The Burden of Proof</u>

219. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

220. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Equality Act 2010. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

221. As for what is required to discharge the burden at the first stage, that must be something more than a difference in the relevant protected characteristic and a

difference in treatment; see **Madarassy v Nomura International plc [2007] ICR 867, CA**. That said, the something more required at the first stage need not be a great deal; see **Deman v EHRC [2010] EWCA Civ 1279**.

222. A finding that an employer has behaved unreasonably, or treated an employee badly, will not, however, be sufficient, of itself, to cause the burden of proof to shift; **Glasgow City Council v Zafar [1998] ICR 120**.

223. The guidance in in **Igen Ltd v Wong [2005] ICR 931, CA** states when the burden has passed, not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. However, that explanation need not be "adequate" in the sense of providing a reason which satisfies some objective standard of reasonableness or acceptability – it does not matter if the employer has acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic (**Royal Mail Group v Efobi [2021] UKSC 33** at para 29).

Discrimination arising from disability ("a s.15 claim")

224. S 15 of the Equality Act 2010 states:

> **15 Discrimination arising from disability**
>
> **(1) A person (A) discriminates against a disabled person (B) if:**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

225. The EHRC Code states:

> **"5.7 For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."**

226. The EHRC Code also explains what is meant by "disadvantage":

> **"4.9 'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A**

> **disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently."**

227. That wording was endorsed by the Supreme Court in **Trustees of Swansea University Pension and Assurance Scheme and another v Williams [2018] UKSC 65** as providing "helpful advice" as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under section 15.

228. The courts have said that there is little to be gained by seeking to draw a distinction between "unfavourable treatment" and "detriment". The Supreme Court has confirmed that the relevant question is whether the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to their detriment? An unjustified sense of grievance cannot amount to "detriment" (**Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**).

229. There is a need to identify two separate causative steps in order for a s.15 claim to be made out (**Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**):

> (1) the disability had the consequence of 'something';
>
> (2) the claimant was treated unfavourably because of that 'something'.

230. In **Basildon** the EAT said it does not matter in which order the tribunal approaches these two steps: 'It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability'.

231. In **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**, the EAT summarised the proper approach to establishing causation under S.15:

- First, the tribunal has to identify whether the claimant was treated unfavourably and by whom.
- It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.
- The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

232. For a s.15 claim to succeed the 'something arising in consequence of the disability' must be part of the employer's reason for the unfavourable treatment. The key question is whether the something arising in consequence of the disability

operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent (**T-Systems Ltd v Lewis EAT 0042/15**). "Significant extent" means a more than trivial part of the reason for the unfavourable treatment (**Sheikholeslami v The University of Edinburgh [2018] IRLR 1090**). In **Sheikholeslami** the EAT also said that the connection with the disability may involve more than one link in the chain of consequences**.**

233. Where a claimant has established the constituent elements required under section 15(1)(a), the onus is on the employer to demonstrate that the treatment in question is not to be treated as amounting to discrimination because it was a proportionate means of achieving a legitimate aim (s.15(1)(b)). As the EAT explained in **Parnell v Royal Mail Group [2024] EAT 130: "**this is sometimes referred to as showing "objective justification", because, in assessing whether an employer is able to justify its unfavourable treatment of the claimant, the employment tribunal is required to apply an objective test (see **Hensman v Ministry of Defence UKEAT/0067/14**, adopting the approach to justification laid down in **Hardy and Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565** , and **City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746**), albeit that it must assess the proportionality of the impugned treatment at the time it takes place".

234. In **ICTS (UK) Ltd v Visram, UKEAT/0344/15/LA** the EAT said that the legitimacy of the aim relied on by the respondent was to be judged by the employment tribunal on an objective basis (not limited to what was in the respondent's mind at the time).

235. Because the assessment is an objective one it can take account of evidence that shows what the true position was at that time even if it was not considered by the decision maker. However, particular scrutiny will be afforded to justification that was not considered by the employer at the time of the dismissal (**Mrs Dawn Brightman v TIAA Ltd UKEAT/0318/19)**.

236. The EAT summarised the correct approach in **Department for Work and Pensions (appellant) v Boyers (respondent) [2022] IRLR 741:**

> "23. When assessing whether unfavourable treatment can be justified as a proportionate means of achieving a legitimate aim, the discriminatory effect of the treatment must be balanced against the reasonable needs of the employer. The treatment must be appropriate and reasonably necessary to achieving the aim. The more serious the impact, the more cogent must be the justification for it. It is for the tribunal to undertake this task; it must weigh the reasonable needs of the employer against the discriminatory effect of the treatment and make its own assessment of whether the former outweigh the latter.
>
> 24. The Supreme Court set out a structured, four-stage approach to that balancing exercise in **Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15, [2015] 3 All ER 725, [2015] AC 1399,** a case involving possession proceedings in the County Court. The enquiry should encompass the following steps: first, whether the aim is sufficiently important to justify the treatment; second, whether there is any rational

> connection between this aim and the less favourable treatment or disadvantage suffered; third, whether the means chosen are no more than is necessary to accomplish the aim (and whether proportionate alternative measures could have been taken without a discriminatory effect); and, fourth, whether the steps complained of strike a fair balance between the need to accomplish the aim and the detriment suffered."

237. The EHRC Code sets out guidance on objective justification. In summary, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the EHRC Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the EHRC Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

238. The burden of proof provisions apply to s.15 claims. Based on **Pnaiser**, in the context of a S.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show:

- that he or she has been subjected to unfavourable treatment
- that he or she is disabled and that the employer had actual or constructive knowledge of this
- a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment
- some evidence from which it could be inferred that the 'something' was the reason for the treatment.

239. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either S 15 of the Equality Act 2010:

- that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability, or
- that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

<u>Victimisation</u>

240. S.27 of the Equality Act 2010 makes victimisation unlawful:

> **27 Victimisation**
>
> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because:**
>
> **(a) B does a protected act, or**

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

241. This means that for a victimisation claim to succeed, a claimant has to show three things. First, that they did a protected act (or that the respondent believed they had or may do such an act); second, that they were subjected to a detriment; and third that they were subjected to that detriment because of the protected act.

242. S.27(1)(a) refers to subjecting to a detriment because of a protected act but does not refer to “less favourable treatment”. There is therefore no absolute need for a tribunal to construct an appropriate comparator in victimisation claims. The EHRC Code at para 9.11 states: ‘The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act’.

243. The question in any claim of victimisation is what was the 'reason' that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act (or that they believed the claimant had or may do such an act), the employer is liable for victimisation; and if not, not.

244. The protected act need not be the only reason for the detrimental treatment. It is sufficient that the protected act has a “significant influence” on the decision to act in the manner complained of (**Nagarajan v London Regional Transport [1999] IRLR 572)**. For an influence to be “significant” it must be “an influence which is more than trivial” (**Igen Ltd Wong [2005] ICR 931, CA).** In **Villalba v Merrill Lynch and Co Inc and ors [2007] ICR 469,** the EAT held "if in relation to any particular decision a discriminatory influence is not a material influence or factor, then in our view it is trivial".

<u>The Public Sector Equality Duty (“The PSED”)</u>

245. The PSED is set out in s.149 of Equality Act 2010 which provides that:

Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

246. In **R. (Brown) v. Secretary of State for Work and Pensions [2008] EWHC 3158** the court considered what a relevant body has to do to fulfil its obligation under the PSED. The six 'Brown principles' have been accepted by courts in later cases. They include that the duty is a non-delegable one. The duty will always remain the responsibility of the body subject to the duty. In practice another body may actually carry out the practical steps to fulfil a policy stated by a body subject to the duty.

247. S.156 Equality Act 2010 provides that a failure to comply with the general or specific public sector equality duties does not confer any cause of action under private law (s.156 Equality Act 2010).

Discussion and Conclusions

248. In this section we apply the relevant law to the findings of fact we have made. We have taken into account the parties' submissions. We have not set out the submissions in full but have referred to them where relevant in explaining our conclusions. We have used the issues identified in the List of Issues as the framework for setting out our discussion and conclusions.

<u>The complaint of discrimination arising from disability - breach of s.15 of the Equality Act 2010 (Issues 2.1- 2.6)</u>

249. The respondent accepted that the claimant's long term sickness absence was something arising in consequence of the claimant's disability (Issue 2.2). It also accepted it had knowledge of the claimant's disability at all relevant times (Issue 2.6). Specifically, it conceded that it had knowledge of his anxiety and depression throughout his employment, of OCD and Tourette' syndrome since 2019 and of his experiencing a phobic state with intrusive thoughts from the OH Report dated 17 December 2021.

250. The claimant complained of 4 acts of unfavourable treatment because of his long-term sickness absence. They are set out at Issues 2.1.1 to 2.1.4. We had to decide in relation to each alleged act of unfavourable treatment (i) whether it happened as alleged by the claimant and, if so, (ii) whether the claimant's long-term sickness absence was a significant influence on the unfavourable treatment happening (Issue 2.3). If the alleged act of unfavourable treatment was because of the claimant's long-term sickness absence, his s.15 Equality Act 2010 complaint in relation to that act would succeed unless the respondent established that the treatment was a

proportionate means of achieving a legitimate aim (Issues 2.4 and 2.5).We deal with those questions in relation to each alleged act of unfavourable treatment in turn.

Unfavourable act 1 - dismissing the claimant on 14 July 2023 (Issues 2.1.1, 2.3 and 2.4)

251. It was not disputed that the respondent dismissed the claimant. It was also not in dispute that the dismissal was an unfavourable act (Issue 2.1.1). For this allegation, the first question we had to decide was whether the dismissal was "because of" the claimant's long-term sickness absence.

252. The respondent in its written submission accepted that the lack of any reasonable prospects of the claimant returning to work was one of the reasons for his dismissal. However, those submissions went on to deny that the respondent treated the claimant less favourably because of something arising from his disability. That was on the basis that the long-term sickness absence was not itself the reason for the dismissal. Rather, it submitted, the reason for dismissal was the combination of the claimant's prolonged sickness absence, his failure to engage with the respondent about a return to work and there being no indication of when, if ever, he might be able to return to work.

253. We remind ourselves that this is not an unfair dismissal complaint, so the claimant does not have to show that the "something arising" was the reason or principal reason for the dismissal. The test under s.15 is whether the "something arising" operated on the minds of the alleged discriminator to a significant (i.e. more than trivial) extent. We find that the claimant's long term sickness absence was a more than trivial influence on the Staffing Committee's decision to dismiss. That is clear from the termination letter, which specifically refers to the claimant's long-term sickness absence as part of the reason for dismissal. In relation to issue 2.3, we find that the dismissal was "because of" the claimant's long-term sickness absence.

254. That means the onus passes to the respondent to show that the dismissal was a proportionate means of achieving its stated legitimate aims (issues 2.4 and 2.5).

255. The aims relied on are:

i. Ensuring that the organisation was able to efficiently manage its limited resources ("Aim 1");

ii. Ensuring that it had staff in place who were able to carry out their functions ("Aim 2");

iii. Ensuring that it had appropriate staff in place to enable the Council to carry out its functions ("Aim 3").

256. The claimant submitted that the respondent's reliance on the legitimate aims was undermined by the fact that it did not provide its legitimate aim until 11 March 2025. Although that date is not entirely accurate (Mr Roberts set out those aims on Day 2 of the hearing, confirming them in writing on 11 March), the claimant's underlying point still stands. The aims were not explicitly referred to at the time of dismissal. That is not fatal to the respondent's reliance on them because the test of

the justification is objective and not limited to what was explicitly in the minds of the decision makers at the time. We accept, however, that (per **Brightman**), in those circumstances we must subject the justification to particular scrutiny.

257. The claimant submitted that Aim 1 could not be a legitimate aim because that aim "was the responsibility and function of the whole council". He cited materials in support of that submission which seem to us to confirm the importance of a council effectively managing its resources and (to quote one of the sources cited by the claimant) "ensuring the council does not live beyond its means". We find the materials cited by the claimant in his submission support, rather than undermine, the legitimacy of Aim 1. We find it was a legitimate aim for a respondent, particularly one with limited resources, to take steps to ensure it is managing those resources effectively. It seems to us that applies even more strongly where those resources take the form of public funds.

258. We also accept that Aims 2 and 3 were legitimate aims. The claimant suggested there was no difference between these 2 aims but did not submit that neither was a legitimate aim. Given the central role played by the clerk, we find that the respondent had a genuine need to ensure that the clerk it employed was able to carry out the clerk's functions (Aim 2). We find there was also a closely linked but separate genuine need to ensure that there was a clerk in place, enabling the respondent to carry out its functions (Aim 3). We accept that both those were legitimate aims. We find that all 3 aims were legal and not discriminatory in themselves.

259. We are required to balance the reasonable needs of the employer against the discriminatory effect of the treatment. Where the relevant treatment is a dismissal, it seems to us there must be particularly cogent reasons justifying it.

260. As we have said, we accept the respondent's submission that the role of clerk was essential to the functioning of the council. That was not only because the clerk was the Responsible Financial Officer and the person with knowledge of the relevant procedures and regulatory framework applying to the respondent. It was also because of the clerk's role in the day-to-day administration of the respondent including ensuring, e.g. bills were paid and relevant notices and minutes prepared.

261. The claimant was the respondent's sole employee. As the respondent submitted, by the date of dismissal the claimant had been absent from work due to long term ill health for over 13 months (from 8 June 2022 to 4 July 2023). The reason for that absence was work-related stress aggravating anxiety and depression. This was not a case where an employee was recovering after physical illness or injury and had a clear prognosis for recovery, e.g. after a period of treatment or rehabilitation. The respondent was not faced with a need to cover a defined period of absence before the claimant would return to work. Instead, it was faced with an ongoing and open-ended period of absence.

262. We accept the respondent's submission that the respondent could not go on without addressing the clerk's absence. Although it had to some extent managed to cover that absence up to the point of dismissal through a combination of locum clerks and Cllr Roberts (in particular) taking on much of the burden of the role, we accept that neither approach was sustainable long-term. Cllr Roberts for all her dedication did not have the necessary expertise nor time to fulfil the clerk's role. Although the

respondent had managed to find locum clerks we accept the respondent's submission that it proved impossible to do so on a sustainable basis because any candidates with relevant experience wanted permanent, not short-term roles. The 2 locums who had been appointed did not stay in post for long. We find that by July 2023 there was a need to resolve the situation one way or the other.

263. We accept that, in theory, dismissal was not the only option. The alternative was to find a way to enable the claimant to return to work. Neither OH report ruled out the possibility of a return. The advice from OH in June 2023 remained the same as that in the previous reports from 17 November 2021 and 30 August 2022. In summary, that advice was that the claimant was fit for at least some of his duties subject to adjustments.

264. The claimant submitted that OH had repeatedly said that he could return to work if reasonable adjustments and recommendations had been implemented. He submitted that it was the respondent's failure to do so effectively which elongated the claimant's illness and inability to return to work. Had the respondent followed OH's clear recommendations months earlier, he submitted, he could have returned to work.

265. We find the reality was more complicated. This was not a case of an OH Report identifying specific adjustments to be made by an employer, such as changes to working hours or revised duties. Instead, the primary recommendation in both OH reports was to carry out a stress risk assessment to identify the stressors on the claimant. That intention was that that assessment would result in the identification of adjustments to allow the claimant to return to work.

266. The respondent had tried to engage with the claimant to discuss the OH recommendation and complete a stress risk assessment at the meeting on 31 January 2022. The stress risk assessment completed unilaterally by the claimant on that occasion had identified all the matters which the claimant was aggrieved about as "hazards". We accept the respondent's submission that the "adjustment" required by the claimant to address those hazards was, in essence, for the respondent to accept that the claimant was wholly in the right. We accept the respondent's case that the claimant was completely intransigent, leading to the respondent's decision at its meeting on 15 February 2022 to ask OVW for advice because his behaviour was, in the respondent's words "hindering us from our duties as town councillors". By March 2022 the claimant's behaviour had led to what was referred to as "a deadlock" at para 34 of the judgment in the April 2022 Claim. By 28 March 2022 the respondent had resolved that it should investigate termination of the claimant's employment because of the strong feeling that that the trust and confidence in the claimant had broken down.

267. On Mrs Rees's advice, Cllr Roberts tried again to engage with the claimant about the OH Report and risk assessment in Autumn 2022. That was the intended outcome of the meeting on 7 November 2022. As we have recorded in our findings of fact, that outcome was not achieved because of the claimant's behaviour at that meeting and his insistence on using it to rehearse his complaints in the April 2022 Claim.

268. In April 2023, the claimant said that he would in due course be submitting a formal notice under s.44 "not to return to my appointed position in law as Proper Officer

and responsible Financial Officer work in the context of issues of the [2002 April Claim] Tribunal case."

269. We also accept the respondent's submission that the claimant did not substantively engage with Mrs Rees's investigation. That had provided him with another opportunity to put forward his views about what the respondent could do to improve working relations with him and what would enable him to return to work. Those specific questions were included in the investigation questions sent to the claimant. He did not respond to those questions and did not take up the opportunity to make written representations on those matters.

270. Viewed objectively, we find the claimant was only willing to engage with the respondent on his terms. This was not a case of a respondent being unwilling to make reasonable adjustments. The respondent had shown itself willing to make reasonable adjustments, agreeing to reduce the claimant's duties and changing elements of his working practices at its meeting on 14 October 2021. The Tribunal in the April 2022 Claim dismissed the claimant's complaints that the respondent had failed to make the reasonable adjustments considered in that case. The difficulty, we find, was that what the claimant required before he was willing to resume his duties was not adjustments but a capitulation. In the absence of that, there was no prospect of the claimant returning to work. We accept it was not reasonable for the respondent to give in to the claimant in that way. Doing so would have resulted in things reverting to the position which had led to councillors leaving their position with the respondent and to the situation where its business was hamstrung by the claimant's inability to accept that he might be in the wrong or that his advice would not be followed.

271. Viewed objectively, we find that dismissal was in this case a proportionate means of achieving all 3 of the aims identified by the respondent. Given the claimant's intransigence and unwillingness to engage, there was really no option but for the respondent to bring his employment to an end so that a successor could be appointed. The complaint under s.15 relating to the claimant's dismissal fails because the respondent has shown that the dismissal was objectively justified (Issue 2.4).

Unfavourable act 2 - Failing to respond to his letter of 27 August 2023 by his deadline of 15 September 2023 (Issues 2.1.2, 2.3 and 2.4)

272. The respondent accepted that it did not respond to the JR Letter. We find that not doing so amounted to an unfavourable act (2.1.3).

273. However, we find that the failure to respond was not because of the claimant's long term sickness absence (issue 2.3). We remind ourselves that that is the "something arising" from the claimant's disability relied on. The claimant in his evidence appeared to accept that the failure to respond was not because of his long-term sickness absence. We find he has not shown facts from which we could conclude that his long-term sickness absence was a significant influence on the respondent's decision. Instead, we are satisfied that the explanation for that decision was the clear advice in the Kath Kidd email that there was no need to respond. This complaint fails on that basis.

Unfavourable act 3 - Carrying out a flawed investigation process before reaching the decision to dismiss (Issues 2.1.3, 2.3 and 2.4)

274. The respondent's case was that this act of unfavourable treatment did not happen. It denied that the investigation process was "flawed" in any way.

275. The claimant set out the alleged flaws in the investigation at points 1.1 to 1.3 in his further particulars of claim dated 14 March 2024 (pp.95-96). He confirmed that his allegation referred to the investigation carried out by Mrs Rees between March 2023 and 19 May 2023. The specific flaws identified were:

a. That the Report contained material and quotations from the judgment and reasons in the April 2022 Claim despite Mrs Rees having said on 13 March 2023 that that Claim was wholly separate from and had no bearing on the matters being investigated. Employment Judge Russell had also directed in her case management order that this Tribunal could not deal with matters in the April 2022 claim.

b. Mrs Rees was not independent and impartial, having been instructed by the respondent and briefed by Cllr Roberts and Cllr Llewelyn who she then interviewed as part of the investigation. She also appeared as a witness for the respondent in the April 2022 Claim before undertaking the investigation.

c. Procedural flaws, Mrs Rees having communicated directly with the claimant from her personal email on behalf of the respondent's committees when there were no minutes to record a decision to delegate that function to her.

d. A failure to comply with the PSED by the respondent (and in particular, as we understand the claimant's case, its Staffing Committee) delegating compliance with the PSED to Mrs Rees.

276. The respondent submitted that there was no good basis for finding the investigation process was flawed, particularly taking into account the respondent's limited resources. It submitted that Mrs Rees's investigation was fair and careful and that the Report was measured, logical, thorough and fair. The claimant had been given every opportunity to take part in the investigation process with various deadlines during the process having been extended at the claimant's request. It strongly rejected the claimant's assertion in his evidence that the investigation was a sham and that Mrs Rees's attempts to arrange a meeting or to obtain his written representations amounted to her "hounding" the claimant.

277. When it came to the alleged failure to comply with the PSED, the respondent submitted that even if the PSED applied to what was an employment dispute, the respondent had not delegated its decision making to Mrs Rees. She carried out the investigation, but if the PSED applied to any decision it was to the decision to dismiss which was taken by the Staffing Committee and the decision to reject the claimant's appeal which was taken by the Staffing Appeal Committee. Practically, it was impossible to see what the claimant suggested should have been done by the respondent to investigate the matter if it was not allowed to delegate that investigation. The use of an independent person was clearly preferable given the nature of the matters to be investigated.

278. We prefer the respondent's submissions on this issue. There was no evidence to support the claimant's suggestion that the investigation was a sham or that Mrs Rees was anything other than professional in carrying out her investigation. We do not accept that her having been briefed by Cllr Roberts and Cllr Llewelyn meant she was not independent. Given the size and resources of the respondent and their central role in the council's activities it is difficult to see who else could have briefed her. We also accept the respondent's submission that instructing an external person was the preferable approach to investigating in this case. The respondent's councillors did not have the experience or skills to carry out the investigation, which is why they had sought the advice of OVW and Gwynedd Council. It was why those organisations had in turn advised the respondent to engage an external professional to assist and advise.

279. We are satisfied that Mrs Rees adopted a thoroughly professional approach to the investigation process. That included advising the respondent that the first step to be taken was seeking to restore the working relationship with the claimant. We do not accept that having given evidence for the respondent at the hearing of the 22 April Claim meant she was no longer independent in carrying out the investigation. Having been involved in the process to that date it was inevitable that she would give evidence at the Tribunal. We found Mrs Rees a credible witness and her evidence reliable. We accept her evidence that she has what she referred to as her own "code of ethics" and that she took an impartial and independent approach to the investigation. There was no evidence that her approach altered pre and post the 2022 April Claim hearing. We found that the Report reflected the evidence that she gathered and that the approach to evidence gathering was logical and balanced. We do not find it was a "flaw" to include findings from the April 2022 Claim judgment in the Report. They were findings of an independent tribunal having hear evidence on matters relevant to the Staffing Committee's decision. If the Report did not include the claimant's evidence and perspective on matters, that was because he had chosen not to meet Mrs Rees or respond by the provision of written answers or evidence despite being given the opportunity (and extended time) to do so.

280. We also prefer the respondent's submissions when it comes to the PSED and the delegation of the investigation to Mrs Rees. We did not hear detailed arguments about whether and how the PSED applied in the context of an employment matter nor whether it had been breached. The claimant submitted that **Brown** says the duty is non-delegable. It seems to us that does not prevent a body subject to the PSED delegating steps in a process to a third party (see **Brown**). We accept the respondent's submissions that Mrs Rees was not the decision-maker when it came to the dismissal nor the appeal. The decision-makers were the Staffing Committee and the Staffing Appeal committee respectively.

281. We remind ourselves that what we are deciding is whether any breach of the PSED meant there was a "flawed investigation" amounting to unfavourable treatment for the purposes of s.15 of the Equality Act 2010. Applying **Shamoon**, the question for us is whether any failure in the delegation process (whether related to the PSED or a failure to comply with procedures in the decision to delegate) amounted to something which a reasonable worker might regard as a disadvantage. We find it would not. Delegating the investigation process to an HR professional with the requisite skills and experience was an eminently sensible and pragmatic step. It meant that the investigation was carried out by an independent person with relevant skills rather than

by the respondent's councillors. We find that a reasonable worker would not regard that delegation as a disadvantage, particularly when it was clear that the decision-maker remained the respondent's Staffing Committee (for the dismissal) and the Staffing Appeal Committee (for the appeal).

282. In his written submissions the claimant raised an additional alleged flaw. He said the investigation was flawed because of a lack of relevant medical evidence. In his written submissions he cited a number of case-law authorities in support of the need for adequate medical evidence. That allegation was not part of his pleaded case. A number of the authorities cited were in the context of unfair dismissal complaints. In any event, we do not accept that on the facts the investigation was flawed in the way alleged. The respondent had already obtained 2 OH reports and contacted OH at Gwynedd Council to seek a further OH appointment on 6 June 2023. It was advised by OH that a further OH review would be of no benefit.

283. Taking all that into account, our conclusion on issue 2.1.3. is that Mrs Rees's investigation was not a "flawed investigation" as alleged by the claimant. That alleged unfavourable treatment did not occur. This complaint fails on that basis.

284. In case we are wrong about that, we have gone on to consider whether, if the investigation was flawed, that was "because of" the claimant's long-term sickness absence (Issue 2.3). The burden is initially on the claimant to show facts from which we could infer that the claimant's long-term sickness was a material cause of any such flaws, with material meaning more than trivial.

285. We accept, of course, that the long-term sickness absence was the context for the investigation and so a material cause of the investigation. However, the question we are deciding is whether it was a material cause of a flawed investigation. We find that the fact that the long-term sickness was a material cause of the investigation is not enough in itself to make it a material cause of any flaws in that investigation. Instead, the burden is on the claimant to show facts from which we could conclude that the claimant's long term-sickness absence was a reason for any flaws. He has not done so, whether that be in relation to the decision to delegate the investigation to Mrs Rees, any procedural failings, failures to comply with the PSED or the decision not to obtain further medical evidence. Instead, the evidence showed that the respondent's decisions were based on advice from OVW and Gwynedd Council (when it came to delegating to Mrs Rees) and the OH adviser (when it came to obtaining a further OH report). The claimant has not shown facts from which we could conclude that his absence was a material cause of any flaws in the way Mrs Rees carried out the investigation, had there been any. The burden of proof does not pass to the respondent, and we find that any flaws in the investigation were not "because of "the claimant's long-term sickness absence. Had the complaint not already failed for the reasons given above, it would have failed on this issue.

Unfavourable act 4 - Failing to comply with the relevant Codes of Practice and Public Sector Equality Duty (Issues 2.1.4, 2.3 and 2.4)

286. We found that the Staffing Committee was not provided with copies of the EHRC Code or materials about the PSED at its meeting on 4 July 2023 and so did not expressly consider them in reaching its decision to dismiss the claimant. We found that the Staffing Appeal Committee were referred to both, but accepted the advice that

the EHRC Code had been complied with and that the PSED did not apply (but had in any event been complied with).

287. In her case management orders Employment Judge Russell directed that the claimant clarify what provisions of the EHRC Code and PSED the claimant relied on and in what way he said these were breached. The claimant's response to that order was in his further information dated 14 March 2024 (pp.95-104).

288. That further information refers (p.97) to various provisions of the EHRC Code but do not always correspond to the contents of the Code. There are no paras 6.94 nor 6.97-6.99 in the Code. We think that numbering may have meant to refer to paras 17.94, 17.97-17.99 in the chapter dealing with "avoiding discrimination during employment". Those paragraphs make clear that an employer must not discriminate in dealing with grievances or in disciplinary procedures. Chapter 19, which is also referred to by the claimant in his further information, makes clear that an employer must not discriminate in dealing with ill-health dismissals and stresses the importance of reasonable adjustments.

289. When it comes to the alleged failure to comply with the EHRC Code and PSED the further information is not easy to understand. It contains quotes setting out general legal principles and parts of case-law. What it does not do is to articulate what the alleged specific failures to comply were nor they add anything to the complaints considered elsewhere in this case.

290. We accept that the EHRC Code can be used in evidence and that we must take it into account where relevant to any issue we are deciding. However, as the code itself makes clear, it does not create legal obligations beyond those already in the Equality Act 2010.

291. It is clear from the Equality Act 2010 that the PSED does not give rise to enforceable private rights. A claimant in the Tribunal cannot bring a complaint that their employer has failed to comply with the PSED. We were not referred to case-law or guidance which clarifies whether that necessarily means that a failure to take the PSED into account in reaching a decision cannot amount to unfavourable treatment or a detriment. However, the claimant did not clarify whether and how the PSED applied in an employment situation or how the Staffing Committee's failure to take it into account amounted to a disadvantage in his case.

292. It is for the claimant to establish that he was subjected to unfavourable treatment and in the absence of any clarity from the claimant about the alleged unfavourable treatment or detriment in this complaint, it fails.

293. In case we are wrong about that, and a failure by the respondent to take into account the EHRC Code or PSED does without more amount to unfavourable treatment or a detriment we have considered whether that was "because of" the claimant's long-term sickness. For the avoidance of doubt, had we found that the claimant had been subjected to unfavourable treatment because the Staffing Committee did not take into account the EHRC Code or PSED, we would have found that was not "because of" the something arising from the claimant's disability relied on, i.e. his long-term sickness absence. The burden is on the claimant to prove facts from which we could conclude that the failure to have regard to the PSED or the EHRC

Code was significantly influenced by that long term sickness absence. He has not done so and this complaint would have failed on that issue even if there was unfavourable treatment.

The complaint of victimisation - breach of s.27 of the Equality Act 2010 (Issues 3.1-3.5)

294. The respondent accepted that both the April 2022 Claim and the 29 March Grievance were protected acts for the purpose of s.27(2) of the Equality Act 2010 (Issue 3.1).

295. The claimant complained of being subjected to 4 detriments. They were the same acts as those relied on as acts of unfavourable treatment in his s.15 complaint. They are set out at Issues 3.2.1 to 3.2.4. We had to decide in relation to each detriment (i) whether it happened as alleged by the claimant. (ii) whether it amounted to a detriment (issue 3.3) and, (iii) whether the detriment was because of either or both of the claimant's protected acts (Issue 3.4). In deciding Issue 3.4, the question is whether the protected act was a material influence or factor, i.e. one which is more than a trivial influence. We deal with those questions in relation to each alleged act in turn.

Detriment 1- dismissing the claimant on 14 July 2023 (Issues 3.2.1 and 3.4)

296. It was not disputed that the respondent dismissed the claimant. It was also not in dispute that the dismissal was an unfavourable act (Issue 3.2.1).

297. We had to decide whether the dismissal was "because of" either or both of the claimant's protected acts in the sense of either or both having a significant influence on that decision (issue 3.4).

298. The burden is initially on the claimant to prove facts from which we could conclude that was the case. The claimant in his submissions referred us to 3 particular matters.

299. The first was the finding at para 5.1(a) of the Report that "the nature of the working relationship is such that if the Council do not operate to [the claimant's] instruction [the claimant] complains to various regulatory bodies. [The claimant] displays intransigent and determined criticism of the Council and individual councillors".

300. The second was an extract from Cllr Llewelyn's interview with Mrs Rees for the Investigation (p.381) quoted at para 4.2(h) of the Report in which Cllr Llewelyn said "We have followed the appropriate steps and guidelines in place. If we deviated from the guidelines and protocols – we fear he would file an official complaint or open a tribunal case if we didn't follow the guidelines – it's difficult because he is such an unreasonable man."

301. The third was to para 5.2 of the Report (p.420). That dealt with the claimant's long term sickness absence and asked "Is it possible for the Clerk's employment to continue due to his long-term sickness absence". The claimant's point in referring to this was not made clear. However, as we understand it, it is that the issue was decided

without obtaining a professional medical report and without following the respondent's procedures relating to capability or long-term sickness absence. That does not seem to us to assist us in deciding issue 3.4. Aside from the fact that the OH advice was that a further report would be of no benefit, it does not seem to us that there were flaws in the procedure followed which could support a conclusion that the decision to dismiss was because of the protected acts.

302. The respondent submitted that there was no evidence to support the claimant's complaint that he was dismissed because of the protected acts. It pointed to the fact that the decision to dismiss was made by the 3 councillors on the Staffing Committee over a year after the protected acts took place. Mr Vaughan-Jones had not even joined the Council until November 2022, several months after the protected acts relied on. It submitted there was no evidence that the Staffing Committee's decision was motivated by anything other than the claimant's long term sickness absence with no prospect of resolution and the breakdown of the relationship with the claimant marked by his complete refusal to engage with the respondent. It submitted that the same applied to the members of the Staffing Appeal Committee. Cllr Jones, the respondent pointed out, had not become a councillor until after the date of the protected acts.

303. We find that the members of the Staffing Committee were aware of both the protected acts. Cllr Vaughan-Jones gave evidence that that was the case. It does not seem to us that the fact that he was not a councillor at the time those acts occurred prevents them potentially being a significant influence on the Staffing Committee's decision to dismiss. Neither, in itself, does the fact that they took place more than a year before that decision. If nothing else, the hearing of the April 2022 Claim took place only a few months before the decision to dismiss and the Report quoted from the judgment in that case.

304. We accept that the Report was the primary source informing the Staffing Committee's decision to dismiss. Although we accept the Report does include the quotes referred to by the claimant in his submissions we find it is important to read it as a whole to assess the prominence given to the 2 protected acts. When that is done, we find that there is no explicit reference to the 29 March Grievance in the Report. Para 3.2 refers to the claimant lodging 6 grievances between July 2021 and November 2022. However, for reasons which are unclear, the 29 March Grievance is not included in the 6 grievances specified in that paragraph. When it comes to the April 2022 Claim, para 3.3 refers to "two claims to the Employment Tribunal" taken by the claimant. That is in a paragraph setting out the various complaints made by the claimant to regulatory bodies. We find that on a fair reading of the Report it is fair to characterise the 2 protected acts as being referred to in passing.

305. We find the focus of the majority of the evidence quoted in section 4 of the Report was not on either of the protected acts but on the breakdown of the working relationship between the claimant and the respondent. The evidence related primarily to the claimant's behaviour at council meetings, his reaction to his instructions being contradicted and his criticisms of the respondent and individual councillors. It referred to his threats to publicise those criticisms and highlighted the impact of his behaviour on the respondent's ability to recruit and retain councillors. The majority of the evidence about the breakdown related to the period prior to the conclusion reached by the respondent at the 28 March 2022 council meeting that it should investigate termination of the claimant's employment because of the strong feeling that the trust

and confidence in the claimant had broken down (para 3.5 and 3.6). That decision was taken before either of the protected acts took place. In terms of events since that decision, the focus in the Report was on the claimant's failure to engage with the respondent to try and repair the relationship or facilitate his return-to-work from long terms sickness absence rather than either of the protected acts.

306. Taking the Report as a whole, we find the passing references to the protected acts are insufficient to cast doubt on the credible evidence given by Cllr Vaughan-Jones that the protected acts played no part in the Staffing Committee's decision to dismiss. We remind ourselves that "because of" in this context means a more than "minor or trivial" influence on a decision. We find the dismissal was not "because of" either or both of the protected acts.

307. This complaint was about the decision to dismiss. For the avoidance of doubt, we also find that the protected acts did not play a part in the Staffing Appeal Committee's decision to reject the appeal. Given Cllr Jones's evidence about the lack of pre-reading done, it is not clear whether that committee was aware of the protected acts at all. Even assuming that it was, we find its focus was on the claimant's long term sickness absence and his lack of engagement with the respondent in seeking to address the causes for his absence. We accept the evidence of Cllr Jones that the decision was not "because of" the protected acts.

308. This complaint fails.

Detriment 2 - Failing to respond to his letter of 27 August 2023 by his deadline of 15 September 2023 (Issues 3.2.2 and 3.4)

309. The respondent accepted that it did not respond to the JR Letter. We find that not doing so amounted to an unfavourable act (3.2.2).

310. However, we find that the failure to respond was not because of either of the claimant's protected acts (Issue 3.4). The claimant in his evidence appeared to accept that the failure to respond was not because of those protected acts. We find he has not shown facts from which we could conclude that they were a significant influence on the respondent's decision not to respond. Instead, we are satisfied that the explanation for that decision was the clear advice in the Kath Kidd email that there was no need to respond. This complaint fails on that basis.

Detriment 3 - Carrying out a flawed investigation process before reaching the decision to dismiss (Issues 3.2.3 and 3.4)

311. Our conclusion on issue 3.2.3 is that Mrs Rees's investigation was not a "flawed investigation" as alleged by the claimant. That alleged detriment did not occur. We have explained our reason for that in dealing with Issue 2.1.3 above. This complaint fails on that basis.

312. In case we are wrong about that, we have gone on to consider whether, if the investigation was flawed, that was "because of" either or both of the claimant's protected acts (issue 3.4). In this context "because of" means the protected act being a material influence on the flawed investigation. Had we been required to decide this issue we would have found that the claimant had failed to discharge the burden of

proving facts from which we could conclude that the protected acts were a material cause of any flaws in the investigation. We accept that Mrs Rees knew about both the protected acts but there was no evidence that they played any part in her decisions about how to conduct the investigation nor in the way delegation to her was handled. Had the complaint not already failed for the reasons given above, it would have failed on this issue.

Detriment 4 - Failing to comply with the relevant Codes of Practice and Public Sector Equality Duty (Issues 3.2.4 and 3.4)

313. Our conclusions on this complaint are the same as those in relation to unfavourable act 4 in the context of the s.15 complaint. The claimant failed to articulate what the relevant detriment was. He also failed to prove facts from which we could conclude that any such detriment was "because of" either or both the protected acts.

314. This complaint fails.

Time Limit Issues – (Issues 1.1.1 to 1.1.4)

315. We have found that none of the acts complained of amounted to acts of unlawful discrimination. In those circumstances, the time limit issues do not arise for determination.

Summary of conclusions

316. All the claimant's complaints fail and are dismissed.

Approved by:

Employment Judge Rh Mcdonald

7 February 2026

Judgment sent to the parties on:

12 February 2026
For the Tribunal:

Katie Dickson

Notes

Judgments (apart from judgments under rule 51) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found at www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Annex

The Issues

1. Time Limits

1.1 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2. If not, was there conduct extending over a period?

1.1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4. If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1. Why were the complaints not made to the Tribunal in time?

1.1.4.2. In any event, is it just and equitable in all the circumstances to extend time?

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the Respondent treat the Claimant unfavourably by:

2.1.1 Dismissing him on 14 July 2023

2.1.2 Failing to respond to his letter of 27 August 2023 by his deadline of 15 September 2023

2.1.3 Carrying out a flawed investigation process before reaching the decision to dismiss

2.1.4 Failing to comply with the relevant Codes of Practice and Public Sector Equality Duty

2.2 Did the following things arise in consequence of the Claimant's disability:

2.2.1 The Claimant's long term sickness absence

2.3 Was the unfavourable treatment because of any of those things?

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

2.4.1 Ensuring that the organisation was able to efficiently manage its limited resources;

2.4.2 Ensuring that it had staff in place who were able to carry out their functions;

2.4.3 Ensuring that it had appropriate staff in place to enable the Council to carry out its functions.

2.5 The Tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims

2.5.2 could something less discriminatory have been done instead

2.5.3 how should the needs of the Claimant and the Respondent be balanced?

2.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

3. Victimisation (Equality Act 2010 section 27)

3.1 Did the Claimant do a protected act as follows:

3.1.1 On 24 April 2022 bring an Employment Tribunal claim against the respondent for failure to make reasonable adjustments?

3.1.2 on 29 March 2022 raise a grievance that the Respondent had failed to make reasonable adjustments?

3.2 Did the Respondent do the following things:

3.2.1 Dismiss him on 14 July 2023

3.2.2 Fail to respond to his letter of 27 August 2023 by his deadline of 15 September 2023

3.2.3 Carry out a flawed investigation process before reaching the decision to dismiss

3.2.4 Fail to comply with the relevant Codes of Practice and Public Sector Equality Duty

3.3 By doing so, did it subject the Claimant to detriment?

3.4 If so, was it was because the Claimant did a protected act?

~~3.5 Was it because the Respondent believed the Claimant had done, or might do, a protected act?~~