



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Kauser

**Respondent:** Keighley Town Council

**Heard At:** Leeds

**On:** 1, 2, 3, 4 and 5 April  
2019

**Before:** Employment Judge D N Jones  
Ms L Fawcett  
Mr M Brewer

## REPRESENTATION:

**Claimant:** Mr A J McGrath, counsel

**Respondent:** Mr D Flood, counsel

# JUDGMENT

The Tribunal holds, unanimously:

1. The respondent unfairly dismissed the claimant, as conceded by the respondent on the second day of the hearing;
2. The respondent wrongfully dismissed the claimant;
3. The claimant was not culpable of any conduct in respect of which it is just and equitable to reduce either the basic or the compensatory award;
4. It is not just and equitable to reduce the compensatory award on the ground that the claimant would or might have been fairly dismissed in any event.
5. The claimant was not subjected to discrimination in the form of detriments and less favourable treatment in respect of the late acknowledgement of her grievance, the failure to offer separation from those of whom she had complained, or offered paid time off, because of her race or sex.

6. The respondent shall pay to the claimant damages in respect of the wrongful dismissal in the sum of £5,313.87.
7. The respondent shall pay to the claimant outstanding holiday pay in the sum of £2,405.11.
8. The respondent shall pay to the claimant a basic award, in respect of the unfair dismissal, in the sum of £4,401. The calculation of any compensatory award is postponed to a remedy hearing on 25 June 2019.

## **REASONS**

### Introduction

1. Safia Kauser, the claimant, was employed by the Keighley Town Council, the respondent, as its Town Clerk from 30 October 2015 until 20 March 2018 when her employment was terminated summarily. She had been employed by the respondent previously in an administrative and financial role from 1 June 2009 and, as Responsible Financial Officer, from 30 October 2014, a post she continued to hold until the dismissal.

2. By a claim form presented to the tribunal on 1 June 2018, the claimant complained that she had been unfairly and wrongfully dismissed. The claim was amended, by order of Employment Judge Bright on 27 November 2018, to allow the claimant to bring complaints of direct sex and race discrimination in relation to 3 aspects of treatment arising from the submission of a grievance on 24 April 2017.

3. After the tribunal had heard the evidence, the claimant made an application to amend the claim further to allege that the dismissal was an act of direct discrimination, the protected characteristics being race and sex. The tribunal rejected the application. Applying the overriding objective and addressing the relevant guidance, the tribunal ruled that the hardship to the claimant being prevented from bringing such a claim was not as great as the hardship to the respondent of having to meet it at such a late stage in the proceedings. At an earlier preliminary hearing on 14 September 2018, Employment Judge Traylor recorded that no complaint of discrimination was made in the claim form and Miss Owen, the claimant's barrister, confirmed that no discrimination claim was being made. That situation changed after disclosure of an investigation report (PACT 1 and 2), which led to the application to amend in November 2018.

4. The respondent had prepared its case for this hearing and made decisions upon which evidence to call on the basis of the claim as identified at the two preliminary hearings. To allow the amendment would have led to delay, by reason of postponement of the proceedings with the consideration of producing further evidence, reopening the cross-examination of the claimant, and the further expense that would have entailed. Mr McGrath, on the claimant's behalf, said that the decision not to call to witnesses, Councillor Westerman and Mayor Nazam had not been expected and that the claimant was being punished for not having ticked the correct boxes in the claim form. We did not accept that. There was no good reason that this application could not have been made earlier. The claimant knew which

witnesses were to give evidence following disclosure of statements in February 2018. The boxes she ticked in the claim form were clearly not determinative, as she was given permission to amend by Employment Judge Bright, to add discrimination claims. The claim for a discriminatory dismissal would have been out of time. Although that is one of a number of considerations, there has been extensive delay in giving notice of any such claim and the evidence is less cogent than it would have been. In conclusion the interests of justice were not furthered by adding a further claim after evidence had been closed.

### **The facts/background**

5. On 24 April 2017 the claimant submitted a grievance against the members of the human resources subcommittee, being Councillors Pedley, A Ahmed, Thorne, Shaw and S Ahmed.

6. On 18 May 2017 the annual general meeting of the full town council was held. The new mayor was sworn in and members of the respective subcommittees elected.

7. On 19 May 2017 the claimant was asked to resubmit her grievance to the new mayor which she did on 24 May 2017.

8. On 30 May 2017 the mayor spoke to the claimant about her grievance. He asked if she wished to withdraw it. She said she wanted the procedure to be invoked.

9. On 13 June 2017 the human resources committee appointed three members to determine the claimant's grievance.

10. On 11 July 2017 Mr Ashton, the deputy town clerk, submitted a grievance.

11. On 11 July 2017 the claimant was invited to a grievance hearing.

12. On 18 July 2017 the human resources committee met and discussed how to progress the grievances of the clerk and the deputy town clerk. It proposed appointing an independent investigator.

13. On 31 July 2017 the full council approved appointment of an external body to investigate the grievances. The organisation was called PACT.

14. On 31 July 2017 the claimant sent a press release on behalf of the council to the Keighley News.

15. On 23 August 2017 Joanne Grigg, of PACT, attended the human resources committee to explain the grievance process. The committee commissioned her to prepare an investigation report.

16. On 14 October 2017 PACT was invited to extend its investigation to consider 17 complaints which have been made by councillors against the claimant.

17. On 23 August 2017 Councillor Westerman sent the claimant an email about allowances and required a reply within 24 hours.

18. On 24 October 2017 the claimant made a telephone call to Councillor Westerman to discuss the email.
19. On 26 October 2017 the claimant was suspended with the agreement of her union representative, but not her agreement.
20. On 30 October 2017 the claimant returned to work, then reported sick until 20 November 2017.
21. On 1 November 2017 Councillor Westerman made a complaint to PACT about what the claimant had said to him in the telephone call.
22. On 3 November 2017 the suspension of the claimant was retracted.
23. On 10 November 2017 Councillor Akhtar commissioned an investigation into Councillor Westerman's complaints.
24. On 20 November 2017 the claimant returned to work.
25. On 23 November 2017 a report from PACT was sent to the council.
26. On 24 November 2017 the claimant requested, but was refused, a copy of that report.
27. On 26 November 2017 the claimant received the outcome to the grievance. Only one allegation was upheld, that Councillor Pedley had inappropriately sent her a photograph of himself on his holiday.
28. On 27 November 2017 there was an emergency general meeting of the full council. The authors of the investigation into the grievance and disciplinary matters, from PACT, attended to present their report. A decision was made relating to the disciplining of the claimant, the precise circumstances of which are disputed.
29. On 29 November 2017 claimant was suspended.
30. On 30 November 2017 the claimant submitted a fit to note work, declaring her sick.
31. On 20 December 2017 the claimant requested copies of the minutes of the council of 27 November 2017. There were provided.
32. On 12 January 2018 the claimant was provided with a redacted copy of the PACT report concerning her grievance.
33. On 25 January 2018 there was a full council meeting. Minutes of the meeting of 27 November 2017 were circulated but then collected and retained. A disciplinary panel was appointed to consider the allegations against the claimant.
34. On 31 January 2018 the claimant was invited to a disciplinary hearing before Councillor Walker to answer eight allegations of misconduct.
35. On 9 February 2018 the claimant's union representative received a copy of minutes of the meeting of 27 November 2017.

36. On 12 February 2018 the claimant attended a disciplinary hearing before Councillor Walker and submitted a written statement.
37. On 1 March 2018 a full town council meeting was held. Councillors Corkindale and Mahmood were elected to consider any appeal. Councillor Walker presented his report. The council voted to dismiss the claimant summarily.
38. On 6 March 2018 the claimant's representative was informed that she had been dismissed, by telephone.
39. On 20 March 2018 the claimant was sent a letter of dismissal with reasons.
40. On 27 March and 18 the claimant appealed against the dismissal.
41. On 22 May 2018 councillors Corkindale and Mahmood dismissed the claimant's appeal and sent her a outcome letter on 30 May 2018.
42. On 12 October 2018 the PACT report into the disciplinary investigation was disclosed to the claimant.

### **The Evidence**

43. The Tribunal heard evidence from the claimant. A witness statement of Councillor R Beale was submitted by the claimant but he was not called to give evidence. The respondent had served and submitted witness statements from Councillors M Walker, P Corkindale, Anayat Mohammed and J Kirkby, but at the commencement of the second day of the hearing Mr Flood inform the tribunal that the respondent did not propose to call them.
44. 2,043 pages of documents were submitted in two tribunal bundles prepared by the respondent. The claimant submitted a supplemental bundle of 153 pages.

### **The Law**

#### Unfair dismissal

45. By Section 98(1) of the Employment Rights Act (ERA 1996) it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which relates to conduct, see Section 98(2)(b).
46. Under Section 98(4) of ERA "*where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
  - (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
  - (b) *shall be determined in accordance with equity and the substantial merits of the case.*

47. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA. Material considerations in a case where the reason for the dismissal was conduct, will include whether the employer undertook a reasonable investigation and formed a reasonable and honest belief in the misconduct for which the employee was dismissed<sup>1</sup>. It is not for the Tribunal to substitute its own view, but rather to review the decision-making process against the statutory criteria and, if it fell within a reasonable band of responses, the decision will be regarded as fair<sup>2</sup>. The 'reasonable band of responses' consideration includes not only the determination of whether there was misconduct and the choice of sanction, but will include the investigation<sup>3</sup>. A fair investigation will involve an employer exploring avenues of enquiry which may establish the employee's innocence of the allegations as well as those which may establish his guilt. That is of particular significance in the event the dismissal will impact upon the employee's future career<sup>4</sup>. With regard to any procedural deficiencies the Tribunal must have regard to the fairness of the process overall. Early deficiencies may be corrected by a fair appeal<sup>5</sup>.

48. By Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal, a Code of Practice issued by ACAS is admissible and any provision in the Code which appears to be relevant to any question arising in the proceedings should be taken into account in determining that question. The ACAS Code of Practice on Discipline and Grievance Procedures 2015 is one such Code.

49. If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.

50. Under section 122(2) of the ERA, where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, it shall reduce or further reduce that amount accordingly.

51. By Section 123(1) of the ERA, the amount of the compensatory award should be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. If the dismissal is unfair for procedural reasons, the Tribunal may reduce or extinguish any compensatory award, if the Tribunal concludes that the complainant would or might have been dismissed had the procedures been fair<sup>6</sup>.

52. Under Section 123(6) of the ERA, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall

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<sup>1</sup> BHS v Burchell [1980] ICR 303.

<sup>2</sup> Iceland Frozen Foods v Jones [1983] ICR 17.

<sup>3</sup> J Sainsbury PLC v Hitt [2003] ICR 111.

<sup>4</sup> Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457.

<sup>5</sup> Taylor v OCS Group Ltd [2006] ICR 1602

<sup>6</sup> Polkey v A E Dayton Services Ltd [1988] ICR 142.

reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the finding.

Wrongful Dismissal

53. An employee will be wrongfully dismissed if her employment is terminated without notice unless such summary dismissal is permitted. That will arise if the employee has committed an act of gross misconduct.

54. It is for the employer to establish, on a balance of probabilities, that the claimant committed an act justifying summary termination of the employment.

Discrimination

55. By section 39(1) of the Equality Act 2010 (EqA) an employer must not discriminate against a person by subjecting her to a detriment.

56. Direct discrimination is defined in section 13 of the EqA:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourable than A treats or would treat others.”

57. By section 9 of the EqA, race is a protected characteristic and is defined as including colour, nationality, ethnic or national origins. By section 11 of the EqA sex is a protected characteristic.

58. By section 23 of the EqA:

“On a comparison of cases for the purpose of section 13... there must be no material difference between the circumstances relating to each case”.

59. Section 136 of the EqA provides:

“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. But [that] subsection does not apply if A shows that A did not contravene the provision.”

60. There have been a number of authorities relating to the predecessor of section 136 of the Equality Act 2010, not least **Igen v Wong** which approved the guidelines in the case of **Barton v Investec Henderson [2003] ICR 1205**.

*“It is for the claimant to prove on the balance of probabilities facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination. If the claimant does not prove such facts the claim will fail. In deciding whether the claimant has proved such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers will be prepared to admit such discrimination even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that he or she would not have fitted in. The outcome at*

*this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. The Tribunal does not have to reach a definitive determination that such facts would lead to it concluding there was discrimination but that it could. In considering what inferences or conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts... When the claimant has proved facts from which the inferences could be drawn, that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that his treatment was in no sense whatsoever on the protected ground. The respondent must not only 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. Since the respondent would generally be in possession of the facts necessary to provide an explanation the Tribunal would normally expect cogent evidence to discharge that burden. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire, procedure and/or any Code."*

61. The decision of the Court of Appeal in **Ayodele v Citylink**, approved the previous authorities, albeit under similar but differently worded provisions in the Discrimination Acts, and confirmed they remained relevant to the approach to the burden of proof under section 136. In **Madarassy v Nomura International plc**, the Court of Appeal held that a difference in status, namely that of the protected characteristic alone, was not of itself sufficient to discharge the burden of proof. In **Glasgow City Council v Zafar** the House of Lords held that because an employer acted unreasonably did not mean that it had acted discriminatorily. If the employer treated those with and without the protected characteristic equally unreasonably there would be no discrimination. In **Nagajaran v London Transport** the House of Lords held that the essential question was why the employer had acted in a particular way and that the reason may be a subconscious one. Lord Nicholls pointed out that most people will not admit to acting in a discriminatory way and are often unaware they are doing so.

## **Analysis and Conclusions**

### Wrongful dismissal

*[i] Did the claimant commit an act of serious insubordination, abusive behaviour, use of foul language, unprofessional and inappropriate conduct by losing her temper in a phone call with Councillor Westerman on 24 October 2017 and say, "do you know you're a fucking racist bastard"?*



62. The claimant consistently denied this allegation in her evidence. It was also denied by her during the investigation with PACT. Councillor Westerman did not give evidence.

63. Mr Flood relied upon the materials which had been collected in the investigation by the PACT HR team, comprising of interviews with Councillor Westerman, Councillor Anayat and the claimant and the dismissal letter with the reasoning of Councillor Walker. He focused on the background which led to the telephone call which, he submitted, indicated that the claimant was probably angry and that the claimant did not dispute she had asked Councillor Westerman if there had been a racial motive to his behaviour. In addition, Mr Flood drew attention to the what Councillor Anayat had said in the investigation; that he had spoken to the claimant after the phone call and that she had said she let Councillor Westerman have it, she had flipped, that she had raised the question of a racial motive and had used swear words.

64. The respondent made a decision not to call Councillor Westerman at an early stage in these proceedings. No witness statement was served from him. A witness statement was served from Councillor Anayat but it contained no reference to the discussion he had with the claimant on 24 October 2017. The decision of the respondent to call no evidence left the tribunal with oral testimony from only the claimant.

65. The consideration of evidence tested by cross examination and that of hearsay documentation is not to measure like with like. In some cases, the testimony of a witness is so weak, unreliable or incredible, in contrast to compelling contemporary documentation that a finding can be made against that witness. This was not such a case.

66. The claimant said there was an agenda by some councillors to dismiss her. She said this included Councillor Westerman. There is documentation to give some credence to this. In March 2014, Councillor Westerman made a written complaint about the claimant. He expressed his belief that she had been culpable of acts of gross misconduct concerning a meeting with external auditors. On 9 September 2016, according to the witness statement of Councillor Beale, Councillor Westerman had said to him that the claimant had too much power. In July 2017, according to the PACT investigation report, Councillor Westerman made complaints about the claimant's rudeness to councillors and the serious effect she had on the reputation of the council. He concluded, "*I believe that the town clerk has for far too long been given the scope to run the councillors to suit her own purposes*". The report also referred to a complaint, made about the same time, in which Councillor Westerman referred to the rules concerning gross misconduct. He stated, of the claimant's conduct, "*please take this as a very serious breach of the employee handbook and breaches of standing orders*".

67. The claimant argued this provided support for her belief that Councillor Westerman had a motive to embellish the content of her discussion with him and to invent a serious allegation with a view to it being used to dismiss her. The respondent did not meet that by calling Councillor Westerman to rebut the claimant's accusation.

68. Whilst we found that in part of her evidence the claimant was a little evasive and unclear, we did not regard her as an unreliable witness or one who lacked credibility. Most of what she recounted was consistent and compatible with the emails and documentation which were contemporaneous. In his email of 23 October 2017, Councillor Westerman showed his annoyance that the claimant had not replied to his earlier two emails and he added an ultimatum that unless the claimant responded to him within a day he would report matters to the police. This was understandably taken seriously by her. She considered it a threat. That was the context in which the claimant made the call and challenged Councillor Westerman about the reason for it. The precise circumstances and details of what had been said, in that disputed exchange, required both parties to the phone call to provide their account. In the absence of Councillor Westerman we are not satisfied, on a balance of probabilities, the claimant used the profane language alleged or conducted herself in an abusive and insubordinate manner.

69. Suggesting that a serving councillor was motivated by racial considerations could, of itself, amount to misconduct or even gross misconduct. The claimant had been told by Councillor Beale of a conversation he had had with Councillor Westerman, in September 2016, in which Councillor Westerman had said there were too many Asians on the Council. In that context, for her to query whether there had been a racial motive behind the suggestion he might report her to the police, in a one to one conversation, was not an act of misconduct.

*[ii] Did the claimant become angry, speak over councillors, raised her voice and say, "either you allow me to speak or I will walk out of the meeting", on 18 May 2017 at a full council meeting?*

70. This concerned the annual general meeting of the council at which the new subcommittees were to be elected. It was a public meeting attended by 60 visitors. It is common ground that the election of the chair of the human resources committee followed a question having been raised about the relationship between the claimant and one of the nominees, her father-in-law, Councillor Akhtar. Councillor Ahmed suggested that as both the chair and town clerk were members of the committee, it could present a potential conflict of interest. The council elected Councillor Pedley as the chair of the committee, in favour of Councillor Akhtar. The claimant then raised her concern that Councillor Pedley would not be impartial in handling a grievance she had submitted. It was the manner in which the claimant was said to have raised this that constituted the alleged act of gross misconduct.

71. In her evidence the claimant adamantly refuted any suggestion that she had been angry, raised her voice or threatened to walk out of the meeting. Mr Flood drew attention to five statements provided to the investigator of councillors who variously described the claimant's behaviour as inappropriate. In particular Mr Flood drew attention to a statement of Councillor Thorne, who was supportive of the claimant for the most part. He referred to her speaking above others and raising her voice. He had spoken to the claimant after the meeting and said she should not have done so. Mr McGrath pointed out that this councillor had said that Councillor Pedley had talked over the claimant and that the mayor had lost control of the meeting.

72. If findings of facts rested solely upon the maximum number of similar accounts, Mr Flood could successfully say this allegation was made out. The

exercise is not nearly so straightforward. Even had those accounts been given in evidence, the majority does not necessarily prevail. The claimant points out that there was a selective choice of those interviewed and others may well have supported her position. More significantly, we find ourselves having to measure the quality of the claimant's evidence against hearsay documents which do not carry comparable weight. The respondent chose to call no evidence about the claimant's conduct at this meeting. It is not referred to in the witness statements of the councillors who were to give evidence. The claimant's account of her conduct in this meeting was not undermined in her evidence. We are not satisfied, on a balance of probabilities, that the claimant conducted herself as alleged.

*[iii] Did the claimant act insubordinately by providing to the Keighley News a press release on 31 July 2017 which was inaccurate and misleading by stating that the Mayor had breached the rules of debate, that Councillor Westerman should not have been allowed further to question Councillor Walker under the rules of the council but that the Mayor allowed that to continue under his chairmanship?*

73. The claimant had prepared a press release in respect of a council meeting at which a councillor had sought to reopen an issue which had been voted upon in the recent past. Councillor Westerman challenged the propriety of that motion. The claimant said that she had prepared a summary for the press, who were anxious to receive a report from the council about what had happened. She had spoken to the Mayor who had told her to get on with it. She released it without further referral and approval of the Mayor.

74. Mr Flood questioned the claimant about the standing orders and the policy of the council in respect of media releases. He suggested that it was clear that, read together, the claimant was obliged to consult with the Mayor before releasing this report from the press, notwithstanding she may have been told to get on with it. The claimant constructed the standing order in a way which left her greater autonomy. We consider the construction suggested by Mr Flood is correct; but the claimant is not accused of misconduct in that regard. Rather, it is said that the press release was inaccurate and misleading.

75. The claimant was not cross-examined on the standing orders in respect of the issue which arose at the meeting, that is whether Councillor Westerman had inappropriately pursued a line of questioning contrary to the rules and that the mayor had chosen to allow that.

76. We accept the submission of Mr McGrath that there is no evidence upon which we could satisfactorily find this was an act of misconduct; that is there is no evidence that the press release was inaccurate or misleading. There was an analysis of this in the letter of 20 March 2018, but in the absence of any evidence expressly addressing the question of the accuracy of the press release, the allegation must fail.

77. In the circumstances, the respondent has not established that the claimant committed any act of gross misconduct which would warrant the summary termination of her employment under the terms of her engagement.

78. The wrongful dismissal complaint succeeds.

Conduct

79. For the above reasons, we are not satisfied that there was conduct which arose before the dismissal which should be taken into account in reducing or extinguishing the basic award.

80. Nor was there conduct which caused or contributed to the dismissal which should be taken into account for reducing any compensatory award.

Discrimination

Was the claimant treated less favourably than the respondent treated, or would have treated, a man, or alternatively a white employee of British origin, by unduly delaying the acknowledgement of the claimant's grievance, failing to provide or offer separation between her and the councillors subject to the grievance and/or failing to offer her with paid time out pending the resolution of the grievance?

81. Whilst the claimant had always been aggrieved, with some justification, at the tardy response and progress to her grievance, she had not been aware of how the respondent had managed another grievance, that of Mr Ashton, until disclosure of the PACT investigation report in this case. It was from that the claimant learned that Mr Ashton, the deputy clerk, had raised a grievance on 11 July 2017. It was acknowledged after a meeting of the human resources subcommittee on 17 July 2017. In a statement to the investigator of the grievance Mr Ashton said that, by that time (31 August 2017), the respondent had not really done anything. He said that a suggestion had been made that he take paid time off whilst the issue was addressed but he did not think that would be helpful. He was then informed that an independent investigator would be appointed, which he felt was the right proposal. He said that he and the claimant shared an office. On 18 July 2017 Councillor Nazam (the Mayor) had arranged for the claimant and Mr Ashton to work in separate offices whilst the grievances were investigated.

82. The grievance of the claimant was submitted on 24 April 2017. Her complaints concerned the fact she did not feel valued as a manager because of the conduct of the chair of the human resources committee, Councillor Pedley and its members. She described a number of occasions when she had felt undermined.

83. The grievance of Mr Ashton raised complaints of unfair degrading treatment from the claimant, being required to undertake an excessive workload and having to work in a hostile environment with inappropriate conversations, with shouting in the office and in council meetings.

84. There were differences in the way the respective grievances and complainants were managed. An employee in the claimant's position could reasonably have considered the delay in acknowledgement and failure to offer segregation from those she complained about and paid time out as a disadvantage. Whether they would have been taken up does not affect the perception that they were not offered and such treatment can reasonably be regarded as less favourable and a detriment.

85. Applying section 136 of the EqA, are there facts from which we could decide, in the absence of any other explanation, that such less favourable treatment was because of sex or race? If we decide it could, there is no explanation advanced by any evidence produced on behalf of the respondent and the three complaints would succeed.

86. Mr Flood submits there are material differences between the two cases which eliminate any discriminatory causal influence in respect of each of the alleged unlawful acts.

87. In respect of the first detriment, the claimant submitted her complaint shortly before the elections and at a time when the tenure of the mayor and committees was about to end. Furthermore, her complaint was about those tasked with managing her. Whilst it is true that Mr Ashton's grievance criticised his own manager, the human resources committee was not impugned directly by him and it could progress his complaint. With regard to the claimant's grievance it faced the difficulty of considering how to respond to a complaint about itself, being in a situation of immediate conflict. In that respect there was a material difference.

88. A new mayor was appointed in May. He had a discussion with the claimant about her grievance on 19 May 2017. It is not clear how he became aware of it, but a copy was forwarded by the claimant to the Mayor on 24 May 2017. In closing submissions Mr McGrath alleged there was an undue delay of six weeks. That would be a reference to 13 June 2017, when Mayor Nazam spoke to the claimant immediately before a human resources committee meeting. He asked if she had considered withdrawing her grievance. She said in response that she would consider withdrawing it but, as it was on the agenda for the committee, the grievance procedure should be invoked with a panel and she would consider withdrawing it later if she wished. At a human resources committee meeting on 18 July 2017, it was resolved to seek permission from the full council to appoint independent investigators to address the grievances of both the Town Clerk and Deputy Town Clerk. A letter was sent to both from the Mayor with an individual support package.

89. In respect of the delay, which we take to be up to the point when the Mayor spoke to the claimant on 13 June 2017, there is a difference between six weeks to acknowledge the claimant's grievance in contrast to one week to acknowledge Mr Ashton's. We accept the submission of Mr Flood that there were material considerations which differed in respect of the two grievances and those who had submitted them. The handover period and the delay in electing a new committee built in a delay which would have occurred, in all likelihood, whoever had submitted a grievance at that time. For the reasons set out above, the grievance of the most senior employee against the subcommittee of councillors who had to address it, gave rise to a further inevitable delay. Advice would have to be taken from the independent company which the respondent engaged. In contrast, by 11 July 2017 a new committee had been elected and it could immediately process the complaint of Mr Ashton. It did so by commissioning a consolidated investigation with the claimant's own grievance.

90. By reference to section 22 of the EqA, there are material differences in the two cases. These provide different circumstances for the treatment other than the difference in protected characteristics.

91. We have considered whether there are other facts from which we could draw inferences that the decision in not acknowledging the grievance earlier was tainted by regard to either protected characteristic. The only evidence in respect of sex was the perception of the claimant that a number of the new council intake of Asian councillors, in April 2015, were concerned about taking guidance and direction from a town clerk who was a younger Asian woman. This is not reliable material upon which to infer that decision makers involved in the handling of her grievance had pejorative attitudes to women. There is no evidence that this was a view held by those who made the decisions.

92. In her witness statement, the claimant referred to the behaviour of Councillor Pedley who had sent her a photograph of himself from his holiday and, she said, had made propositions of a personal nature. These were not presented as allegations of harassment or discrimination in the claim and so Councillor Pedley was not due to give evidence. We were not able to find facts in respect of those matters. In fairness Mr McGrath did not invite us to do so.

93. In respect of race, the evidence from which an inference might have been drawn was that of the comment made by Councillor Westerman to Councillor Beale. We were not satisfied, on the evidence, that Councillor Westerman was involved in any of the decisions relating to the grievance which gives rise to the discrimination complaints. It was not appropriate to attribute the comment made by him to others about whom no evidence arises of a racially discriminatory nature.

94. In the circumstances we are not satisfied the claimant has established there are facts from which we could conclude that the delay in acknowledging her grievance was because of either protected characteristic.

95. Similarly, we have no evidence from which we could satisfactorily conclude that the decision not to offer her paid time out or segregation from the human resources committee was because of either protected characteristic. In respect of segregation, the claimant herself imposed a restriction on her employers, that she would not attend any committee meeting. She had, to all intents and purposes, imposed the separation she complains was not offered. For the committee to offer further separation in some form would seem unlikely and might itself invite the criticism of disrespect to its senior employee. In any event, there is no evidence this was because of either race or gender.

96. We have no evidence about why it was thought appropriate to offer Mr Ashton time out and not for such an offer to be made to the claimant, but we agree with Mr Flood that there are material differences between the two cases. The claimant was in a position of seniority and in a principal role. Her work immediately effected the proper and efficient running of the council, so her time was less dispensable. There is no evidence to infer that the failure to make this offer was because of either race or sex. In **Madarassy**, Mummery LJ pointed out that a difference in status alone is not sufficient to discharge the burden of proof. In the recent authority of **Edobi v Royal Mail [2019] IRLR 352**, the Court of Appeal confirmed the approach to the shifting burden. That case had the interesting parallel of the respondent failing to call as witnesses the decision makers. Sir Patrick Elias held that the burden had nevertheless not shifted and that the explanation from the decision makers was required only after it had.

97. In the circumstances the claims for discrimination do not succeed.

Polkey

98. Any evaluation of whether an employee might have been dismissed had an alternative and proper procedure been followed involves an element of conjecture. That is because the tribunal considers a hypothetical disciplinary process which never in fact took place. Usually, the starting point for considering that is the basis upon which the actual process was found to have fallen short.

99. In this case the respondent has chosen to call no evidence at all on any issue: that includes the argument Mr Flood developed that the claimant would or might have been dismissed for the three findings which were said to be gross misconduct. He also initiated an argument that the relationship between the claimant and the respondent had become so strained and damaged that she would probably have left in any event or been dismissed. The tribunal did not permit him to pursue that in cross-examination or in closing submissions. That is because that aspect of the *Polkey* principle had not been foreshadowed in the response or amended response, or any of the witness statements adduced. The claimant was therefore having to meet an entirely novel argument for which she had not been able to prepare her case. This reflects a similar ruling whereby the amendment to the claim was refused, namely the claimant sought to introduce a complaint of a dismissal which was discriminatory which the respondent had never addressed.

100. The tribunal faced a blank canvas to sketch an alternative disciplinary procedure because the basis upon which the concession that the dismissal was unfair was never specified by the respondent. Moreover, had the dismissal been substantively unfair no procedural correction would have led to a dismissal at all. By substantively, we mean such factors as a disciplinary case which has been manufactured or manipulated or circumstances and events which have been intentionally taken out of context to justify removal of the claimant. That was part of the claimant's case. It was neither answered nor refuted by witness evidence.

101. Serious reservations arise in respect of disclosure. A number of documents were said by the respondent not to have been relevant or disclosable, but have subsequently been disclosed or provided after the claimant and her representatives have identified a document by reference to another. An example was the short, written report Councillor Walker prepared and submitted to the extraordinary meeting on 1 March 2018 at which the Council voted by 12 to 1 to dismiss the claimant summarily.

102. Of particular concern is the position relating to the minutes of the meeting of the council on 27 November 2017. Three different copies have emerged. The claimant had initially been told by three councillors, and a minute taker, that she had been summarily dismissed by a vote of the full council at that meeting. She was subsequently told, contrary to that, that there was to be a disciplinary investigation. Two months later, her union representative was handed a copy of the minutes which made no reference to the outcome. A subsequent disclosure of the minutes of this meeting, which were released at a full council meeting in January and then recovered and retained, recorded a discussion of three options: the immediate dismissal of the claimant, the mutual termination of her employment or external

mediation. A proposal made by Councillor Pedley and seconded by Councillor Westerman, that a disciplinary procedure should be instigated was reported to have been carried.

103. Councillor Akhtar had covertly recorded the meeting and the transcript confirms that Councillor Pedley proposed that the claimant be instantly dismissed for gross misconduct. The recording ran out before any vote was taken. A further copy of the minutes of this meeting, seemingly wrongly dated 1 November 2017, was disclosed which reports a resolution that the claimant should be dismissed instantly because of the severity of the proven complaints of gross misconduct. Thirteen councillors voted in favour including Councillor Pedley, Councillor Corkindale and Councillor Walker. Eight councillors voted against and two abstained, including the Mayor. This would inevitably raise difficulties about the impartiality of Councillor Walker and Councillor Corkindale, who conducted the subsequent disciplinary hearing and appeal. Mr McGrath submitted that this provided a motive to conceal what he said had actually happened on 27 November 2017, the instant dismissal of the claimant, with the presentation and disclosure of misleading and incorrect minutes. He points to the evidence which was to be given. In his witness statement Mr Walker stated, at paragraph 5, that the meeting proposed instigating a disciplinary procedure and Mr Corkindale stated, at paragraph 14 of his statement *“I was one of the councillors who was present at the extraordinary meeting at the town council on 27 November 2017 at which the PACT report was discussed. Although there was an open discussion at how the case against Safia should proceed, I did not witness any decision taken at that meeting to dismiss her. On the contrary it was agreed that a disciplinary process should be put in place before any such decision would be taken”*.

104. In the absence of evidence from anyone who was present at the meeting, we do not make a finding as to what in fact happened. The concerns we have expressed about the disclosure process, the inconsistent accounts given to the claimant about what happened at that meeting and the contradictory minutes raise questions about the integrity of this disciplinary process from an early stage. The task of assessing what might have happened in a fair process is impossible without some evidence having been led by the respondent. That is because the trail of documentary material raises serious questions to be answered and provides support for the claimant’s case that this dismissal was substantively unfair and pursued in bad faith.

105. For these reasons we are not satisfied that that the claimant would or might have been dismissed otherwise.

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Employment Judge D N Jones

Date 8 April 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE



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