IN THE HIGH COURT OF JUSTICE **Claim No: CO/3680/2017**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

B E T W E E N :

THE QUEEN ON THE APPLICATION OF
ELIZABETH PAULINE JANE HARVEY

Claimant

-and-

LEDBURY TOWN COUNCIL

Defendant

-and-

ANDREW HARRISON
HEREFORDSHIRE COUNTY COUNCIL

Interested Parties

DETAILED GROUNDS OF RESISTANCE

INTRODUCTION

1. The Claimant, Cllr Harvey, is an elected member of both the Defendant Council (the "Council") and the Interested Party, Herefordshire County Council ("HCC"). As a matter of law, this case involves the interrelationship between the Council's proper exercise of its powers as an employer and its duties towards its staff, and the proper scope of the Localism Act 2011 ("the 2011 Act").

2. The issue arises because the 2011 Act provides that if an allegation is made in relation to a breach of the Code of Conduct, the investigation as to whether there has been such

a breach is only for HCC to investigate. The facts concern where an employee raises a grievance to its employer, the Council. The Council considers that it investigated an employment matter – a workplace grievance raised by two members of staff in relation to how they were being treated. Cllr Harvey, however, reported herself to HCC for an investigation as to whether or not she had breached the Code of Conduct. Thus, it falls to this Court to consider the two regimes, applying relevant case law from the Court of Appeal and the High Court.

3. It is important to bear in mind, however, that the underlying issue in this case which the Council has had to address is the impact of Cllr Harvey's conduct on the Council's ability to deliver its functions. Cllr Harvey's behaviour is perceived by various employees of the Council, as well as other Councillors, as being workplace bullying, generally aggressive, and objectionable. Her demands make it difficult for Council employees to do their jobs properly. Two of the Council's employees (the Deputy Clerk and Senior Clerical Officer) have in fact resigned, which they explained was as a result of Cllr Harvey's behaviour. The Mayor of the Council fears other employees may resign if they are not protected. The Council's formal grievance process was activated by the Town Clerk (the "Clerk") and the then Deputy Clerk. The Council considers that it has taken the steps necessary and proportionate in relation to protecting its employees, managing its obligations as an employer, and being able to carry out its functions.

   The Council did not resist permission being granted as it wished to be proportionate in its response to the claim. The Council considers that Parish Councils, as employers, have the power as a public body, and are entitled, as any employer would be, to deal internally with grievances made by Council employees. The Council also considers it to be clear that such grievances can be raised entirely separately from matters around the Code of Conduct. The Council respects its duty of care to its employees and its important right to deal internally, confidentially, and appropriately with what can be sensitive and private matters raised by employees; and which need to be addressed so that the Council can carry out its functions.

4. There are three grounds of challenge:

   (1) Ground 1: the Council's actions were ultra vires its powers
   (2) Ground 2: the Decision was substantively unfair
   (3) Ground 3: the Decision was procedurally unfair

Relevant Chronology

11 Jan 2007	Grievance Procedure adopted.
15 Dec 2015	Clerk raised a grievance against the Council; as did the Deputy Clerk.
19 Jan 2016	The Council held an Extraordinary Full Council Meeting ("EFCM") and decided that a Grievance Panel comprising five Council members should be constituted to hear the above grievances and decide on a course of action. It also resolved that, pending its decision on the grievances, direct communication between the Clerk and Deputy Clerk, on the one hand, and Cllr Harvey on the other, should cease. It agreed that an Appeal Panel also be set up, comprising different members to the Grievance Panel. Terms of Reference for the above two Panels were also agreed.
31 Jan 2016	Cllr Harvey referred the complaints that had been made against her to the Monitoring Officer of HCC.
29 Feb 2016	Cllr Harvey invited to attend a meeting to enable her to respond to the grievances that had been made with respect to her. She declined to attend, apparently on legal advice.
21 March 2016	Cllr Harvey was invited to attend the meeting of the Grievance Panel. She declined to attend, apparently on legal advice.
21 March 2016	Grievance Panel held that the complaints against Cllr Harvey were made out.
12 April 2016	Monitoring Officer at HCC informed Cllr Harvey that, having sought the views of the statutory "independent person", she had arranged for the complaints to be investigated by an external investigator.
19 April 2016	Cllr Harvey appealed Grievance Panel's decision, which was upheld by the Appeals Panel. Cllr Harvey attended this meeting.
5 May 2016	The Council, at a further EFCM, noted and endorsed the decisions of the Grievance Panel and the Appeal Panel, and resolved, inter alia, in order to "*help prevent the on-going bullying, intimidation and harassment of staff",* that Cllr Harvey should not sit on any of the Council's committees, sub-committees, panels/or working/steering groups; not be eligible to substitute for a member of any of the same; not represent the Council on any outside body; and that all communication between Cllr Harvey and the Clerk and Deputy Clerk was to go through the Mayor of the Council or the Deputy Mayor in his/her absence. These measures were to remain in place from the Annual General Meeting ("AGM") of the Council on 12 May 2016 until the AGM of May 2017, "*when the matter may be reviewed".*
8 May 2017	The Council's Standing Committee reviewed the above decision, and resolved to continue the measures taken with respect to Cllr Harvey for another year, with the additional stipulation that the prohibition on communication between Cllr Harvey and Clerk and Deputy Clerk be extended to all Council staff. This decision was subject to a further review to take place in May 2018.
9 May 2017	The Monitoring Officer wrote to Cllr Harvey informing her, inter alia, that she had concluded that there had been no breach of the Code of Conduct on Cllr Harvey's part and that she would be taking no further action on the complaints. The letter also recorded that the Council would not be disclosing the reports or any evidence they had gathered as these were confidential to the process and legally privileged. A copy of this letter was provided to the Council the same day.
10 May 2016	Monitoring Officer wrote to the Mayor of the Council noting that the grievances before the Council concerned allegations of bullying by Cllr

	Harvey; that that was behaviour prohibited by the Council's Code of Conduct; and that, as such, in her opinion, the grievances could not be dealt with otherwise than in accordance with the arrangements made under section 28(6) of the 2011 Act.
11 May 2017	The Monitoring Officer wrote to the Council by email at 18:19pm, to say that, inter alia, that a "*town council can only take sanctions against a member where the principal authority has recommended this following a breach of the code".*
11 May 2017	Cllr Harvey drew the outcome of the Code of Conduct investigation and the Monitoring Officer's view to the attention of Full Council. A full Council meeting approved and adopted the Standing Committee's resolution.
21 July 2017	Pre Action Protocol letter was issued.
7 August 2017	Pre Action Protocol reply was sent.
10 Aug 2017	Cllr Harvey filed her claim for judicial review.
8 Sept 2017	The Council filed an Acknowledgment of Service indicating that the "*parties are actively involved in without prejudice negotiations. The Defendant does not oppose the grant of permission. The Defendant will update the Court as soon as possible as to the progress of negotiations. In the event the matter does not settle and permission is granted, the Defendant… seeks a direction to file and serve detailed grounds…"*
3 Oct 2017	His Honour Judge Allan Gore QC sitting as a Judge of the High Court granted permission, held that "*The Defendant does not oppose the grant of permission. Ground 1 is clearly arguable. If permission were refused on the other grounds, which are not so clearly arguable, the Claimant would probably seek to renew at an oral hearing, and the proportionate case management order would be to list that at the same time as the substantive hearing…"*

LEGAL FRAMEWORK

5. The 2011 Act is central to this claim. Section 1 provides, inter alia:

> ***"1 Local authority's general power of competence***
> *(1) A local authority has power to do anything that individuals generally may do.*
>
> *(2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—*
> *(a) unlike anything the authority may do apart from subsection (1), or*
> *(b) unlike anything that other public bodies may do.*
>
> *(3) In this section 'individual' means an individual with full capacity.*
>
> *(4) Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) to do it in any way whatever, including—*
> *(a) power to do it anywhere in the United Kingdom or elsewhere,*
> *(b) power to do it for a commercial purpose or otherwise for a charge, or without charge, and*
> *(c) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.*
>
> *(5) The generality of the power conferred by subsection (1) ('the general power') is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.*

(6) Any such other power is not limited by the existence of the general power (but see section 5(2)) …".

6. Section 2 of the 2011 Act places a number of limitations on the exercise of the general power comprised by section 1. Section 2(3) provides that the general power does not confer power to make or alter arrangements of a kind which may be made under Part 6 of the 1972 Act (arrangements for discharge of authority's functions by committees, joint committees, officers, etc); or to make or alter arrangements of a kind which are made, or may be made, by or under Part 1A of the Local Government Act 2000 (arrangements for local authority governance in England).

7. Section 5(2) provides for powers for the Secretary of State to make supplemental provision. Whilst orders have been made under section 5, no relevant powers have been exercised in this case.

*"**5 Powers to make supplemental provision***
(1) If the Secretary of State thinks that a statutory provision (whenever passed or made) prevents or restricts local authorities from exercising the general power, the Secretary of State may by order amend, repeal, revoke or disapply that provision.
(2) If the Secretary of State thinks that the general power is overlapped (to any extent) by another power then, for the purpose of removing or reducing that overlap, the Secretary of State may by order amend, repeal, revoke or disapply any statutory provision (whenever passed or made).
(3) The Secretary of State may by order make provision preventing local authorities from doing, in exercise of the general power, anything which is specified, or is of a description specified, in the order.
(4) The Secretary of State may by order provide for the exercise of the general power by local authorities to be subject to conditions, whether generally or in relation to doing anything specified, or of a description specified, in the order.
(5) The power under subsection (1), (2), (3) or (4) may be exercised in relation to—
(a) all local authorities,
(b) particular local authorities, or
(c) particular descriptions of local authority.
(6) The power under subsection (1) or (2) to amend or disapply a statutory provision includes power to amend or disapply a statutory provision for a particular period.
(7) Before making an order under subsection (1), (2), (3) or (4) the Secretary of State must consult—
(a) such local authorities,
(b) such representatives of local government, and
(c) such other persons (if any),
as the Secretary of State considers appropriate.
(8) Before making an order under subsection (1) that has effect in relation to Wales, the Secretary of State must consult the Welsh Ministers."

8. Part 6 of the 1972 Act contains sections 101 to 109. These are very long-standing provisions. These provide in summary that:

- Section 101(1)(a), subject to any express provision contained in the 1972 Act or any Act passed after that Act, a local authority may arrange for the discharge of

any of their functions by a committee, a sub-committee or any officer of the authority.

- Section 101(2) makes further provision by virtue of which a committee of a local authority may make arrangements for the discharge of its functions by a sub-committee, and a sub-committee may do the same with respect to an officer.
- Section 101(12) provides that references in section 101 and section 102 to the discharge of any of the functions of a local authority include references to the doing of anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of those functions.

9. Section 102 of the 1972 Act provides, inter alia, that, for the purpose of discharging any functions in pursuance of arrangements under section 101, a local authority may appoint a committee of the authority; or any such committee may appoint one or more sub-committees.

10. Section 106 is concerned with standing orders and provides:

> *"Standing orders may be made as respects any committee of a local authority by that authority or as respects a joint committee of two or more local authorities, whether appointed or established under this Part of this Act or any other enactment, by those authorities with respect to the quorum, proceedings and place of meeting of the committee or joint committee (including any sub-committee) but, subject to any such standing orders, the quorum, proceedings and place of meeting shall be such as the committee, joint committee or sub-committee may determine".*

11. Section 111(1) of the 1972 Act further provides:

> ***"111.— Subsidiary powers of local authorities.***
> *(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions".*

12. Section 27 of the 2011 Act provides:

> ***"27 Duty to promote and maintain high standards of conduct***
> *(1) A relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority.*
>
> *(2) In discharging its duty under subsection (1), a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity.*
>
> *(3) A relevant authority that is a parish council—*
>
> *(a) may comply with subsection (2) by adopting the code adopted under that subsection by its principal authority, where relevant on the basis that references in that code to its principal authority's register are to its register, and*

(b) may for that purpose assume that its principal authority has complied with section 28(1) and (2)" … .

13. By section 27(6) "relevant authority" means, for the purposes of Chapter 7 of the 2011 Act ("Standards"), inter alia, a county council in England and a parish council.

14. Sections 28(1) and 28(2) of the 2011 Act are concerned with the contents of Codes of Conduct adopted under section 27. Section 28(4) provides (so far as relevant):

> *"A failure to comply with a relevant authority's code of conduct is not to be dealt with otherwise than in accordance with arrangements made under subsection (6); …".*

15. Sections 28(6)-(7) provide:

> *"(6) A relevant authority other than a parish council must have in place—*
>
> *(a) arrangements under which allegations can be investigated, and*
> *(b) arrangements under which decisions on allegations can be made.*
>
> *(7) Arrangements put in place under subsection (6)(b) by a relevant authority must include provision for the appointment by the authority of at least one independent person—*
> *(a) whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate …".*

16. Section 28(9) provides:

> *"In subsections (6) and (7) 'allegation', in relation to a relevant authority, means a written allegation—*
> *(a) that a member or co-opted member of the authority has failed to comply with the authority's code of conduct, or*
> *(b) that a member or co-opted member of a parish council for which the authority is the principal authority has failed to comply with the parish council's code of conduct".*

17. By section 28(11):

> *"If a relevant authority finds that a member or co-opted member of the authority has failed to comply with its code of conduct (whether or not the finding is made following an investigation under arrangements put in place under subsection (6)) it may have regard to the failure in deciding—*
> *(a) whether to take action in relation to the member or co-opted member, and*
> *(b) what action to take".*

THE COUNCIL'S GRIEVANCE PROCEDURE AND THE CODE OF CONDUCT

18. The Council's Grievance Procedure was adopted on 11 January 2007. The objectives of the procedure (see para 1.2) are to foster good relationships between the Council and its employees; to settle grievances as near as possible to their point of origin; to ensure that the Council treats grievances seriously and resolves them as quickly as possible; and to ensure that employees are treated fairly and consistently throughout the Council. The

Grievance Procedure provides in the first instance for grievances to be dealt with informally; and thereafter in accordance with the detailed procedure for making a formal grievance.

19. The purpose of the Council's Code of Conduct, by contrast with that of the Grievance Procedure, is to:

> *"assist Members (including coopted Members) in the discharge of their obligations to the Council (referred to as "the Authority"), their local communities and the public at large by:*
>
> (a) *setting out the standards of conduct that are expected of Members and co-opted Members of the Authority when they are acting in that capacity, and in so doing*
>
> (b) *providing the openness and accountability necessary to reinforce public confidence in the way in which Members perform those activities".*

20. The Grievance Procedure is concerned with the Council's internal administration of its operations, including employee relations. The Code of Conduct is directed to the public sphere, with a focus on the maintenance by Councillors of standards in public life. Accordingly, the Grievance Procedure, on the one hand, and the Code of Conduct, on the other, have different roles, purposes and functions: see further the statement of the Chief Executive of Herefordshire Association of Local Councils ("HALC").

RESPONSE TO CLAIM

General

21. It is important to distinguish between Ground 1 of the claim, and Grounds 2 and 3.

22. Ground 1 of the claim involves a narrow question of law: did the Council have the power to proceed as it did with respect to Cllr Harvey, namely, by investigating the complaints made against her pursuant to its Grievance Procedure; making findings under that Procedure; and imposing measures upon her aimed at resolving its employees' grievance, without regard to sections 27-28 of the 2011 Act? In the Council's submission, the answer to that question is plainly "yes". The Court of Appeal has so held in relation to earlier investigatory regimes. Indeed, as an employer, the Council not only had the power, it also had a duty, to deal with relevant complaints raised by its employees pursuant to its Grievance Procedure.

23. Grounds 2 and 3 of the claim involve a question of the application of the point of law established by Ground 1. It is the Council's case, in summary, that it acted lawfully (i.e. reasonably and rationally) both substantively (Ground 2) and procedurally (Ground 3). Accordingly, the claim should be dismissed.

Ground 1: ultra vires

24. Cllr Harvey asserts that "*the decision of 11 May 2017 was ultra vires the powers of the Parish Council…"* and seeks as a remedy an order quashing the Decision "*and a declaration to the effect that the Parish Council does not have power itself to investigate, determine and impose sanctions in relation to complaints that members have breached the Code".*

25. Cllr Harvey's case is misconceived. The Council's Decision was not ultra vires its powers; and it was not a decision to investigate, determine or impose sanctions in relation to a complaint that members have breached the Code.

26. The provisions of section 1 of the 2011 Act and the 1972 Act are broad. They plainly confer a power on a local authority such as the Council to adopt a Grievance Procedure, and to explore complaints made under that Procedure, whether by Committee or otherwise. This is clear from the decision of the Court of Appeal in R (Lashley) v Broadland DC [2001] EWCA Civ 179 (in a pre-2011 Act context)

27. The facts of Lashley are instructive. In that case, an officer of Broadland District Council ("BDC") complained to a senior officer about the conduct of the Claimant Councillor towards that officer. The Councillor had lost her temper with the officer in question. The officer had to take three weeks of sick leave from stress, which the medical evidence explained was "*a result of stress consequent upon exceptional pressures at work".* The Court of Appeal declined to examine closely how the stress had arisen, but was entirely satisfied that "*the situation was clearly one which required action on the part of the Chief Executive".* The Court of Appeal also recorded that other complaints had been reflected through a Union representative, raising the problem of:

> "*undue pressure some councillors are placing on staff in the workplace"* and noted the Union representative's observation that "*it is becoming increasingly common to hear of incidents of Councillors taking on the self-appointed role of criticising members of staff. These incidents involve councillors making derogative remarks to staff, often in front of colleagues, and seeking to undermine the authority of senior managers by expressing disparaging remarks about them to junior members of staff".*

As the Union representative explained, it was difficult for staff to respond to such conduct, given the respective roles of Councillors and Council staff.

28. Other evidence before the Court indicated that the Chief Executive had "*had other reports"* that the Councillor concerned had "*made derogatory remarks about other members of staff*". The action initially taken by BDC to deal with the officer's complaint was to request an apology; but no apology was offered. In due course, BDC put protective measures in place whereby no staff, for their own protection, were to have any direct dealings with the Claimant Councillor; and, if she required information, her request was to go through three named people (one of whom was the Chief Executive) in writing, and they would pass it on to the relevant staff-member. The Claimant was also prohibited from entering any Council building, other than to attend Council meetings; and she was instructed to report to the Main Reception on each occasion.

29. The Claimant Councillor subsequently claimed judicial review with respect to the decision of the BDC Standards Committee. Her contention was that the proceedings before the Committee had been *ultra vires* the powers of the Council, since they were said to in truth said to amount to disciplinary proceedings aimed at enforcing the National Code of Local Government Conduct, which Councils had no power to enforce at that time.

30. The Administrative Court firmly rejected that argument. The Claimant appealed to the Court of Appeal, and the Court of Appeal equally firmly dismissed the appeal from that finding, holding that the proceedings before the Standards Committee had been aimed at facilitating the Council's functions in maintaining its administration and internal workings in an efficient state, and in furthering the welfare of its employees, such that the proceedings were plainly *intra vires* the Council's powers. At paragraph 28 of his Judgment, Kennedy LJ (with whom Laws and Rix LJJ agreed) observed:

> *"[Counsel for the claimant] recognises, as he must, that if a local government officer complains to his senior officer about the way in which he has been treated by a councillor the complaint has to be investigated. Ordinary principles of good management so require, and such an investigation is plainly a function which a local authority is entitled to carry out pursuant to its statutory powers as set out in the 1972 Act. In reality it makes sense for the investigating officer to report to a committee, such as the Standards Committee which can then consider what action to take. So far as the councillor is concerned, the Committee's powers are restricted, but they are not non-existent. In extreme cases it can report matters to the police or to the auditors. In less extreme cases it may recommend to the Council removal of a councillor from a committee, or simply state its findings and perhaps offer advice. On the other side of the equation, the committee can dismiss the complaint or, for example, suggest changes to working practices to prevent such problems arising in the future"* (emphasis added).

31. At paragraph 74F of the Judgment, the Court of Appeal also quoted approvingly from the judgment of Mr Justice Munby in the Court below:

> *"[Counsel for the Claimant] asserts that the activity of the Committee was not linked to any particular function or functions of the Council. I disagree. As [Counsel for the Council] correctly submitted, the activity of the Committee was in my judgment linked to, that is to say it was calculated to facilitate and was conductive or incidental to, the Council's functions (I) of maintaining its administration and internal workings in a state of efficiency and (II) of maintaining and furthering the welfare of its employees"* (emphasis added).

32. In the Court of Appeal's clear view, therefore:

1) An investigation is "*plainly a function which a local authority is entitled to carry out"* pursuant to the 1972 Act; clearly, the investigation in this case can be so categorised.

2) In the Court's view, whilst *"it makes sense for the investigating officer to report to a committee, such as the Standards Committee",* it was open to an authority exercising its general powers under the 1972 Act to determine to whom an investigating officer should report; again, clearly this is applicable here.

3) The proceedings undertaken by the Council in Lashley were not disciplinary proceedings aimed at enforcing the Code of Local Government Conduct, but ones aimed at maintaining a good administration and furthering the welfare of its employees, and they were proceedings which fell well within the ambit of the 1972 Act; yet again, the same is plainly the case here.

4) The nature of the employee grievances investigated by BDC were clearly ones that an authority could investigate; and they are remarkably similar to the grievances in issue here.

33. Whilst Lashley pre-dates the coming into force of the 2011 Act, the Court of Appeal's reasoning and conclusions apply with equal (indeed binding force) to the circumstances of the present case. Accordingly, the claim that the Council's conduct in this case was *ultra vires* plainly fails. It is clear from the Court of Appeal's judgment that conduct of the kind in issue in this case, which is directly comparable to that which was in issue in Lashley, can be investigated by an authority under the 1972 Act powers; and that an authority may impose the measures which it has available to it under those powers to protect its employees.

34. Further, in the specific context of the 2011 Act, the High Court has also so held; see Hussain v Sandwell MBC [2017] EWHC 1641 (Admin). In Sandwell MBC, Green J was considering the issue of pre-formal investigations into the conduct of the Claimant carried out by a local authority prior to the 2011 Act coming into force. In considering the issue of whether the authority in that case had the power to undertake an initial or pre-formal investigation into an alleged breach of the Code of Conduct (pending the subsequent instigation of the formal arrangements under section 28 of the 2011 Act), he held that he "*reject[ed] the submission that the Authority did not have the lawful power to conduct the initial pre-formal investigation. There was ample power under the LGA 1972. And there was also ample power under the LA 2011".* He went on to hold that:

> "*in any event even if there were no express power under the specific provisions governing formal investigations under the LA 2011, the Council was not thereby debarred from conducting investigations under other more general powers under the LA 2011 and/or the LGA 1972 and in using the machinery put in place under the LA 2011 for this purpose".*

35. Thus, even absent an express power under the specific provisions governing formal investigations under the 2011 Act, Sandwell MBC was able to conduct investigations under the more general powers contained in the 2011 Act and/or the 1972 Act. The same plainly applies to local authority grievance procedures. Further, there are other relevant considerations which plainly support this interpretation:

36. First, there is no authority for the proposition that a local authority which is an employer lacks the statutory power to undertake investigations of a kind which any employer might undertake. A very clear statutory provision would be required to prevent a local authority from carrying out such a normal and incidental part of an employer-employee relationship[1]. There is no such provision; against which the scope of the general power of competence is plainly wide, and intended by Parliament to be wide. There is nothing whatsoever in the 2011 Act to suggest that such powers have been removed; and nor has the Secretary of State exercised any powers under sections 5(2) or 5(3) to so limit the general power of competence.

[1] This proposition is self-evident. In any case, however, the Court of Appeal in Lashley clearly indicated that such a complaint by an officer to a senior officer "has to be" investigated. Further,, for completeness, in Moores, the EAT emphasised at p.285 that "*trust and confidence*" is an implied term in the contract of employment (including that between local authorities and their employees), and that it is an implied term of every contract that the employer will provide and maintain a working environment which is reasonably tolerable to all employees, a term applying "*to protection from unacceptable treatment and behaviour and unauthorised interference in work duties".*

The Section 28(4) argument

37. Second, the argument in relation to the provisions of section 28(4) of the 2011 Act is wrong. This was explored by the High Court in Sandwell MBC. At paragraph 141 of his Judgment Green J observed as follows:

> *"In my judgment nothing in the LA 2011 or in section 28 thereof prevents a Council performing pre-formal investigations. What the Act requires is that once an Authority determines upon a* ***formal*** *inquiry into an allegation of breach of a Code then it must, prima facie, utilise its formal arrangements. But there is no prohibition on pre-formal inquiries and investigations. Such pre-formal inquiries may be necessary to see whether a complaint brought to its attention is frivolous or vexatious or whether even if it has substance it should be dealt with by some other procedure or avenue such as civil proceedings in a Court or a complaint to the police. Pre-formal inquiries may also, as this case shows, involve alleged misconduct by members, officers and third parties whereas the formal Arrangements concern* ***only*** *members. In my view, a Council is entitled to investigate in order to find out whether a prima facie case exists and in order for them to receive advice as to the appropriate next steps. Were the distinction between pre-formal and formal inquiries not to exist it would mean that every allegation, however trivial or absurd, could only be investigated through a formal process even if that were wholly disproportionate and represented an unnecessary squandering of the Council's scarce resources or would involve the addressee of a complaint in an unnecessary expenditure of time, money and effort. To my mind this is the common sense interpretation of Section 28 LA 2011 and avoids undue rigidity and formalism"* (emphasis in **bold** in original, emphasis underlined added).

38. Thus, section 28 of the 2011 Act "*is concerned with the effects of prior findings of breach*" (Judgment, para 142 (b)); or with "*what happens after there is a 'failure to comply'*" with a Code of Conduct. In this case, what is in issue is a complaint made pursuant to a Grievance Procedure, rather than an allegation of a breach of the Code of Conduct per se. Accordingly, the Code of Conduct is not engaged; and, in particular, where there is no "*prior finding of breach*", the relevant authority is fully entitled, in the exercise of its statutory powers, to investigate it under its Grievance Procedure, without invoking the formal arrangements comprised by section 28 of the 2011 Act.

39. As Green J remarked in the above passage, "*pre-formal inquiries*" may be necessary for the purpose, inter alia, of determining whether, even if the relevant complaint "*has substance it should be dealt with by some other procedure or avenue*". In this connection, the Judge referred, by way of example, to "*civil proceedings in a Court or a complaint to the police".* This indicates that section 28 of the 2011 Act was not intended (and could not sensibly operate as) an ouster of the jurisdiction of any other body, whether in the form of criminal investigations or civil proceedings in a Court, or indeed an Employment Tribunal. Likewise, "*some other procedure or avenue*" is plainly broad

enough to encompass local authority internal proceedings, such as grievance, disciplinary or harassment procedures.

40. Even in a case in which there has been an allegation of breach of a code of conduct, therefore, on the Judge's analysis, unless and until a finding is made by the authority undertaking the pre-formal investigation that (to use the words of section 28(4)) a "*failure to comply*" with its code of conduct has taken place, that authority is free to deal with that allegation under its general powers and procedures, without reference to section 28 of the 2011 Act. Further, the Judge made it clear at paragraph 142 of his Judgment that the only analysis of the legislation which enables the provisions of section 28(4) to be reconciled with the relevant scheme as a whole, including in particular section 28(11), is one which permits authorities to carry out their own investigations prior to considering whether there has been a breach of a code of conduct; and to be able to decide whether or not, if a complaint has substance, it should be dealt with by some other procedure or avenue.

41. Third, the above interpretation is also consistent with the context of the 2011 Act and the mischief which that Act was seeking to address in enacting section 28. There can be no suggestion that the 2011 Act was intended to alter established practices in relation to health and safety matters and employment law, as had been established as within the *vires* of a local authority by Lashley. Rather, the relevant sections of the 2011 Act were aimed at the regime which had developed in relation to the Standards Board of England. That regime, in turn, had developed as a consequence of a series of reports, in particular the Nolan Report on Standards in Public Life, and was aimed at improving standards in public life and public accountability, where previously the main sanction available had been the imposition of surcharge by auditors. As the Chief Executive of HALC explains in her Witness Statement in these proceedings, however, the processes around the Standards Board of England rapidly become deeply unpopular. By the time that the tenth report of the Committee on standards in public life "*Getting the Balance Right – Implementing Standards of Conduct in Public Life"* was published in January 2005, the existing system was described as consisting mainly of "*minor, vexatious and politically motivated complaints*." Section 28 of the 2011 Act was enacted with a view to providing a different regime aimed at remedying this situation.

42. In light of the above, it is plain that the 2011 Act was not aimed at restricting the powers of authorities, as body corporates, to take measures in relation to their functions and protecting staff from harassment, but at reforming the processes around the Standards

Board of England. Consistently with this, and as the Chief Executive of HALC points out, the existence of a grievance procedure in a Local Authority is long established. Indeed the Grievance Policy in this case dates from 2007, over a decade ago. There is nothing unusual about how it has been applied in this case.

43. Thus it is clear that the provisions of section 28 of the 2011 Act are only intended to come into play if and when there has been a finding that a Member of an authority has acted in breach of the Code of Conduct. In the present case, the Council did not address the question of whether Cllr Harvey's conduct was in breach of the Code and, unsurprisingly, made no finding with respect to that question.

44. Finally, in the Council's submission, as a matter of practicality and common sense, it cannot be correct that, in circumstances such as those of the present case, where a formal grievance has been issued and upheld both by a Grievance Panel and on appeal (and where other employees have explained that they have in fact resigned because of a Councillor's conduct), the Council had no power to take (proportionate, reasonable) steps to address the grievance absent, a finding of breach of the Code of Conduct. Such powers would be open to any employer to take with a view to managing workplace, relations, including local authorities such as the Council.

Removal or re-constitution of committees

45. Further, for the avoidance of doubt, the case law makes clear that the removal or non-appointment of a Councillor to a particular committee is entirely consistent with the exercise by a Council of its democratic functions. In Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin), for instance, Hickenbottom J (as he then was), discussing the different code of conduct regimes in England and Wales, remarked:[2]

> *"… 27 Ethical Standards Officers in England (the equivalent of the Ombudsman in Wales) were abolished, and their functions were not retained. Instead, from 1 July 2012, section 34(1) makes it a summary criminal offence deliberately to withhold or misrepresent a disclosable pecuniary interest which, upon conviction, may attract a maximum fine of £5,000 and an order disqualifying the person from being a member of the relevant authority for up to five years. Thus, in England, a councillor cannot be disqualified unless he is (i) in the paid employment of the authority (section 80(1)(a) of the 1972 Act: see paragraph 12 above); (ii) convicted of any offence and sentenced to imprisonment for at least three months (section 80(1)(b) of the 1972 Act: again, see paragraph 12 above), or (iii) convicted of an offence under section 34(1) of the 2011 Act and thereafter made the subject of a disqualification order by the magistrates. The power of local authorities to suspend members was also revoked from 7 June 2012.*

[2] This passage was also cited with approval by Edis J in R (Taylor) v Honiton Town Council [2016] EWHC 3307 (Admin) at para 37.

> *28 It was uncontentious before me that, there being no common law right for an authority to impose sanctions that interfere with local democracy, upon the abolition of these sanctions and outside the categories I have described above, a councillor in England can no longer be disqualified or suspended, sanctions being limited to (for example) a formal finding that he has breached the code, formal censure, press or other appropriate publicity, and removal by the authority from executive and committee roles (and then subject to statutory and constitutional requirements)".*

46. In other words, according to the Judge, while the disqualification or suspension of a councillor may amount to a sanction involving an interference with local democracy, his or her removal from a committee role does not.

47. It may be noted that the Council's position in this regard, is also consistent with the April 2017 document issued by the Oxfordshire Association of Local Councils entitled "*Dispute Resolution in parish and town councils*" (April 2017). Clearly, such a guidance document has no legal force, and cannot be used as an aide to the construction of the relevant statutory provisions. It does serve to illustrate, however, how in practice the 1972 Act and the 2011 Act operate, and reflects the well-entrenched processes followed by local authorities in England and Wales for dealing with internal grievance matters and Code of Conduct complaints respectively.

Ground 2: Substantive unlawfulness

48. Cllr Harvey contends that the Council's decision of May 2017 with respect to her was, on its facts, also (a) contrary to her rights under Article 10 of the ECHR and (b) unlawful at common law for being unreasonable and failing to take into account relevant considerations. In the Council's submission, both of these propositions are entirely lacking in merit.

Article 10

49. In so far as Cllr Harvey argues, if she does (see paragraph 59 of the Statement of Facts and Grounds), that, as a matter of principle, her Article 10 rights have been infringed as a result of the Council's conduct with respect to her she is clearly wrong.

50. The Council does not dispute that the right to free speech "*includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical and the provocative, provided it does not tend to cause violence. Freedom only to speak inoffensively is not worth having"* (Redmon-Bate v DPP [2000] HRLR 249). That,

however, is not the point. It is well established that Article 10, does not confer an unqualified right upon employers, including elected local authority Members,[3] to bully and/or harass and/or otherwise mistreat their employees in the exercise of their right to freedom of expression. Article 10 on its face explains that

> "*The exercise of these freedoms, since it carries with its duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the preventing of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for the maintaining of the authority and impartiality of the judiciary….".*

51. In the Council's submission, it is abundantly clear that the imposition of protective measures such as those which have put in place with respect to Cllr Harvey is, in the circumstances of the present case, entirely consistent with Article 10. So much is apparent from the decision in Heesom. There, Hickinbottom J, having considered the Article 10 jurisprudence, including in particular the decision of the majority of the European Court of Human Rights in Janowski v Poland (1999) 29 EHRR 705, remarked:[4]

> *"… Therefore:*
> *i) Civil servants are, of course, open to criticism, including public criticism; but they are involved in assisting with and implementing policies, not (like politicians) making them. As well as in their own private interests in terms of honour, dignity and reputation (see Mamère at [27]), it is in the public interest that they are not subject to unwarranted comments that disenable them from performing their public duties and undermine public confidence in the administration. Therefore, in the public interest, it is a legitimate aim of the State to protect public servants from unwarranted comments that have, or may have, that adverse effect on good administration …".*

52. In the Council's submission, those observations have direct application in the circumstances of the present case.

Complaints on the facts as to substantive unfairness

53. The main thrust of Ground 2 is an argument as to the factual merits and as to whether the actions taken by Council with respect to Cllr Harvey involved substantive unfairness. According to her (see paragraphs 61-63 of the Statement of Facts and Grounds):

    1) The Council had no or insufficient information properly to reach the conclusion that she continued to engage in bullying or harassing behaviour between May

[3] See the decision of the Employment Appeal Tribunal in Moores v Bude-Stratton Town Council [2001] ICR 217.
[4] At Judgment, para 42.

2016 and May 2017, given that HCC, after a full investigation, had found that she had not been guilty of a breach of the Code of Conduct; this should have been taken into account, and was not; and/or the Council were under a duty to obtain more information from HCC as to why they had concluded that she was not guilty of a breach of the code of conduct.

2) The measures imposed were disproportionate under the Human Rights Act 1998 or unreasonable as a matter of common law, as lesser measures could have been imposed.

3) The measures imposed were not in accordance with the law because they "*were not the subject of any adequately accessible law with sufficiently foreseeable effect".*

54. This is pleaded as either a breach of Article 10 or at common law. These are dealt with together, distinguishing where necessary between Article 10 and the common law.

Reasonably entitled to reach the view / failure to take into account relevant considerations in reaching a view/ Tameside Duty

55. The Council was plainly entitled to reach the view that it was appropriate to continue the measures, for the reasons that the Mayor explains in her Witness Statement in these proceedings.

56. Cllr Harvey's complaint focuses, in reality, on HCC's confirmation that she was not in breach of the Code of Conduct, and the extent to which she considered that finding to have been, first, determinative of the action being taken by the Council; and second, a matter which should in any event have been taken into account. The former proposition is without merit, however, for the reasons given with respect to Ground 1 above. So far as the latter proposition is concerned, as the Mayor explains, HCC's finding was, in fact, before Full Council, as Cllr Harvey herself told the Full Council of its existence. Thus, the Full Council was well-aware of the outcome of the Code of Conduct investigation when it approved the Standing Committee's resolution to continue the measures taken with respect to Cllr Harvey for a further year. That finding could not have been taken into account by the Standing Committee, since, at the date of that meeting, it had not yet been made.

57. As to the Tameside duty, Cllr Harvey's submissions with respect thereto are again without merit, and misrepresent the scope of that duty. Whilst the Tameside duty establishes that a public authority decision-maker may owe a duty of inquiry to elicit further information in particular factual circumstances, this does not mean that it must in all cases do so. As Laws LJ explained in R (Khatun) v London Borough of Newham [2004] EWCA Civ 55, "*it is for the decision-maker and not the court, subject… to Wednesbury review, to decide upon the manner and intensity of enquiry to be undertaken into any relevant factor accepted or demonstrated as such".* In this case, it was not unreasonable of the Council not to conduct further inquiries of HCC where:

1) The letter from HCC, drafted by a solicitor, made it very clear that HCC would not release any further reports or evidence concerning the Code of Conduct matter to the Council, and that it considered such material to be legally privileged. The underlying report had been prepared by an external solicitor's firm. It was entirely reasonable for the Council not to pursue HCC for information in circumstances in which HCC had clearly stated, on legal advice, that the relevant information was privileged.

2) Cllr Harvey was professionally represented. She had not taken any steps herself to bring other relevant information on the facts to either the Standing Committee or Full Council's attention.

3) Cllr Harvey has still not taken any such steps.

4) HCC are an Interested Party in these proceedings. They have not indicated that they will disclose such material.

5) If Cllr Harvey does have other evidence she wishes to bring forward, she is welcome to do so, as the Mayor confirms in her Statement; and, if appropriate, an earlier review can be considered in advance of May 2018.

6) There is no evidence to show that the HCC investigation, conducted in relation to a different matter (ie whether there had been a breach of the Code of Conduct) would have had any bearing on the Council's decision, given the fact, in particular, that that decision was taken with a view to enabling it to safeguard its functions and staff by imposing reasonable protective measures on Cllr Harvey, and given the different purposes which Codes of Conduct and internal Grievance Procedures respectively serve

58. In R (L) v SSHD [2017] EWHC 1002 (Admin) Michael Fordham QC, sitting as a Deputy Judge considered the scope of the duty of inquiry in a different context (an Article 8 fresh claim case concerning a mother being removed from the UK where her child, with whom she had limited contact only, would remain). He held, considering and applying the relevant authorities:

> *"A public authority decision-maker can owe a duty of enquiry to elicit further information. The test is whether the decision maker has taken reasonable steps to acquaint itself with relevant information. It can moreover, in principle, be permissible for a judicial review claimant who argues that this duty has been breached to point to material which was not before the decision-maker, but which would have been before the decision maker had such an enquiry been undertaken. But there is simply nothing of that kind in this case….. there had been no material change at that time. There is therefore nothing here that it can be said from the LAC review the Secretary of State ought to have obtained. In any event, I do not accept that the Secretary of State owed an inquisitorial duty, in the circumstances of this case to go and obtain a further update, despite the applicability of section 55 regarding the children's best interests. In my judgment, if there was something of an updating nature in this case, the claimant could be expected to bring it through her solicitors to the Secretary of State's attention, which is exactly what she had done with the Family Court order itself. Equally, if there was some impediment to the claimant obtaining further updating information, she could be expected to bring that to the attention of the Secretary of State, explain her difficulties and make her invitation for further enquiry, showing what steps she had taken to obtain further information.*
>
> *37 I said there were two aspects in relation to enquiry. The second aspect is whether, prior to or at the time of the Family Court order, there were other materials that might have illuminated the position. I have referred already to the Independent Social Worker's report and recommendations referred to in terms on the face of the order. It is likely that there were other relevant materials. So far as that is concerned, the same points apply. I do not accept that the Secretary of State had a duty in the circumstances of this case to go and elicit further information. I do not accept that there was any failure to take reasonable steps. She was, in my judgment, entitled to expect the claimant to put forward anything further or to explain any impediment that prevented that from taking place.*
>
> *38 So far as the duty of enquiry is concerned, I was shown various authorities helpfully touching on this point. Nimako-Boateng, to which I have already referred, contains this at paragraph 40:*
>
> > *"If an appellant wishes to advance a case that the child's welfare will be jeopardised by removal because it would break up existing patterns of contact with another parent or relative, one would expect to see clear and reliable evidence submitted to that effect. The burden of making out an Article 8 claim rests on the appellant, even although the respondent may have her own duty under section 55 […] to investigate and consider the welfare of the child."*
>
> *39 Also relevant on this topic are the further authorities of AN (Afghanistan) & Ors v Secretary of State for the Home Department [2013] EWCA Civ 1189 at paragraph 22 and Makhlouf in the Supreme Court at paragraph 51. Taking those cases in turn, AN recognises by reference to previous authority that it would be extremely rare that a Tribunal will be expected to make further enquiries. Makhlouf explains that in that case there was nothing which should have prompted the Secretary of State's officials to make further enquiries as to the best interests of the children. No doubt all cases are fact specific but in my judgment, no criticism can properly be levelled at the Secretary of State in the taking of the fresh claim decision, the whole point of which was that the claimant was taking the opportunity that the rules afford to put forward such further*

material as she wished to rely on to say that it made a difference and gave her a realistic prospect of success" (emphasis added).

59. In circumstances such as those of this case the Tameside duty is not engaged. The duty that applies is that which Lord Woolf MR referred to in R v SSHD ex p Iyadurai [1998] Imm AR 470 at page 475 (also cited by Mr Fordham QC in R(L)): the question is whether the decision-maker has taken "***adequate steps"*** to acquaint itself of the position; properly considered the information which is available to it; and reached an opinion which is consistent with that information, recognising that it is its responsibility to evaluate the material which is available. The Council in this case has plainly met those requirements. Accordingly, there is no material public law error relating to any breach of the Tameside duty on the Council's part in the circumstances of this case.

Not reasonable measures / disproportionate measures

60. At common law, the measures imposed by the Council upon Cllr Harvey were required only to be "reasonable" measures, ie measures which an authority, acting reasonably, would impose. Further, where Article 10 is engaged, the proportionality of such a measure is also in issue. In the Council's submission, it makes no difference in this case which standard is applied. The measures were plainly lawful ones for it to impose, whichever standard is in play. The measures are limited and reasonable to safeguard staff. They operate to prevent Cllr Harvey communicating directly, in 2016, with specific members of staff; and, in 2017, with all members of staff. This is not disproportionate or unreasonable, given the nature of her conduct.

61. In particular, there is no basis for arguing that the measures are disproportionate, when they do not prevent Cllr Harvey from expressing views. They simply restrict her from expressing her views directly and/or exclusively to a narrow group of people, namely employees of the Council. Thus, they do not restrict the essence of expression: and it is long established that, where measures do not restrict the essence of expression, this is a proportionate interference. In Rai v UK (1995) 19 EHRR CD93, for instance, the Court held that the UK Government's refusal to allow a demonstration in Trafalgar Square was a proportionate interference with Article 10, because the Government was not preventing a demonstration taking place, and indeed had proposed alternative venues. Article 10 rights could still be exercised, simply not in that location. Similarly, in Mayor of London v Haw [2010] EWCA 817, the Court held that the Mayor's right to possession of Parliament Square outweighed the Article 10 rights of the Democracy Village protestors to maintain

their protest camp there, on the basis, in part, that the demonstrators would still be entitled to protest elsewhere. Further or alternatively and in any event, the Council's measures are plainly proportionate, having regard to the scale of measures examined by the Court of Appeal in Lashley.

62. It is telling that, in her grounds of claim, Cllr Harvey attacks the principle of such measures being imposed in general, rather than seeking to explain why, in her particular case, measures which the Court of Appeal have held to be proportionate (eg such as removing a Councillor from Committee) are in fact disproportionate. This is no doubt because her case is essentially indistinguishable from the case of Lashley. The Mayor explains in her Statement how and why the measures were assessed by the Standing Committee, and all considered to be reasonable and necessary in order to protect the interests of staff and to enable the Council to function properly.

63. Such measures were clearly needed both in May 2016 and May 2017. Thus, when Full Council considered the decision of the Standing Committee in 2016, and when the Standing Committee reviewed the measures and the Full Council subsequently considered the Standing Committee's decision in May 2017, there was no evidence before the Standing Committee in each instance, whether from Cllr Harvey or otherwise, to indicate that she accepted that she would have to moderate her conduct; and/or to demonstrate that lesser sanctions could meet the same aims. Indeed, in May 2017 the Standing Committee specifically asked Cllr Harvey whether she was sorry for her conduct, and she refused to answer. Moreover, even at this late stage, Cllr Harvey has adduced no evidence to suggest that she is willing to ameliorate her conduct or make any kind of engaged, reflective or constructive response to the Council's decisions with respect to her.

Not in accordance with the law

64. This aspect of the Claim is again entirely without merit:

    1) Self-evidently, the measures available to the Council are limited by the scope of the Council's statutory powers. Cllr Harvey cannot be removed from her public office; And any measures which the Council could apply cannot last longer than for her term of office.

2) It is beyond argument that the measures imposed were not "*not the subject of any adequately accessible law with sufficiently foreseeable effect"*, where the scope of such measures has been clearly considered and set out in long-standing Court of Appeal authority, namely Lashley. The Court of Appeal has indicated the broad scope of measures which are available to a Council. In particular, they include:

- "*Suggest changes to working practices to prevent such problems arising in the future*". The protective measures before the Court of Appeal were that the Claimant Councillor was prohibited from direct dealings with officers, and her communications had to go through three named people, in writing. She was also prohibited from entering any Council building other than to attend Council meetings and was instructed to report via the Main Reception on each occasion.

- In "*extreme cases*" report matters to "*the police or to the auditors*".

- In "*less extreme*" cases, "*removal of a councillor from a committee.*"

65. The measures imposed by the Council in the present case are very similar to, but less draconian than, the measures imposed by BDC in Lashley and considered by the Court of Appeal in that case. They are essentially "*suggested changes to working practices to prevent such problems arising*". In the Council's submission, in light of the decision in Lashley, and given the scale of measures suggested by the Court of Appeal as potentially lawful and proportionate in that case, it is clear that the measures imposed upon Cllr Harvey by the Council in the present case were also lawful and proportionate.

Ground 3: Procedural unfairness

66. Cllr Harvey complains that:

1) She was not informed of the case against her as at May 2017.

2) She was not provided with an opportunity to make representations to the Standing Committee meeting which considered her case.

3) She was not provided with an opportunity, other than in her general capacity as a sitting member, to make representations at Full Council.

4) She was not informed as to the procedure or policy pursuant to which the Council acted.

67. There are three general points to make before turning to Cllr Harvey's specific criticisms.

68. First, judicial review is a remedy of last resort. As the Mayor explains in her Statement, an earlier review of Cllr Harvey's case could always be conducted, in advance of May 2018. Cllr Harvey could request this at any time. The Mayor considers that this would be treated sympathetically: and she would personally welcome conducting one, if Cllr Harvey were to provide evidence to show that she is prepared to moderate her behaviour. The matter then could and would be considered afresh in light of that evidence. However, Cllr Harvey has not been willing even to apologise; and there is no evidence in this judicial review claim to show that sees any need whatsoever to moderate her behaviour or indeed to give any reflective consideration to the Council's concerns. Instead, she simply challenges the *vires* of the basis upon which the Council acts.

69. Second, without such a commitment by Cllr Harvey to moderating her behaviour, it is, plainly, highly likely that the same decision would be taken again on any further review. This is because the Council will continue to need to take protective steps to ensure that its employees can go about their business, and that it can function effectively. This is therefore a case to which section 31 of the Senior Courts Act 1981 would squarely apply.

70. Third, stepping back from the specific facts of this case, there has been no procedural unfairness in this case; Cllr Harvey has had a "*fair crack of the whip*.". It is well established that "*what fairness demands depends on the context in which the power is being exercised" (*per Lord Hope in R v SSHD, ex p Pierson [1998] AC 539, but applied in many other cases). This is the context of a Councillor who is well aware of the various procedural mechanisms available to her and well aware that she can both request a review, and request terms of reference of any review to be debated by other Councillors.

71. The concept of a "fair crack of the whip" in an inquiry was first expressed by Lord Russell in Fairmount Investment Ltd v. Secretary of State for the Environment [1976] 1 W.L.R. 1255 at 1266, and subsequently applied by Ouseley J in Castleford Homes v Secretary

of State for Environment Transport and the Regions and the Royal Borough of Windsor and Maidenhead [2001] EWHC Admin 77. In Castleford Ouseley J provided a summary of the relevant concept as follows (emphasis added):

> *"52 The relevant law, though not cited to me, is to be found in cases such as Fairmount Investment Ltd v. Secretary of State for the Environment [1976] 1 W.L.R. 1255 at 1266, and H. Sabey & Co. Ltd v. Secretary of State for the Environment [1978] 1 All E.R. 586 . Did the claimant have a "fair crack of the whip?" Was the claimant deprived of an opportunity to present material by an approach on the part of the Inspector which he did not and could not reasonably have anticipated? Or is he trying to improve his case subsequently, having been substantially aware of, or alerted to, the key issues at the inquiry? Did he simply fail to realise that he might lose on an aspect which was fairly and squarely at issue and hence fail to put forward his fall-back case? Those are the sort of questions which can be used to guide a conclusion as to whether the manner in which a particular issue was dealt with at an inquiry involved a breach of natural justice and was unfair."*

72. The term has been subsequently disapproved of as obscure by Jackson LJ in Hopkins v SSCLG [2014] EWCA Civ 470 at 49 ("*What, I think, is meant by not having "a fair crack of the whip" is that there has been procedural unfairness which materially prejudiced the applicant*"), but the essence remains as set out by Ouseley J.

73. The reality is that Cllr Harvey is very well aware of the nature and contents of the Grievances that were lodged against her in 2015. She had been provided with copies of the Grievances in question (which she proceeded to place online). She was also well aware that the effectiveness of the measures taken against her was to be reviewed in May 2017; and, of course, she herself was well aware that she has taken no steps to change the conduct which, as she knew, had led the Council to impose protective measures upon her in the first place. By the same token, she is fully cognisant of the broad processes and procedures within the Council of which she is an elected Member; and, at all material times, she knew full well that she could have made representations undertaking to modify her behaviour so as to obviate the need for the relevant measures, if she had wished to do so.

74. Accordingly, this is a case where there can be no suggestion that Cllr Harvey was *"deprived of an opportunity*" to present material because of "*an approach on the part*" of the Council "*which [s]he did not and could not reasonably have anticipated*". On the contrary, in circumstances in which she knew that the measures taken with respect to her in May 2016 would be reviewed in May 2017, yet failed to put forward any evidence, in or before (or indeed after) May 2017, she reasonably can and, in the Council's respectful submission, should, be regarded as now "*trying to improve her case subsequently*" by claiming procedural and/or substantive unfairness, in the manner described above by Ouseley J.

75. Finally, the fact that Cllr Harvey is fully aware that she and/or other Councillors can request a further review of the Council's decision with respect to her is amply demonstrated by the fact that a group of Councillors have facilitated a motion, due be heard at an Extraordinary Full Council Meeting on 4 December 2017, which would in effect involve a review of the merits of her case. This indicates that Cllr Harvey and other Councillors are entirely familiar with the variety of remedies available to her through Council processes. In the Council's submission, that consideration on its own would warrant a decision by the Court to decline relief, namely on the basis that Cllr Harvey has at all material times had an alternative remedy available to her, whereby her conduct can be fully reviewed.

76. So far as Cllr Harvey's specific criticisms of the processes followed by the Council are concerned, it submits as follows.

Case against her

77. Cllr Harvey was, at all material times, plainly aware of what the essence of the "*case against her*" was. This was plainly apparent from the Clerk and Deputy Clerk's written Grievances, of which she had copies, and which resulted in the Council's decision of May 2016 to impose protective measures with respect to her. It may be noted that she made no complaint about that decision at that time.

78. Further, it is important to understand that the review in 2017 was a review of the protective measures imposed as a result of the abovementioned Grievances in 2016. As the Mayor explains "*that is, a review of the original decision, to decide whether it was necessary to continue with those measures, or whether they should be changed or removed".* It was not a new or fresh Grievance meeting. As such, the nature of "*the case*" in question had not changed between 2016 and 2017 and the 2017 review was, in essence, simply an administrative appraisal as to whether or not those measures had been effective, and whether or not they could safely be removed (the answer being, of course, that they could not).

79. Second, it is implausible to suggest that Cllr Harvey was unaware that:

    1) Her behaviour towards the Clerk had not changed in the intervening year. As the Mayor explains in her Statement, it was "*common knowledge*" (in a small Council in a small town) that her conduct remained unaltered, and the Mayor gives

specific examples of cases in which the Clerk's competence and integrity were criticised by Cllr Harvey in a public manner between May 2016 and May 2017.

2) Plainly, Cllr Harvey would know of her own behaviour towards others; and she knew full well that that behaviour had been of such a nature as to lead the Council to take its decisions of May 2016, and latterly, May 2017.

80. Third, the Council does not accept that Cllr Harvey was unaware of the meeting of the Standing Committee of 8th May 2017: see further below. If she had wished, she could have attended, requested such information as she wished, and/or arranged for a representative to attend, and/or made a written statement to the Committee: see further below.

81. Fourth, it is was clearly a possibility that protective measures taken for the benefit of particular employees could be extended to other employees in May 2017, not least where Cllr Harvey had made a formal complaint about another employee, which the Standing Committee had resolved was unfounded, and that other employee had in fact resigned.

82. For all these reasons, there was no *"procedural unfairness which materially prejudiced the applicant"* in the specific context of this case. This aspect of this ground of challenge is without merit.

Opportunity to attend or make representations at the Standing Committee meeting of the 8 May 2017

83. There was no procedural unfairness in connection with the above meeting. Cllr Harvey was notified of the meeting (as were all Councillors) on 3 May 2017. Her evidence is that she was unwell at the time and that she did not understand the agenda. This does not cause unfairness when (and see also the evidence of the Mayor):

1) Cllr Harvey was well aware that the measures imposed were coming up for review. The agenda in that context is clear. As the Mayor also explains, the Council is a "*small place*".

2) Cllr Harvey would have been well aware that she could have either written to the Standing Committee or attended to make a statement under the public participation part of the agenda, and indeed she could have done so at any time.

3) Further, in any event, she has put forward no evidence which she might have wished the Standing Committee to have considered at its meeting on the 8 May 2017 (which, as noted above, pre-dated the letter from HCC clearing her of any breach of the Code of Conduct).

4) The decision made in May 2017 was expressly said to be subject to a further review to take place in May 2018.

5) As the Mayor notes, it is also always possible for such a review to take place earlier.

6) This also applies to the earlier period; if Cllr Harvey at any time during the year had considered she wished to change her behaviour, or propose some other method which would protect the Clerk, she could have said so. She did not do so, because she does not accept the Council has the power in law to protect its staff from her behaviour. In this regard, however, in the Council's submission, she is plainly incorrect.

7) The Decision of the Standing Committee was also heard by Full Council, where Cllr Harvey was present and able to make whatever representations she wished.

84. Thus, particularly in relation to point 3) and 6), even if there was some limited procedural failing in not expressly inviting Cllr Harvey to make representations to the Standing Committee (which the Council denies), in the absence of any evidence from Cllr Harvey as to how she would propose to modify her behaviour, or else as to what other representations she might have made at the time, the outcome of the decision making-process which the Council followed in May 2017 did not result in any actual, substantive unfairness to her; and, further, in the absence of any such evidence to date, there is no realistic likelihood that the Standing Committee would have made a different decision.

85. For all these reasons, there was no unfairness. This aspect of this ground of challenge is without merit.

Opportunity at Full Council

86. There was no procedural unfairness at the Full Council meeting. Cllr Harvey was notified of the meeting (as were all Councillors). She would have been well aware that she could have written to the Full Council and, moreover, that she had the right to speak at Full Council. She did in fact chose to speak, in particular on the point as to the *vires* of the Council's actions, and expressly drew the Council's attention to the outcome of HCC's investigation. This was entirely a matter for her. As the Mayor explains, Cllr Harvey could have submitted a written statement, if she had wished, and if any Member of the Council wished for other information they were able to speak to the extent they wished and ask for whatever motion they wished to see made to be debated in relation to the Committee's Report. This is in no way procedurally unfair.

87. Further, as above, in all of the circumstances, given the absence of any evidence from Cllr Harvey that could have led the Full Council to have come to a different decision to the Standing Committee, there is no likelihood that the Full Council would have done anything other than endorse the recommendation of the Standing Committee.

88. For all these reasons, there was no unfairness. This aspect of this ground of challenge is without merit.

Policy or procedure

89. Cllr Harvey complains that she was "*never informed as to the procedure or policy pursuant to which the Parish Council purported to extend and enlarge"* the measures taken.

90. It is not clear what, precisely, Cllr Harvey complains of under this head. She was well aware that there was to be a review of the measures that were taken to protect staff, and that the relevant Terms of Reference had been set at the meeting of the 19 January 2016. She was also well aware of the general procedures of the Council. All that happened was that during the course of that review it was determined that it was necessary to enlarge the measures. Cllr Harvey has omitted to explain whether, and if so in what respect, that determination has resulted in any prejudice additional to that which, presumably, she considers herself to have been subjected as a result of the decision of May 2016. In the Council's submission, the determination in question has not resulted in any such prejudice.

91. If Cllr Harvey's point is that the Council failed formally to adopt a review procedure pursuant to which it intended to carry out a review, this is:

    1) Inaccurate, given the agreed Terms of Reference and the Council's Grievance Procedure;

    2) In any event the omission in question amounts, at most, to a minor procedural error, which adds nothing to the points made above. The lack of a formalised procedure is of no consequence to the substantive issues in this case, and there can be no doubt that applying section 31 of the Senior Courts Act 1981, the decision was highly likely to be the same.

    3) It is well established that "*what fairness demands depends on the context in which the power is being exercised".* If Cllr Harvey had wished to see a further formalisation of the process by which the review of the protective measures would be undertaken, she was perfectly able to raise this herself and seek such a procedure as she wished. She did not do so. The lack of a formalised procedure did not, in the circumstances of this case, cause any substantive unfairness.

    4) The Council has made clear that it would be willing to conduct a further review; it is doing so for Cllr Harrison; and see the Mayor's statement that she would personally welcome doing so if Cllr Harvey was willing to agree to moderate her behaviour appropriately.

92. For all these reasons, there was no unfairness. This aspect of this ground of challenge is without merit.

CONCLUSION

93. For all these reasons, judicial review should be refused, and the Council awarded its costs of defending this claim.

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LANDMARK CHAMBERS
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