



EMPLOYMENT TRIBUNALS

Claimant: Ms R Connolly
Respondent: Scrivens Limited
Heard at: Birmingham
On: 2, 3 & 4 May (& in chambers on 7 June) 2023
Before: Employment Judge Flood
Mrs Payne
Mrs Whitehill

Representation

Claimant: In person
Respondent: Miss Whelan (HR Consultant)

RESERVED JUDGMENT

The claimant's complaints of constructive unfair dismissal (sections 94, 95 and 98 Employment Rights Act 1996) ('ERA'); direct disability discrimination; discrimination arising from disability; and failure to comply with a duty to make reasonable adjustments (sections 13, 15, 20 and 21 Equality Act 2010 ('EQA')) are not well founded and are dismissed.

REASONS

The Complaints and preliminary matters

1. The claimant was employed by the respondent, from 14 March 2016 until her resignation with effect on 16 September 2021. By a claim form presented on 19 November 2021 following an unsuccessful period of early conciliation from 26 October 2021 until 3 November 2021 she brought complaints of unfair constructive dismissal, direct disability discrimination, discrimination arising from a disability and a failure to make reasonable adjustments.
2. At a preliminary hearing held on 11 May 2022 before Employment Judge V Jones, the claim was discussed, and this matter listed for final hearing. A draft list of issues was produced, and the claimant was ordered to provide further information on her complaints by 25 May 2022. The matter was also listed for a preliminary hearing in public to determine whether the claimant had a disability within the meaning of section 6 EQA. The claimant provided further information on her complaints for disability discrimination (shown at page 54 to 55) and further information on her constructive dismissal complaint (shown at page 56 to 57). The respondent also filed an amended response. The matter came before Employment Judge Wedderspoon on 25 November 2022 who determined that the claimant was disabled at the relevant time by reason of mental impairment, namely anxiety, within the meaning of section 6 EQA. Her judgment and reasons for that judgment ('the Disability Judgment') were at pages 46-51.
3. Although a draft list of issues had been started, this did not include the necessary information provided by the claimant about her claims since the hearing. At the outset of the final hearing together with the parties the tribunal spent some time discussing that information and compiling a draft list of issues. The parties considered this draft over a break and the final list of issues to be determined ('the List of Issues') was agreed. This was sent to the parties at the end of the first day of the hearing, was referred to throughout the hearing, and is shown below.
4. An issue also arose with respect to witness statements. The claimant had written to the tribunal on 13 April 2023 seeking permission to submit a further witness statement, because she said having seen the respondent's witness statements, she felt she had severely misunderstood the purpose of her witness statement in terms of the detail required to be included. The claimant had initially contacted the respondent on 13 April 2023 to seek their consent to this course of action at which time Miss Whelan informed her that she should write to the

Tribunal. The claimant did so but did not copy the respondent in on her request, as she did not appreciate this is necessary under the Employment Tribunal Rules of Procedure 2013 ('ET Rules'). Unfortunately, this omission was not picked up by the Tribunal administration. The claimant's request was referred to Legal Officer Metcalf who confirmed consent to do this (which she did) and the respondent was given permission to do the same if required. Again, unfortunately whilst this letter was sent to the claimant and notionally copied to the respondent an out of date email address appears to have been used, so this communication never reached the respondent. Having discussed the matter with the parties, both were content to proceed with the hearing based on the statements already produced. The respondent was given leave to ask any supplementary questions of its witnesses to address the additional points made by the claimant in her later witness statement.

5. We had before us an agreed bundle of documents ('Bundle') and where page numbers are referred to in this judgment and reasons, these are references to pages in the Bundle. There was also an agreed Chronology and Statement of Facts. The evidence was completed at 4.15pm on the third and final day of the hearing and so the tribunal adjourned the hearing for a reserved decision to be made. The parties were given seven days to provide any submissions in writing, which both parties did. The Tribunal met in chambers on 7 June 2023 to make its decision.

The Issues

1. Time limits

- 1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - 1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - 1.1.2 If not, was there conduct extending over a period?
 - 1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - 1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 1.1.4.1 Why were the complaints not made to the Tribunal in time?
 - 1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:

Departmental management and procedures

2.1.1.1 Force the claimant to relinquish members of my team to Mrs Wesson upon request. Mrs Wesson would also direct conflicting requests to team members.

2.1.1.2 Mrs Wesson appeared to try and make changes to the stockroom (in particular the Designer stockroom) and went straight to Mr Kinsella to do so.

Stock management and branch support

2.1.1.3 Mrs Wesson attempted to direct on replenishment of stocks and agreed levels despite it clearly being my responsibility to do so.

2.1.1.4 I was unable to carry out frequent product assessments, particularly with Designers frames as this function was given to Mrs Wesson.

2.1.1.5 I was unable to oversee the management of new product launches to branches as this function was taken from my responsibilities and given to Mrs Wesson.

Purchasing/Buying function

2.1.1.6 The entirety of this section of the job description was withdrawn, I no longer attended buying trips, supplier meetings, had any updates on new brands until the point of order or made decisions on poor sellers. I also was forced to train Mrs Wesson on how to produce reports used for these meetings — specifically stocks and sales reports.

Marketing support

2.1.1.7 I was no longer monitoring the matrix or monitoring branch sales on specific designers.

2.1.1.8 I was no longer able to lead designer launch plans or conduct phasing out of certain brands.

2.1.1.9 I was no longer involved in assisting with product strategy within the company for branches as this was something discussed in

supplier meetings, marketing meetings and monitoring of the matrix, of which I was excluded.

Communication

- 2.1.1.10 I was informed that branch visits would be something I would take on as part of the job description, however the opportunity never arose for me to do. instead, to the best of my knowledge, it was something Mrs Wesson was able to do.
- 2.1.1.11 I was excluded from conversations and decisions relating directly to my department as I was no longer able to produce necessary reports and be part of meetings where the nature of such things would be discussed.
- 2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
 - 2.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
 - 2.1.2.2 whether it had reasonable and proper cause for doing so.
- 2.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
- 2.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
- 2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal - i.e., what was the reason for the breach of contract? The respondent contends that if the claimant had not resigned from her role, the Respondent would have terminated her employment on grounds of "*some other substantial reason*" (s98 (1) (b) Employment Rights Act 1996) because ultimately, the claimant's continued an unreasonable refusal continue to perform her role because of the existence of another role in the respondent's structure would ultimately have rendered her continued employment impossible.
- 2.3 Was it a potentially fair reason?

- 2.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

3. Remedy for unfair dismissal

- 3.1 What basic award is payable to the claimant, if any?
- 3.2 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 3.2.1 What financial losses has the dismissal caused the claimant?
 - 3.2.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 3.2.3 If not, for what period of loss should the claimant be compensated?
 - 3.2.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - 3.2.5 If so, should the claimant's compensation be reduced? By how much?
 - 3.2.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 3.2.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
 - 3.2.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 3.2.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
 - 3.2.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - 3.2.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

4. Direct disability discrimination (Equality Act 2010 section 13)

- 4.1 The claimant was a disabled person within the meaning of section 6 Equality Act 2010 because of Anxiety.
- 4.2 Did the respondent do the following things:
 - 4.2.1 In a conversation which took place in mid to late August 2021 shortly after Mrs Wesson had commenced in her role, Mr Kinsella made comments to the claimant that she was "stressing him out" and that she was "paranoid".

4.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who s/he says was treated better than s/he was.

4.4 If so, was it because of disability?

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

5.1 Did the respondent treat the claimant unfavourably by:

5.1.1 On 6 September 2021, Mr Kinsella criticised the claimant's performance (the claimant says he was overcritical and stated facts that were untrue)

5.1.2 Mr Kinsella failed to acknowledge the claimants' concerns about her mental health.

5.1.3 Mr Kinsella failed to offer support to the claimant so she could perform the role.

5.2 Did the following things arise in consequence of the claimant's disability:

5.2.1 The claimant's Anxiety caused her to overthink and overanalyse matters that were not explained to her.

5.2.2 The claimant's Anxiety meant she found it more difficult to cope with excessive workloads/unreasonable deadlines/the demands of her role.

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

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

5.4.1 Reviewing the claimant's performance

- 5.5 The Tribunal will decide in particular:
- 5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
 - 5.5.2 could something less discriminatory have been done instead;
 - 5.5.3 how should the needs of the claimant and the respondent be balanced?
- 5.6 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

- 6.1 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?
- 6.2 A “PCP” is a provision, criterion, or practice. Did the respondent have the following PCPs:
- 6.2.1 The introduction the new role of Product Manager within the respondent structure;
 - 6.2.2 The process for implementing changes in management structure for existing employees.
 - 6.2.3 A practice of postponing, delaying and rescheduling meetings at short notice
- 6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that:
- 6.3.1 In relation to 6.2.1 and 6.2.2 because of the claimant’s Anxiety she found it more difficult to understand the scope of the new role and the subsequent changes leading her to overthink and overanalyse;
 - 6.3.2 In relation to 6.2.3, delay in rearranging important meetings negatively impacted the claimant’s mental health.
- 6.4 Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
- 6.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:
- 6.5.1 Hold a meeting/meeting to clarify the differences between the claimant’s role and the new Product Manager role and set defined boundaries to ensure that the two roles work effectively.

- 6.5.2 Put in place a training and development plan to make it clear what was expected of the claimant after the change.
 - 6.5.3 Agree to the claimant's request made on 9 August 2021 to move departments.
 - 6.5.4 Agree to the claimant's request made on 9 August 2021 to step down.
 - 6.5.5 Hold the rearranged review meeting on 9/10 September 2021 as requested or arrange for Mr Davies to conduct the meeting instead of Mr Kinsella
- 6.6 Was it reasonable for the respondent to have to take those steps [and when]?
- 6.7 Did the respondent fail to take those steps?

7. Remedy for discrimination

- 7.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 7.2 What financial losses has the discrimination caused the claimant?
- 7.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 7.4 If not, for what period of loss should the claimant be compensated?
- 7.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 7.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
- 7.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 7.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 7.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?
- 7.10 If so, is it just and equitable to increase or decrease any award payable to the claimant?
- 7.11 By what proportion, up to 25%?
- 7.12 Should interest be awarded? How much?

Findings of Fact

6. The claimant attended to give evidence and her partner; Mr B Bostock also gave evidence on behalf of the claimant. Mr M Kinsella ('MK'), General Manager at the respondent's production facility, Mersona and Mr G Davies ('GD'), previously General Manager and currently Executive Manager at Mersona both gave evidence on behalf of the respondent. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle.
7. We have made findings not only on allegations made as specific discrimination complaints but on other relevant matters raised as background as there may have been relevance to drawing inferences and conclusions.
8. The Tribunal resolved conflicts of evidence as arose on the balance of probabilities and assessed the credibility of the witnesses and the consistency of their evidence with surrounding facts.
9. We made the following findings of fact:
 - 9.1. The claimant was employed by the respondent from 14 March 2016 until 16 September 2021. The respondent operates a chain of 180 branches offering optical and hearing aid services to customers and employs approximately 1000 people nationwide. It also provides services to NHS and private patients in medical centres and provides services in 40 Marks & Spencer stores under the M&S Opticians brand name. The respondent runs a production facility in Halesowen which trades under the name Mersona and where approximately 60 members of staff worked at the time the claimant was employed. Mersona supports the respondent's and M&S Opticians branches with four parts of its operations – (1) optical production, (2) warehouse and logistics, (3) contact lenses and (4) hearing aids. Its optical manufacturing business is the largest of these operations and includes the Frames Department where the claimant worked, which represents a significant part of Mersona's business.
 - 9.2. The claimant started work in March 2016 as an administration assistant within the Frames Department. The claimant had a good working relationship with GD, whose office was located near the Frames Department, and she enjoyed her work and the challenges it brought. During 2017 the respondent appointed a Frames Manager to lead the Frames Department, Ms D Taylor Moseley ('DTM'). The claimant was instructed to effectively provide training to DTM on how the Frames

Department operated given her experience working there. The two developed a close friendship and worked well together.

Claimant's health issues and discussions with DTM

- 9.3. The claimant began to experience poor mental health during 2017. She was diagnosed with anxiety on 14 November 2017, taking medication (Sertraline) to treat this condition from time with the dosage being gradually increased to 200 mg on 15 November 2018. The claimant discussed her mental health issues with DTM explaining that she “*confided in her frequently*”. We saw messages between the claimant and DTM from March 2020 where the claimant told DTM that she as having a “*rough time*” with her mental health. The claimant told us about an occasion where DTM enabled the claimant to participate in telephone call with NHS Talking Therapies from DTM's car, as the claimant felt uncomfortable doing this from work premises. The medical report completed by the claimant's GP Dr M Ahmad on 23rd May 2022 records (at page 61) that the claimant was referred to Dudley Talking Therapy services but was “*unable to attend sessions due to work and did not want her anxiety/mood to affect her job*”. It further noted that the claimant had.

“mentioned that the work manager was aware and that she had said that, potentially, she could speak with HR to see if she can attend appointments. [Claimant] mentioned that she feels quite paranoid about this, as then everyone will know about her diagnosis.”

The claimant acknowledged that DTM did not share this information with other members of the respondent's management nor did DTM inform HR of what the claimant had told her.

Appointment of MK

- 9.4. In November 2020 MK was appointed to the role of Deputy General Manager at Mersona. He reported to GD who was the General Manager at the time. GD was approaching retirement and MK was recruited to enable GD to start to step back from the General Manager role with the view that MK would take this over in due course as part of the respondent's succession planning. MK told us that upon joining respondent November 2020, the organisation was still dealing with the effects of Covid, lockdown and furlough and he observed that its operations were “*quite antiquated*” and that Mersona's operation needed modernisation and reorganisation.
- 9.5. The General Manager at Mersona (and MK when he joined) reported to Ms J Saimbi ('JS'), the respondent's Professional Services Director, who was based at the respondent's head office in Birmingham but spent at least one day a week at Mersona's site in Halesowen. JS was

responsible for choosing sourcing and purchasing frames and was reliant on the Frames Department at Mersona to help with this task. JS informed MK upon joining that there were a number of problems with the functioning of the Frames Department in particular in relation to stock control. He was told that there were issues with the supply of frames to branches and that DTM was not performing the full extent of her role. JS also told MK that she intended to recruit a professional buyer to become responsible for sourcing, negotiating prices and maintaining stock levels of all frames throughout the business. MK spent several weeks upon commencing his role observing the operations of Mersona including the Frames Department and met individually with DTM, the claimant and another member of staff working in the frames department at the time, Ms K Ash ('KA'). MK observed that DTM was struggling in her role and that the claimant informed him that she felt she was performing aspects of DTM's role already working in a supervisor role in the Frames Department.

Creation of Frames Department Manager role and appointment of claimant to that role

- 9.6. On 17 February 2021, DTM resigned and left her employment on 9 March 2021. MK, GD, and JS decided that a different managerial role was required. MK explained that the current Frames Manager role that had been performed by DTM was too big for one individual to carry out. DTM had been supposedly accountable for the sourcing, negotiation and purchasing of new frame models, although JS was the person actually carrying out these tasks. MK decided that a new Frames Department Manager role would be created which was focused on managing and directing the Frames Department to deliver against their objectives. Whilst sourcing and negotiating and purchasing new frame models would form part of the new role "*where necessary*", this would not form part of the role's key accountabilities. It was intended that the Frames Department Manager role would be weighted towards overseeing the local team to support branches by effectively managing warehousing and distribution of frame stocks. MK drafted a new job description for the Frames Department Manager role (pages 96-97). He used the previous Frames Manager roles job description (page 87) as a basis for this but told us he changed the focus to team management, branch support and stock control and limited involvement in new product sourcing and purchasing activities (which the respondent ultimately intended would be carried out by someone else) describing this as "*where necessary*".
- 9.7. MK decided that the claimant would be a good candidate for this role, and he told us he had championed the claimant for the role with JS, who was reluctant to appoint the claimant (the claimant was later informed of this). The claimant was offered the role and started her new role as

Frames Department Manager on 29 March 2021. The claimant attended a meeting in February 2021 with GD and MK where the role was discussed. MK gave evidence that explained to the claimant that the frames department manager role was not a “*like for like*” replacement for the role that DTM had been performing. He said he discussed with the claimant each separate element/bullet point of the Frames Department Manager job description he had prepared and explained to the claimant that although the Frames Manager job description had been used as a template, he intended the role to be different. He said it was explained that in relation to buying/purchasing function support duties, that attending buying trips/meetings and purchasing new models would not be listed in the role is key accountabilities but had specified in the job description in case it was necessary for the claimant to support absences. MK gave evidence that the claimant was nonchalant during this meeting and said she was fine with the new role as she had been doing DTM’s job for her anyway. MK said he further reiterated to the claimant that the new role was different.

- 9.8. The claimant agreed in cross examination that MK told her that the Frames Department Manager role was different to the Frames Manager role during this meeting. She conceded that it was ‘possible’ that MK took her through the requirements of the role, discussing each bullet point in the job description but contended that he did not fully explain the differences between the new Frames Department Manager role and the old Frames Manager role that DTM had carried out. We find that the discussions in this meeting were broadly as described by MK. The claimant was informed that the role she would be performing was different to that of DTM’s. However, we also find that despite this discussion, the claimant did not fully understand the differences between the two roles after this meeting.
- 9.9. The claimant was sent an amendment to contract letter on 26 April 2021 confirming her job title as Frames Department Manager with a new rate of pay of £23,000 per annum (page 90). The previous Frames Manager role was paid at the rate of £27,000 but the claimant was not aware of this differential at the time. The claimant was issued with a new contract of employment (pages 91-95) which contained a reference to a probationary period of six months, and a copy of the job description.
- 9.10. It was clear that the claimant was anxious about the move to this role and referred to this being a “*step up*” with challenges and that it as a “*steep learning curve*”. The claimant gave evidence that she was “*promised*” additional support consisting of a personal development plan; additional training and an additional member of staff in the form of a supervisor. When asked about this in cross examination the claimant said that MK had told her additional training would be provided although no specifics

were given and that she presumed and was operating under an assumption that he would come up with a training plan to be produced and given to her in time. She said that she expected to be set goals and milestones as she had never been a manager before. We find that no specific promises were made to the claimant as she suggests but that she was given generalised reassurance that she would be supported and trained in the role. Steps were taken to try recruit a supervisor for the Frames Department and the claimant was involved in interviews. However, a suitable candidate was not found. Some recruitment did take place with three additional employees being recruited to the Frames Department to work alongside the claimant and KA.

- 9.11. The claimant started to carry out the Frames Department Manager role but stated that it was “*difficult due to not receiving the correct tools*” and she felt let down by senior management. When asked about this during cross examination the claimant said she felt she’d been put into a role without sufficient support. MK told us that as the claimant started to carry out the new role, he coached and mentored the claimant and was having a minimum of two conversations each day with her and sometimes speaking five or six times a day. This was denied by the claimant, and she stated that the level of contact depending on the work being carried out acknowledging that on some days she may have to speak to him multiple times, but on others she may not need to ask any questions. We find that there was regular contact between the two during the working day with MK giving the claimant guidance where required, although this was not as formal or structured at the claimant had anticipated.
- 9.12. MK explained that neither he nor anyone else in the management team had an expectation that the claimant would move seamlessly from her previous role into this higher level role. He stated that within the first three months the claimant was starting to tackle around 50% of the bullet point items listed on her job description but that he continued to encourage and support her and gave her positive feedback when she questioned her abilities. He told us he was happy that the claimant’s performance in the role was developing.
- 9.13. The claimant alleged that she informed MK shortly after commencing the Frames Department Manager role that she had a general mental health issue, that she could not remember how he responded but no further action was taken. This was denied by MK. We find that the claimant did not mention her mental health issues expressly to MK at this time. There was no note of any such discussion and given that the respondent responded promptly with a letter when the claimant mentioned her mental health in September 2021 (see paragraphs 9.49 and 9.50 below), we found that it was implausible that this would have been raised by the claimant without any recorded follow up at all. We find that the claimant

expressed to MK that she was finding the role difficult but did not at this time attribute any difficulties to her mental health or allege that she was having any health problems.

Feedback meeting and discussions

- 9.14. The claimant wrote to MK and GD on 18 May 2021 asking for a meeting to have some feedback on how she was performing in the new role (page 98). MK told the Tribunal that as he was constantly speaking to the claimant about issues and challenges in her role, he had not planned to have a formal meeting to discuss performance but was happy to meet with the claimant as she had requested this. The meeting took place between the claimant and MK on 20 May 2021 and notes of the meeting held were shown at page 99-100 (and it was noted by the claimant that MK's notes referred to the claimant having been promoted into the Frames Manager, role. MK agreed in cross examination he had recorded this incorrectly). MK gave the claimant positive feedback about her performance noting that she was doing well with her adjustment to the role and had a good rapport with direct reports (noting also that she needed to maintain a dispassionate management style particularly with respect to KA, who was a friend of the claimant). MK also noted some limitations including that:

“tasks often appear to weigh heavy on Rachel's shoulders – even though she is equipped to deal with them, reaching the appropriate solution seems to be a struggle”.

and he also noted that the claimant:

“ suffers from a glass half full approach” with a “tendency to overthink situations, rather than view them rationally or measure the tangible data”.

- 9.15. MK also noted in his record of the meeting that in summary the respondent was pleased with the claimant's development and her progress was encouraging. He further recorded that other matters had been monopolising his time which meant he had “neglected” his direct involvement with the claimant periodically. The claimant agreed that this was a positive review meeting and that she was surprised by this but took this as a sign that she was performing the role well. However, the claimant still felt she was not performing to the best of her ability and rather that she was “muddling through”. The claimant did not during this meeting raise any concerns with MK about a lack of support. The claimant and MK had a good working relationship at this time, and we were shown several e mails between the two that were friendly and jokey in tone suggested a relaxed and open working relationship (pages 101, 106 and 107). However, it was a particularly busy time for the respondent with many competing demands being placed on employees' time.

Safilo buying meeting trip with JS.

9.16. The claimant had attended buying meetings with suppliers when DTM had been Frames Manager and had assisted DTM with these. Upon being appointed as Frames Department Manager, she was asked to attend a buying meeting accompanying JS to London to meet at the head office of one of its suppliers Safilo. The claimant travelled with JS to London and during the journey they had discussions about the business and the ranges that Safilo stocked with the claimant being asked her opinion about various ranges. The claimant felt that she contributed well to the meeting that took place (although she mentioned an incident over the lunch break when she was asked to change her menu choice and decided she would not eat anything and being informed by JS that she was being ridiculous, which made her feel uncomfortable). The claimant alleged that after this trip, MK told her that she would not be attending further meetings as JS had told him that the claimant did not perform well at this meeting. She did not raise any concerns about this at the time but felt uncomfortable liaising with JS after this. MK agreed that he gave the claimant feedback he had received from JS after this meeting that the claimant had not added much to the visit, had failed to take appropriate notes and that JS was slightly disappointed. He denied that he told the claimant she would not be attending any further meetings. On this point, we preferred MK's version of events. This was shortly after the claimant's appointment with the full support of MK, and we find it is unlikely that he would have provided such a negative instruction about the claimant never attending such meetings again. He acknowledged though that the claimant did not attend such meetings after this.

Appointment of HW

9.17. At the end of June 2021, JS informed MK that the respondent had decided to temporarily second an existing area manager within its operations Ms H Wesson ('HW'), to a newly created role at Mersona for a three month trial period. This was intended to see how a new role of dedicated product manager/buyer role might work within the structure. This new role was to report to JS, as the role holder would potentially be taking over the buying aspects of the role JS was at this time carrying out. Since the claimant had been carrying out the Frames Department Manager role, she had spent just 2-3% of the time dealing with the logistics of administration of shipping core products from overseas and was not involved in the range selection and price negotiation of these collections. The claimant had attended only 3 or 4 designer supplier meetings and had not been involved in any other aspect of product selection or supplier costs discussions.

9.18. MK informed the claimant a couple of weeks in advance of HW's secondment and described the claimant as being immediately

apprehensive about the introduction of a new more senior role. MK told us he repeatedly reassured the claimant that she had no need to worry, she was doing a good job in her role and that there would be no change to reporting lines as a result of HW's appointment. MK told us he informed the claimant that there would be some parallel working as HW would need to access frame department systems and product range information to carry out her role. The claimant contended that the role to be carried out by HW was not officially outlined to her regarding how it would affect her position. She stated that HW was being brought in to deal with the buying aspect of matters and that she did not yet have a job title as it was newly created and there was insufficient detail. The claimant said MK told her HW would report to him. MK was insistent that he said the claimant would report to JS. We find that there was some miscommunication about the reporting lines of HW at the start and MK may well have mistakenly informed the claimant that HW was reporting to him on a day to day basis, albeit this was not something said to mislead the claimant. At the start the role and its place within the structure was still unclear and under development. The claimant knew that the HW role was not part of the Frames Department, but she felt threatened and undermined by the recruitment of HW. We accept that the claimant was not given clear information about what the new HW role would look like and its day to day impact on her own role.

- 9.19. HW commenced her new role as Product Manager, reporting to JS on 19 July 2021. The job description for HW's role was shown at page 109 to 110. The claimant did not see this job description at the time. In her first 2 weeks in the role HW spent time learning about the working environment in Mersona. She asked the claimant and other employees in the Frames Department for information to assist her develop her knowledge of the frames purchasing aspect of the role. This involved extracting information from the respondent's bespoke computer system, Annapurna, which she needed the claimant's assistance with. The claimant described being "forced" by MK to assist HW with her role in that she was required to train HW in certain functions that were part of her own job description, and that the claimant was unsure whether she was training HW to take over her own role if HW needed to know about the function for another purpose. MK reported that the claimant was irritated by HW's requests for assistance and raised frequent concerns with MK about this. MK responded by explaining to the claimant that she and all employees were required to help with the requests coming from HW. MK gave evidence that the claimant had told him that she thought HW was a distraction to the Frames department because she was asking for too much information and trying to take up too much of her employees' time. He said the claimant also made comments to MK about not seeing the need HW's role.

9.20. The claimant contended that upon introduction of HW's role that the respondent took steps which she now as the acts that amounts to a fundamental breach of contract. Our findings fact on each of the alleged acts are as follows:

Departmental management and procedures

9.21. The claimant alleged that she was forced to relinquish members of her team (permanently) to HW upon request and that HW directed conflicting requests to team members. The claimant clarified that this initially amounted to ad hoc requests for HW to "borrow" members of the Frames Department team but that it was eventually agreed that one team members, Bethany, would assist HW for one day a week. It was unclear what the claimant was referring to when she alleged that conflicting requests were made to team members. MK contended that this was incorrect, and that the claimant's team remained intact up to the end of her employment. He said he was unaware that Bethany worked one day a week with HW and that this was something he would have been aware of and authorised. He contended that the members of the Frames Department team were asked to assist HW in her role and to provide facts and data to her when requested. We find that the claimant was not forced to relinquish in the sense of permanently give up team members to enable them to work with HW as she alleged and prefer the respondent's version of events of these employees being asked to assist as part of their normal duties. It may well have been that Bethany was working up to one day a week assisting HW on the project that had been assigned to HW, but this was not a formal assignment or relinquishment of position.

9.22. The claimant also alleged that HW tried to make changes to the stockroom (in particular the Designer stockroom), and went straight to MK to discuss this, rather than discussing with her first. The claimant said she was unsure how many times HW made such changes (but at least once), but she did not discuss the matter in advance with the claimant. She further clarified that it had in fact been a proposal made by HW to MK (and not her) about suggested changes to the layout of the stock room that she objected to. MK contends that it was in fact him that tidied up the stock room on one occasion and not HW. He said he had made the claimant aware of this at the time. We find that the claimant was mistaken in her suggestion that HW had made changes to the stockroom but there had simply been a discussion about layout on one occasion and it was MK who may have made some changes to layout when he tidied it.

Stock management and branch support

- 9.23. The claimant alleged that HW attempted to direct on replenishment of stocks and agreed levels despite it clearly being the claimant's responsibility to do this. The claimant further clarified that this related to an occasion when she had been asked show how to run a stock replenishment report which was done on Mondays, Wednesdays, and Fridays. The claimant explained that data was entered into a spreadsheet and that more stock would be ordered if stock got below a minimum number (e.g., of 5 items) and then an order would be made up to an agreed maximum number (e.g., 15 items). On this occasion HW suggested for a different formula to be used for this process. The claimant told us that the next stock replenishment day that HW sat with KA who conducted the stock replenishment with HW's assistance and that changes were made. MK denied that this was the case as at the time, HW as someone new to the role, would not have had the authority, skills, or knowledge to make changes of this nature to stock replenishment. We find that a conversation between the claimant and HW where a suggestion was made did occur, but that HW did not go ahead and implement any changes. The claimant appears to have conflated a brief discussion with a suggestion in it to HW directing the claimant how the task should be carried out.
- 9.24. She further alleged that because of HW's appointment, she was unable to carry out frequent product assessments, particularly with Designer frames as this function was given to HW. The claimant stated that this was supposed to be a regular practice in the Frames Department, but she did not have the resource at that time to do it as regularly as she would have liked to. The claimant further alleged that in August HW was given a project relating to stock replenishment and the removal of certain brands from branches, which is something she felt she should have been doing. The claimant alleged that she raised with MK that because HW was doing this, she was unable to do product assessments as if she did it would conflict with what HW was doing. MK stated that he never gave the claimant an instruction that she should stop doing product assessments and this was still part of her job. We find that that claimant reached the conclusion herself that in her view she would be unable to carry out this function because of HW's appointment, but she was never directed by MK or anyone that she should stop carrying this out. The team was very busy at the time recovering from supply issues left over from the Covid pandemic and lockdown and no stock assessments were being carried out but there was no restriction on the claimant doing so or instruction given that she should not.
- 9.25. The claimant further alleged that she was unable to oversee the management of new product launches to branches as this function was

taken from her and given to HW. The claimant clarified that this complaint related to her finding out from HW that the respondent had ordered a new designer, Moschino, and that she had not been told in advance, but she was unaware of what product launches took place. MK told us that there were no new product launches during July and August and this function was not taken away from the claimant but there were no such activities for her to undertake. He explained that there was a shortage of supply at the time and at the one supply meeting he recalls HW attending at the time where there was a discussion about new brands, it took a further 2-3 months for a possible release date. We accepted the evidence of MK in this regard. Although there was clearly an intention that HW would be more actively involved in the sourcing of new product ranges, at the time, no launches took place, and the claimant was not therefore excluded from involvement in such matters.

Purchasing/Buying function

- 9.26. The claimant alleged that the entirety of the purchasing/buying function in her job description was withdrawn with HW's arrival in that she no longer attended buying trips or supplier meetings, that she was not informed about on new brands until the point of order and that she was not making decisions on poor sellers. She also alleged that she was forced to train HW on how to produce reports used for these supplier meetings, specifically stocks and sales reports. The claimant also referred to the Safilo head office trip she had attended with JS before HW's arrival and that she did not attend another buying trip after this. MK alleged that the purchasing and buying function had never been part of the claimant's accountabilities in the role of Frames Department Manager but was only required to be involved where this was required. We accepted this explanation and find that the purchasing/buying function was never withdrawn as it was not intended to be a function of the claimant's role. This was perhaps the key difference between the old Frames Manager and the new Frames Department Manager role as it had already been decided at the time the claimant was appointed that there was to be someone in a senior purchasing/buying role. The claimant appears to have assumed that as she attended a meeting with JS on one occasion, before HW was appointed, that this was a key part of her role and as she never attended a further meeting in the short time of her remaining employment, it had been removed. We find that the claimant is mistaken in these contentions. In relation to the production of reports and being forced to train HW, we find that the claimant was assisting HW on her use of the respondent's Annapurna system for the purposes of carrying out HW's role rather than training her on its use to take over from the claimant as appears to be suggested.

Marketing support

- 9.27. The claimant contended that on HW's arrival, she was no longer monitoring the matrix (which was an internal system used by the claimant for the ordering of stock) or monitoring branch sales on specific designers. The claimant clarified that she was in fact still working on the matrix but had mentioned to MK that it was not possible to have two people working on the same thing on the matrix and that she was not able to do this when HW was also working on it. The claimant further clarified that this mainly related to designer frames rather than the respondent's core frames. MK contended that updating the respondent's matrix document (which was the way the respondent monitored branch sales) was a key part of the claimant's job and was never taken away as it was a requirement of the local Mersona team to update and reference this. He agreed that HW would need to access the matrix to see branch data and compare sales to form decisions on strategy. We accepted this explanation as plausible and were not able to find that the claimant was prevented from her tasks in monitoring and updating the matrix.
- 9.28. The claimant also stated that she was unable to lead designer launch plans or conduct phasing out of certain brands. She mentioned the launch of Moschino and the phasing out of Lacoste. It became clear that the claimant was referring to not being involved in supplier meetings where such decisions were taken and that she had not been instructed by anyone to take any actions in relation to produce launches or phasing out designers whilst HW was employed. MK told us that these tasks were very much still part of the claimant's job but that there were just no product launches during this period. We find that decision making in respect to new brands and phasing out old brands would be something that was likely to fall within the remit of HW's developing role but that during this period, no such activities were undertaken.
- 9.29. The claimant alleged that she was no longer involved in assisting with product strategy within the company for branches as this was something discussed in supplier meetings, marketing meetings and monitoring of the matrix, of which she contended she was excluded from. The claimant agreed in cross examination that product strategy had always been something that JS had decided on, but because she was no longer attending supplier meetings, she was not involved in implementing decisions made in such meetings. She agreed that no responsibility for product strategy was taken away but that this was something that had been on her job description which she had not carried out. We find that although the claimant had in her previous role assisted DTM with tasks in implementing product strategy and had attended one meeting with JS, this was not and was never intended to be part of her role and thus was not removed from her.

Communication

- 9.30. The claimant alleged that upon starting the Frames Department Manager role she had been informed that branch visits would be something she would take on as part of the job description, but the opportunity never arose for her to do this. She alleged that contrary to this, HW was able to visit branches. When asked whether this was something that could be carried out by both HW and the claimant as part of their respective roles, the claimant said that she did not know but that it seemed to her that multiple items on her job description were being passed over to HW. MK told us that a branch visit could have been something the claimant was able to do, but she had not made the request to do so since being in the role and that as far as he knew, HW had conducted just one branch visit in the time she had been employed to date. We find that the claimant was not informed by anyone that she was unable to conduct branch visits if required but had simply noticed that HW had conducted a branch visit and made a mistaken assumption that she (the claimant) would no longer be able to do this.
- 9.31. The claimant further contended she was excluded from conversations and decisions relating directly to my department as she was no longer able to produce the necessary reports and be part of meetings where the nature of such things would be discussed. The claimant clarified that this related to her not attending supplier meetings as referred to above and contended that this stopped after she had attended the Safilo supplier meeting in February/March that year. We accepted the respondent's contention that the claimant was not excluded from such matters but that such matters were never a part of her role, other than to assist where required.

KA incident

- 9.32. An issue arose on or around 30 July 2021 around the performance of KA, who was a member of the claimant's team. The claimant had identified some mistakes made by KA and asked MK for advice as to how to deal with this as she felt informal discussions with KA had not been received well. MK advised the claimant that she should arrange a formal meeting with KA to raise her concerns, as given the friendship between the claimant and KA, that KA may be taking criticism personally. MK provided the claimant with a template for recording the notes of this meeting. The claimant told us she felt underprepared and unsupported by MK in conducting this meeting as she had never carried out a task of this nature before and did not know how to approach it. She accepted that there was always going to be a first time for conducting such a meeting but felt that she had insufficient guidance. We find that there was a brief discussion between the claimant and MK about this meeting, but MK did not give detailed instructions to the claimant about what she

should say and how to say it. The claimant did not however inform MK before carrying out this meeting that she felt she was unprepared for doing it.

- 9.33. The meeting itself took place on 2 August 2021 and the notes completed by the claimant of this meeting were page 114. KA became upset during the meeting. Following the meeting KA raised with MK that she was unhappy with the way the claimant had conducted the meeting expressing the view that the claimant had been blaming KA for her own mistakes. MK then raised the with the claimant who was very unhappy that KA had approached MK around her. KA and the claimant were called to a meeting with MK on 5 August 2021 to try to “draw a line” under matters so that both could move on. MK told us he felt the meeting had been positive and that they would be able to move forward but subsequently discovered that the claimant had continued the discussions with KA in the car park and had overturned what he felt had been an earlier conciliatory stance. KA subsequently informed MK that she did not want to take the matter further and would accept things as they were. This clearly affected the atmosphere between KA and the claimant. The claimant (perhaps understandably) felt undermined by KA, and she also formed the conclusion that she was not fully supported by MK because of how this matter was handled by him.

Claimant raising concerns about HW role.

- 9.34. The claimant said in late July/early August she started to become concerned about the overlap between hers and HW’s role and that she raised concerns with MK on multiple occasions verbally. She contended that she requested a meeting between MK, HW and herself to discuss what role the new product manager would play in relation to the Frames Department. She alleged that this meeting was denied, and that MK told her that HW’s was a new role and effectively he did not know what the role would entail but that the claimant needs to do whatever to keep head office happy. MK stated that the claimant had been asking many questions about HW’s role asking what she was doing and why she was doing it and in response he told the claimant to focus on her own job and that HW’s job was entirely separate and did not overlap with hers. The claimant accepted in cross examination that MK was saying this to her when she raised concerns in August 2021. MK agreed that the claimant had asked for a meeting to be attended by herself, HW and him to discuss their relevant job descriptions but he decided that this was not appropriate, telling us that HW was in a more senior post to the claimant and that she did not report to him or was part of the Mersona function.
- 9.35. The claimant alleges that during a discussion with MK in the early part of August 2021 that having raised issues of her mental health with MK that he told her that she was “*stressing him out*” and that she was “*paranoid*”.

MK denied that the claimant ever mentioned any mental health issues with him at this time. His account of this conversation was that during a general discussion with the claimant about work matters (in particular about issues arising with what HW was asking of the claimant) he had attempted to reassure her about her skills and contributions and that she had nothing to worry about in terms of her role and performance. MK contended that the claimant had said to him: "*Am I stressing you out?*" and he jokingly said: "yes" and when the claimant went on to say: "*I'm being paranoid aren't I?*" that he replied in amicable and jokey tone: "yes". He contended that the point he was making was that the claimant had nothing to worry about. He categorically denied using these words himself and regarded the interaction as a light-hearted exchange. We find that MK's account of this conversation is more plausible than the claimant's in the context of discussions taking place at the time. The claimant was evasive when asked about MK's recollection in cross examination suggesting first that it would not have been appropriate to joke with MK about this, rather than specifically disagreeing with his version of events which she did only when pushed on this question. We find that the claimant is now presenting the fact that MK agreed with her statements as being the same as him expressly making such comments himself, which we find it is not.

- 9.36. The claimant contended that she became visibly upset and cried in front of MK on multiple occasions when having these discussions about her concerns regarding HW's role. She described this as being met with "*annoyance*" and that MK would sigh and his general body language would show frustration that the claimant was raising concerns about HW's role. She later clarified that she could not remember every occasion when she became upset but specifically recalls two occasions once when she had found out some bad news about a family member's health and once during the probation review meeting itself. MK stated that he remembered the claimant crying in front of him on these two occasions only and the first was before HW joined the team and that she also became upset and angry during the probation review meeting. We find that it was only on these two occasions that the claimant became visibly upset during discussions with MK and cried, albeit that we accept she was upset to the point of tears whilst at work but on occasions where MK was not present.

Letter of 9 August 2021

- 9.37. The claimant gave evidence that she prepared a letter setting out her concerns and issues on 9 August 2021 and a copy of this letter was shown at pages 115 -117. This letter raised issues about the claimant not been given the opportunity to fulfil a large part of her job description and that she did not understand why she was expected to assist another

college colleague in training in those areas. The letter included the following statement:

likewise, as evidenced by our conversations, there are things that are now beginning to negatively affect my mental health and life at home.”

The letter also set out the claimant’s concerns regarding the KA situation stating that she felt that her *“position and mental health has been compromised to ensure another team member’s well-being”*. The letter concluded by asking for some clearly defined changes to her role and that if this was not possible that she wished to transfer to another department in a supervisor/team leader role. She stated that this was not possible she wished to step down as manager and return to the frames department at an operative level.

- 9.38. The claimant alleges that this letter was written, printed out and then left on MK’s desk. The claimant contends that she never received a response to this letter, acknowledging that she did not chase up or follow-up with MK as to whether it had been received. MK denied categorically that he had ever received this letter from the claimant and that the first time he saw it was as part of the tribunal proceedings. MK said that the claimant alluded to a letter she had written during a later meeting on 6 September 2021 stating that she had written a letter but never posted it. We find that the claimant may have written this letter on or around 9 August 2021 but did not send this to the respondent or leave this on MK’s desk as alleged. Given the comments made in the letter about the claimant’s health and her requests at the end regarding changes and/or a transfer, we find it is entirely implausible that such a letter would have been received by MK without providing any form of response.

Meeting 16 August 2021

- 9.39. A meeting did take place between MK and the claimant on 16 August 2021 (MK’s notes of this meeting shown at pages 118-120, although these were not accepted as accurate by the claimant). The claimant had requested this meeting and raised with MK her unhappiness with two matters, namely the way MK had handled the KA incident and the issues around HW’s role. The notes record that the claimant had stated that she did not see the importance of HW’s role and felt that it was wasting her time to have to assist HW. The claimant said she did not say it was a waste of time but told MK that she did not have sufficient time to assist HW due to the ad hoc nature of the requests for assistance which she was unable to plan for. The notes also recorded that the claimant felt that HW was *“taking facets of her job away from her, limiting her level of accountabilities”*. MK recorded that he explained to the claimant that the roles performed by her and HW were very different, and that the claimant

should divert her focus to the requirements of the frames department and allow HW to take on the pressure of arranging branch stocks and evaluating sales data. MK described the conversation as being circular because the claimant's solution was to remove HW's role from the structure. He recorded that the claimant remained "*unconvinced and pessimistic*" about the product manager role and was taking a negative stance will stop it also recorded that the claimant had asked about relinquishing her position and returning to the frames department team. The meeting ended with MK agreeing to evaluate the development of the situation over the next two weeks and discuss with the claimant again. Although the claimant disputes what was recorded, we find that the notes broadly summarised the discussion and the points made by the claimant about her dissatisfaction with the current arrangements as regards hers and HW's role.

9.40. After this meeting MK said he noticed changes in the claimant's behaviour, and she was giving him one-word answers to operational questions and had noticed some "*eye rolling and shaking of her head*" when MK was interacting with other team members. MK did not address this behaviour stating that he put the hostility to one side as he was confident that things would improve as HW settled more into her role. He also explained that these events took place over a very short period between the middle of August and the start of September, and he did not have the opportunity to consider the taking of any action to address these matters. The claimant suggested to MK in cross examination that these changes in behaviour should have alerted MK to the fact that she was suffering from mental health issues, and he stated that he had put this behaviour down to the fact that the claimant was unhappy with HW having joined but he hoped that with time the claimant would start to see the value of HW's role.

9.41. The claimant said that the regular discussions between herself and MK stopped after this meeting and just reverted to discussing solely work matters and wishing her good morning and on occasions he did ignore her. We find that following this meeting the working relationship between MK and the claimant became strained. In addition, in the second part of August MK was also spending more time out of the Halesowen office as he was in the warehouse in Lye dealing with a site move so saw less of the claimant on a day to day basis.

Probationary review meeting 6 September 2021

9.42. The claimant emailed MK on 26 August 2021 asking when her probation period was due to end and when a review meeting for it would take place. MK responded the same day confirming that the claimant's probationary period expired on 22 September 2021 and that a review meeting would be scheduled for the week commencing 6 September

2021 (page 127). That probationary review meeting was held between the claimant and MK on 6 September 2021 (notes taken by MK at pages 133-4, albeit again that the claimant disputes the accuracy of these notes). MK began the meeting by asking the claimant how she felt the role had been going to which the claimant responded that the first six months had been fine, but she had been “*very unhappy*” for the past four weeks or so. The claimant went on to explain that she was unhappy with HW’s appointment as she was a drain on her departmental resource. there was crossover between the tasks she was doing, and her own job and it was unfair to expect the claimant to train HW to do the same job as her. We find that this was a broadly accurate summary of what was discussed and is consistent with the claimant’s account now of what she was concerned about in relation to HW’s role.

- 9.43. MK’s notes record that MK then asked the claimant to focus on her own operational ability rather than the issue of HW’s role which had been discussed reiterating that she was undertaking a very different role and that the claimant and other employees had a responsibility to support HW in the products function. He recorded that he asked the claimant about her management style, and she stated “*well, we all come in, we do our job and we all get on*” and when asked about how she was driving the team forward stated that she was unable to motivate those who did not want to be motivated. The notes record MK commenting that he had witnessed a decline in team morale recently and that team members had expressed concerns to him about the claimant’s management style and her use of sarcasm.
- 9.44. The notes record that the claimant asked whether she could read a letter that had been prepared several weeks ago and then went on read from a written document of a few pages. The claimant confirmed in cross examination that she was reading from the letter referred to at paragraph 9.37 above but did not give MK a copy of the document as she felt she did not need to, as he already had it. She complained about a lack of support in her role, in particular regarding the KA matter and went on to complain about the appointment of HW and the impact on the Frames Department. MK told us that he decided to adjourn as the claimant become angry and upset and it was no longer possible to carry out a review of performance. The claimant became upset and tearful at this point. MK recorded in his notes that the claimant’s comments throughout the meeting were “*incredibly condescending*” and that “*she displayed a passive aggressive approach to the exercise*”.
- 9.45. The claimant’s account of the probationary review meeting was that MK was “*incredibly sarcastic and unprofessional throughout the entirety of the meeting*”. The claimant asked why MK had not spoken to her responded “*you have no idea why I am being like this?*”. The claimant

also stated that MK told her that she had made him ill uncomfortable on a number of occasions and when the claimant asked MK to elaborate stated “*you can’t expect me to remember every conversation*”. The claimant also raised a conversation during this meeting not recorded in the notes where MK had given an example when discussing how the claimant needed to prioritise certain tasks which she was very unhappy with. This related to the exchange of correspondence we saw at pages 129-130 where MK had e mailed the claimant to ask her to send him a particular document (the New Order Core Summary) and the claimant had asked when he needed it by. He then replied to ask for a viable time frame for it to be completed and how much was outstanding and when the claimant responded that she could get it to MK by the next day he agreed it was fine. The claimant said that MK brought this up as an example of her failing to meet deadlines when the deadline was agreed in advance. MK told us that he raised this as a recent example, not to complain about the time to respond, but to illustrate that this document was one that needed to be kept up to date constantly so that it could be sent immediately upon request.

- 9.46. We find that this was an extremely difficult meeting and although the notes record broadly what was discussed, they do omit certain aspects of the discussion. We accept that the claimant became angry and upset but also find that MK became frustrated during this meeting with the claimant’s approach and consequently did use the phrases contended by the claimant. The meeting ended badly with both attendees becoming animated and the claimant becoming tearful, so MK decided to adjourn with the claimant being informed that it would be reconvened on 9 September 2021.
- 9.47. The claimant had stage already started looking for alternative employment (since late August 2021) and the claimant accepted a new role on 6 September 2021 by sending a text at 16:31 that day to the operations manager at this new company (page 175).
- 9.48. MK told us was unable to meet with the claimant on 9 September 2021 because he was involved in moving goods to the respondent’s new warehouse units. The claimant said that she received no communication with MK until MK phoned her in the morning to say he was out for that day and that depending on how they had got on, he would reconvene the following day. MK explained that the lease for the previous facility expired that Friday, and he was involved in transporting stocks to the new facility and this task was much larger than originally anticipated and kept him there longer than he hoped. The claimant said that during this conversation she stated that she “*advised him that a delay in carrying out this meeting would be detrimental to my mental health*”. When asked about this conversation in cross examination, the claimant said that she

told MK that ideally, she wanted to get this meeting done before she was due to go on annual leave (starting the following week). MK denies that the claimant referred to an impact on mental health during this telephone conversations but that the claimant simply stated that she would like to get it out of the way before her holiday. We find that the claimant did express a desire to have the meeting but did not expressly state that any delay would cause issues with her mental health. She may have been implying that this was the case by expressing a wish to have the meeting “out of the way” but did not state this expressly.

- 9.49. On 10 September 2021, MK emailed the claimant at 8:16 AM to inform her that was not possible for the meeting to take place that day due to a “business critical matter” (page 135) and suggested that the meeting be rescheduled for the claimant’s return from annual leave. The claimant replied later that morning and her email was shown on page 136. The claimant’s mail included the following statements:

“I just wish to reiterate, as I mentioned to you over our phone conversation yesterday, this will affect my mental health severely (as it already has), over my weeks annual leave. Clearly, the mental impact this whole situation will have on me is not a concern for you as I have raised the issue with you numerous times and there has been no reasonable adjustment on your part”.

Having sent this email the claimant became unwell at work and approached GD in MK’s absence to ask whether she could go home which was agreed.

- 9.50. Having received the claimant’s response raising concerns about her mental health MK called GD to express his surprise at the contents of this email. MK and GD then contacted JS to inform about the claimant’s email and then consulted with Miss Whelan, the then HR director for advice (and said this was the first time he had sought HR advice about the claimant). With Miss Whelan’s assistance MK prepared a letter to the claimant which was shown at page 137 which was sent to the claimant by e mail and post on Friday 10 September 2021. This letter apologised for being unable to continue with the probationary review meeting when on to state:

“You have also mentioned to us today that you have some mental health concerns. We were unaware of mental health issues which were affecting or concerning you until you mentioned it to us in the last few hours. Naturally, this is an issue that we will happily discuss with you on your return to work so that we can understand what the issue is, the medical support you are receiving and the steps which we need to take to support you.”

- 9.51. The claimant started a pre arranged period of annual leave on 13 September 2021 and received the respondent's letter at home in the post on 14 September 2021. She attended the office that same day and met with GD informing him that she would not be able to return to work unless various changes were made. She asked GD to move departments so as not to work with MK; alternatively, that she return to the Frames Department as an operative only with no management or other training responsibilities as regards to other staff. The claimant said GD told her the changes were not possible and she informed GD that she had her resignation letter with her that day and he then advised her to go home, and he would call her the next day. She then contends that GD telephoned her on 15 September 2021 and informed her that no alterations could be made and that she could e mail her resignation letter to him to "get it over with". GD agrees that he had a meeting with the claimant (albeit he was of the view it took place on 15 September 2021) GD said that the claimant told him that she wanted to discuss matters that day as she had a job offer that was due to expire. He agreed that the claimant offered to step down from her managerial position to take up an operational role stating that she could not be involved in training other people and wanted to have minimal involvement with others. He said that she told him the alternative was to hand in her resignation and that she had her letter with her. GD said he told the claimant not to act hastily and informed her that it was not possible for a role to be carried out in isolation but that the respondent did not want to lose her, and she should take 24 hours to think about her decision. He did not recall a telephone conversation the following day with the claimant and contended the claimant simply attended on the following day and handed him her resignation letter.
- 9.52. We find that the claimant attended as she alleged on 14 September 2021 and the discussion with GD took place broadly as the claimant alleged although we accept that the claimant did inform GD that she was not prepared to train others if she stepped down from her managerial role and wanted minimum interaction. We find that GD told her to think about her decision overnight (as this explains why the claimant did not hand her resignation letter that first day). The claimant attended the following day 15 September 2021 and handed her resignation letter directly to GD. That resignation letter was at page 142 and simply stated that the claimant was resigning with immediate effect.
- 9.53. On handing in her letter of resignation, the claimant asked GD if MK was available to speak to her. GD then went to MK's office and informed him that the claimant had resigned and wanted to speak with him. MK told GD he did not see any point in him meeting with the claimant if she had already made up her mind. After having said her goodbyes to colleagues, the claimant went into MK's office and challenged him on not wishing to

speak to her and asked him to admit he had not supported her. MK told the claimant he did not agree with her and then said the claimant rolled her eyes, said “*Have a nice life*” and left the office. The claimant denied this, but we find it is likely that the conversation took place as alleged.

9.54. The claimant was paid 4 weeks in lieu of notice and started new employment on 21 September 2021. She subsequently wrote a letter of complaint to the respondent’s directors (pages 146-149) alleging that she had resigned under duress citing the treatment of MK as the reason and that MK had been disrespectful and had behaved inappropriately. This letter detailed concerns and issues including the way that the introduction of HW had been handled and that she had been set up to fail by MK. She alleged that she was unable to raise a grievance about MK with JS (her two up line manager) as MK had informed her several times that JS had not wanted her to be appointed in the first place. The claimant appeared to acknowledge in this letter that she had not been open about her mental health but alleged that “*it was extremely clear that I was struggling - both visually and because I had communicated that to MK on several occasions*”. She further went on to outline the conversation she alleged had occurred with MK at her probationary review meeting held on 9 September as outlined at paragraph 9.3. This was responded to by Ms Whelan on 15 October 2021 (page 150-151).

The Law

10. Section 94 of the ERA sets out the right not to be unfairly dismissed.
11. Section 95 (1) (c) ERA says that an employee is taken to have been dismissed by his employer if the employee terminates his contract of employment (with or without notice) in the circumstances in which he is entitled to terminate if not notice by reason of the employer’s conduct i.e., constructive dismissal.
12. If dismissal is established, then the Tribunal must also consider the fairness of the dismissal under Section 98 ERA. This requires the employer to show the reason for the dismissal (i.e.: the reason why the employer breached the contract of employment) and that it is a potentially fair reason under sections 98 (1) and (2) and where the employer has established a potentially fair reason then the Tribunal will consider the fairness of the dismissal under section 98 (4), that is:
 - 12.1. did the employer act reasonably or unreasonably in treating it as a sufficient reason for dismissal; and
 - 12.2. was it fair bearing in mind equity and the merits of the case.

13. It was established in the case of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 that the employer's conduct which can give rise to a constructive dismissal must involve a "*significant breach of contract going to the root of the contract of employment*", sometimes referred to as a repudiatory breach. Therefore, to claim constructive dismissal, the employee must show: -
- 13.1. that there was a fundamental breach by the employer;
 - 13.2. that the employer's breach caused the employee to resign;
 - 13.3. that the employee did not delay too long before resigning, thus affirming the contract of employment.
14. Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, [1997] ICR 606. The implied term of trust and confidence was summarised as follows:
- "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*
15. If the act of the employer that caused resignation was not by itself a fundamental breach of contract, the employee may on a course of conduct considered as a whole in establishing constructive dismissal. The 'last straw' must contribute, however slightly, to the breach of trust and confidence (Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75).
16. It was confirmed by the Court of Appeal in the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833 in an ordinary case of constructive dismissal tribunals should ask themselves:
- 16.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - 16.2. Has he or she affirmed the contract since that act?
 - 16.3. If not, was that act (or omission) by itself a repudiatory breach of contract?
 - 16.4. If not, was it nevertheless a part...of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?
 - 16.5. Did the employee resign in response (or partly in response) to that breach?

17. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics

The following characteristics are protected characteristics: ... disability”

6 Disability

(1) A person (P) has a disability if -

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

15 Discrimination arising from disability.

“(1) a person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability”.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

21 Failure to comply with duty.

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 212(1) EQA defines substantial as being “*more than minor or trivial*”.

136 Burden of proof

- (1) *This section applies to any proceedings relating to a contravention of this Act.*
- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

Paragraph 20 (1) (b) of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

18. In relation to a claim for failure to make reasonable adjustments under sections 20 and 21 EQA, the importance of a Tribunal going through each of the parts of that provision was emphasised by the EAT in *Environment Agency –v- Rowan [2008] IRLR 20.*
19. The Equality and Human Rights Commission Code of Practice on Employment (“the Code”) paragraph 6.10 says the phrase “provision, criterion or practice” (“PCP”) is not defined by EQA but
- “should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions”.*
20. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is considered in the Code. A list of factors which might be considered appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case.
21. The duty to make reasonable adjustments arises when a disabled person is placed at a substantial disadvantage by the application of a PCP etc. *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA*, -the duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.
22. *Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA* - The nature of the comparison exercise under s.20 was to ask whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they were treated equally and might both be subject to the same disadvantage when absent for the same period did not eliminate the disadvantage if the had a more

substantial effect on disabled employees than on their non-disabled colleagues. In addition, in relation to whether an adjustment is effective the Court of Appeal said 'So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'

23. Tribunals must consider the essential question whether a particular adjustment would or could have removed the disadvantage experienced by the claimant Romec Ltd v Rudham EAT 0069/07.
24. Ishola v Transport for London [2020] EWCA Civ 112, [2020] IRLR 368, [2020] ICR 1204 confirmed that whilst a one-off decision or act could amount to a practice, it will not necessarily be one and the term generally connotes 'some form of continuum in the sense that it is the way in which things generally are or will be done'.
25. Hendricks v Metropolitan Police Commissioner [2003] IRLR 96, [2003] ICR 530. This makes it clear that the correct focus must be not on whether there is something which can be characterised as a policy, rule, scheme, regime, or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.
26. Kingston Upon Hull City Council v Matuszowicz [2009] EWCA Civ 22, [2009] IRLR 288, [2009] ICR 1170 - a failure to make a reasonable adjustment can be a 'continuing omission', and that the provisions of the legislation stating that the expiry of the period in which P might reasonably have been expected to do something was the relevant date for time purposes applies equally to deliberate and inadvertent omissions to making reasonable adjustments.
27. The duty to make an adjustment which is reasonable may amount to a continuing duty - 'if there is such a duty it requires to be fulfilled on each day that it remains a duty' (at para 25 of Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil UKEAT/0097/13 (26 November 2013, unreported)).
28. In relation to section 15 EQA, the case of Pnaiser v NHS England and Coventry City Council EAT /0137/15 confirmed as follows:
 - (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) *The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*

(c) *Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A’s motive in acting as he or she did is simply irrelevant*

(d) *The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is “something arising in consequence of B’s disability”. That expression ‘arising in consequence of’ could describe a range of causal links ...[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

(e) *..... However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

(f) *This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

(g) *.....*

(h) *Moreover, the statutory language of section 15(2) makes clear that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the ‘something’ leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so.”*

29. *City of York Council v Grosset [2018] WLR(D) 296* also confirmed that section 15 (1) (a):

“requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) “something”? and (ii) did that “something” arise in consequence of B’s disability”. This case also established that there is no requirement in section 15(1)(a) that the

alleged discriminator be aware that the “something” arises in consequence of the disability. That is an objective test.

Conclusion

Constructive unfair dismissal

30. As there was no express dismissal in this claim, we had to consider whether the claimant has established that she was dismissed by virtue of section 95 (1) (c) ERA in that she resigned in circumstances in which she was entitled to treat herself as dismissed.
31. We considered each of the matters relied upon as being a fundamental breach of contract (issues 2.1.1.2 to 2.1.1 above), looking at whether such events happened as alleged (issue 2.1.1 above) and then whether they amounted to a breach of the implied term of trust and confidence (issue 2.1.2), deciding for each matter whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and whether it had reasonable and proper cause for doing so. We considered the question of whether there was a breach of the implied term of trust and confidence on each allegation individually and on all cumulatively (issue 2.1.2). If breach was established, we had to then go on decide whether the claimant affirmed or waived any such breaches (issue 2.1.4) and whether the claimant resigned in response to any breach that is found (issue 2.1.3).
32. Dealing with each matter relied upon in turn we conclude the following:

Departmental management and procedures

Paragraph 2.1.1 - did the respondent force the claimant to relinquish members of her team to HW upon request and did HW direct conflicting requests to team members?

33. As per our findings of fact at paragraph 9.21 above, the claimant was not forced to relinquish team members to HW rather members of the Frames Department were asked to assist HW with her requests for information. This allegation is not made out on the facts, and it is hard to see how requests for members of the claimant’s team to carry out ad hoc tasks to assist another employee could amount to conduct calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent as this was a standard business request and would be a usual part of an employees’ duties. The respondent suggests that the claimant has exaggerated what took place here and this may well be the case as we were unable to find that what took place

was capable of amounting to a breach of the implied term of trust and confidence.

Paragraph 2.1.1.2 - did HW appear to try and make changes to the stockroom (in particular the Designer stockroom), and went straight to MK to do so?

34. Our findings of fact at paragraph 9.22 above were that HW did not make changes to the stockroom, but a conversation had taken place where HW suggested some changes to the claimant. This in no way amounts to conduct calculated or likely to destroy trust and confidence. Responsibility for the stock room remained with the claimant throughout her employment and was not transferred to HW.

Stock management and branch support

Paragraph 2.1.1.3 did HW attempt to direct on replenishment of stocks and agreed levels despite it clearly being the claimant's responsibility to do so?

35. As we found at paragraph 9.23 a conversation between the claimant and HW took place where a suggestion was made by HW about stock replenishment, but she did not in fact implement any changes and did not have the experience or capabilities to do so at the time. This remained the claimant's responsibility throughout. This is not conduct capable of destroying or seriously damaging trust and confidence.

Paragraph 2.1.1.4 – was the claimant unable to carry out frequent product assessments, particularly with Designers frames as this function was given to HW?

36. We refer to our findings at paragraph 9.24. This allegation was not made out on the facts as it was the claimant that reached the conclusion that she was no longer able to carry out product assessments and no such instruction was given to her. This was a part of her role that remained.

Paragraph 2.1.1.5 - was the claimant unable to oversee the management of new product launches to branches as this function was taken from her responsibilities and given to HW?

37. We found at paragraph 9.25 above, that although there was an intention that HW would be more actively involved in the sourcing of new product ranges, at the time we were looking at, no launches product launches took place, and the claimant was not therefore excluded from involvement in such matters. This allegation was not made out on the facts.

Purchasing/Buying function

Paragraph 2.1.1.6 – was the entirety of this section of the job description withdrawn in that the claimant no longer attended buying trips, supplier meetings, had any updates on new brands until the point of order or made decisions on poor sellers?

38. Our findings at paragraph 9.26 above were that responsibility for purchasing/buying was not a key part of the claimant's role and the claimant had not carried out such functions since starting the role, save for attending one supplier meeting off site. The claimant clearly anticipated that this would be a part of her role (perhaps because the previous Frames Manager had been involved in this), but it was made clear to her from the outset that she would not be carrying out these tasks, save when specifically requested to do so (paragraph 9.18). There was no act of withdrawing any such function and so this allegation is not made out on the facts. The fact that the claimant attended one meeting with JS but never had the opportunity to attend another meeting in her time working at the respondent is not conduct that was likely to destroy or seriously damage trust and confidence.

Paragraph 2.1.1.7 - was the claimant forced to train HW on how to produce reports used for these meetings — specifically stocks and sales reports?

39. Again, as found at paragraph 9.26 above, the claimant was being asked to assist HW on how to use the respondent's systems, not training her. This allegation is not made out on the facts and is again hard to see how a request from management to assist a colleague to access systems could amount to conduct likely to destroy or seriously damage trust and confidence.

Marketing support

Paragraph 2.1.1.8 – was the claimant no longer monitoring the matrix or monitoring branch sales on specific designers?

40. We found as set out at paragraph 9.27 above that the claimant was never prevented from carrying out these tasks. Whilst HW was being involved particularly in designer frames and had to access the matrix to carry out these tasks, nothing prevented the claimant from carrying out her tasks in this regard. It is correct that the claimant raised this as a concern and felt that she was unable to do these tasks if HW was doing them. However, taken at its highest, this is not conduct that is capable of amounting to a breach of trust and confidence. The claimant's duties in this regard had not changed and she was reassured by MK that she should continue with her tasks.

Paragraph 2.1.1.9 – was the claimant no longer able to lead designer launch plans or conduct phasing out of certain brands.

41. We found at paragraph 9.28 above that the claimant was still expected to carry out tasks in relation to launching new designers or phasing out brands but that during the short period she was carrying out this role after HW's appointment, no such activities took place. This allegation is therefore not made out.

Paragraph 2.1.1.10 – was the claimant no longer involved in assisting with product strategy within the company for branches as this was something discussed in supplier meetings, marketing meetings and monitoring of the matrix, of which she was excluded.

42. As per our findings of fact at paragraph 9.29, this was never something the claimant was involved in or expected to carry out as part of her role. Therefore, this was not removed from her, nor was she excluded from these tasks.

Communication

Paragraph 2.1.1.11- was the claimant informed that branch visits would be something she would take on as part of the job description, however the opportunity never arose for her, but this was something HW was able to do?

43. We found at paragraph 9.30 that the claimant was something the claimant could expect to be involved in as Frames Department Manager, but during the period she worked there, she never requested to make such a visit. The fact that HW did make such a visit did not appear to have any relationship with whether the claimant could visit branches. There was no removal of these activities or tasks and this allegation is not made out.

Paragraph 2.1.1.12 – was the claimant excluded from conversations and decisions relating directly to the Frames department as she was no longer able to produce necessary reports and be part of meetings where the nature of such things would be discussed?

44. As we found at paragraph 9.31, the claimant was not excluded from such meetings, as this was never intended to be part of her role. This was not a breach of trust and confidence.
45. Although, we determined that there was no repudiatory breach of contract in each of the individual acts alleged either because the facts behind the allegation are not made out or that conduct is incapable of being conduct calculated or designed to destroy/damage trust and confidence, we have considered whether there was a course of conduct

that, viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence. The claimant's central allegation is that parts of her role were systematically removed as a way of trying to give her role to HW and presumably to then remove her from the business. Looking at our findings of fact and conclusions set out above, we also conclude that the acts relied upon, even viewed as a course of conduct, would not cumulatively amount to conduct calculated and likely to destroy or seriously damage the relationship of trust and confidence. The claimant strongly believed that her role of Frames Department Manager was in jeopardy because of the appointment of HW (see paragraphs 9.18, 9.19 and 9.34 above) and despite being reassured by MK that she was valued, and her role was important, it seems she was unable to rid herself of these suspicions. It was a difficult and challenging role and the claimant's expectations as to what it would entail and the support, she would receive were different than the respondents. The relationship with MK deteriorated because of HW's appointment and the KA incident and how it was handled (see paragraph 9.33). The claimant was a capable and experienced employee at Mersona and perhaps felt that having in her view done the large part of the job that DTM previously performed, she would and should progress to a more senior management role. She was upset at what she saw as HW usurping some of the tasks she felt she should be carrying out. The claimant appeared to lack confidence in her own abilities and did not take well to any suggestions or comments on her performance. It is highly unfortunate that matters escalated so quickly to the point that the respondent has lost the services of an experienced employee, but we cannot conclude that the respondent did anything which was calculated or likely to destroy or damage trust and confidence such that the claimant was entitled to resign and treat herself as dismissed.

46. The claimant therefore did not resign, in response to a repudiatory breach of contract. No issue of affirmation needs to be considered as there was no breach. The claimant was not constructively dismissed by the respondent, it cannot be an unfair dismissal and the claim is dismissed.

Disability discrimination complaints

47. At all material times, the claimant was a disabled person under s6 EQA because of Anxiety.

Direct disability discrimination

48. For us to reach the conclusion that the claimant has been subjected to direct disability discrimination, we had to determine whether the respondent subjected her the treatment complained of and then, if necessary, go on to decide whether any of this was "less favourable

treatment”, (i.e., did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances). We then had to decide whether any such less favourable treatment was because of the claimant’s disability or disability more generally. We applied the two-stage burden of proof referred to above. We first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of disability. The next stage would be to consider whether the respondent had proved that the treatment was in no sense whatsoever because disability.

49. There was only one allegation of direct disability discrimination, and this was that shown at paragraph 4.2.1, namely that In a conversation which took place in mid to late August 2021 shortly after HW had commenced in her role, MK made comments to the claimant that she was “*stressing him out*” and that she was “*paranoid*”. We refer to our findings of fact at paragraph 9.35 above. This allegation was not made out on the facts as we preferred MK’s version of how this conversation took place. In any event, at this time, we were satisfied that MK was entirely unaware of the claimant’s disability. Our findings of fact at paragraphs 9.13, 9.35, 9.37 and 9.38 were that the claimant never mentioned her mental health condition to MK despite her alleging that she had done so. Although the claimant had mentioned the matter to her previous manager, DTM, the claimant was aware that this had not been passed on to anyone else in management (paragraph 9.3 above). We concluded that unlike the claimant suggests, it was not reasonable for him to conclude that her changes in behaviour should have alerted him to the fact that she was suffering from mental health issues. MK’s actions in agreeing with the claimant’s questions were not because of her disability as he was entirely unaware, she was disabled. The claimant has not proved primary facts from which the Tribunal could conclude that any treatment was because of disability, we do not find that this shifts the burden of proof to explain the reason for it. This sole allegation of direct disability discrimination is accordingly dismissed.

Discrimination arising from disability.

50. We then went on to consider the s15 EQA claim of discrimination arising from disability. We started by identifying what was the something arising from disability that the claimant relied upon as being the reason for unfavourable treatment. The claimant contended that the matters at paragraph 5.2.1 and 5.2.2 of the List of Issues arose from her disability, namely that:
- 50.1. her Anxiety caused her to overthink and overanalyse matters that were not explained to her.

- 50.2. her Anxiety meant she found it more difficult to cope with excessive workloads/unreasonable deadlines/the demands of her role.
51. However as submitted by the respondent, the claimant did not adduce any evidence to show that the matters she asserted arose from her disability in fact did so. The Disability Judgment referred to the claimant's medical history and that without her medication she would suffer severe symptoms. However, there was no reference to whether the claimant's disability had the effects at work that the claimant relies upon. At the claimant's first performance review meeting on 18 May 2021, MK himself notes that the claimant had a "*tendency to overthink situations*" (see paragraph 9.14). However, there is still no evidence that this was linked to disability. Therefore, we are unable to conclude in the absence of any evidence that these issues were matters arising from the claimant's disability.
52. Therefore, having concluded that the claimant has not shown that the matters relied upon were matters arising from the claimant's disability, we do not strictly need to go on to consider the next stage i.e., to consider whether the unfavourable treatment was caused by these matters. However, we have gone on to consider in general terms the allegations made. The claimant made three allegations of unfavourable treatment set out at paragraphs 5.1.1-5.1.3 of the List of Issues. She firstly alleged that MK criticised her performance and appeared to rely on the comments regarding deadlines made by MK at the probationary review meeting held on 6 September 2021 (see paragraph 9.45 above). We conclude that MK did make some constructive criticism of the claimant in this meeting. However, the criticism here was not in fact related to the matters the claimant says are matters arising from disability at all. This was a comment about the claimant needing to ensure that documentation was kept up to date so that it could be accessed when requested. This claim would also have failed on this basis in any event.
53. The claimant further complains that MK failed to acknowledge her concerns about her mental health. We refer to our findings as set out in our conclusions at paragraph 49 above that the claimant did not mention any matters of mental health to MK until he received her e mail of 10 September 2021 (see paragraph 9.48). When this was mentioned, MK responded promptly by writing to the claimant offering support (paragraph 9.50). Therefore, this allegation of unfavourable treatment would have failed on the facts in any event.
54. The final act of unfavourable treatment relates to an allegation of failing to offer the claimant support to perform the role of Frames Department Manager. We refer to our findings of fact at paragraphs 9.10 to 9.12. There was support offered from MK although this was informal in nature and there was a mismatch of expectations with the claimant expecting a

much more structured and organized training and development plan. Nonetheless we do not conclude that there was a failure to provide support.

55. The remaining issue at paragraphs 5.6 (and 6.1) of the List of Issues is therefore whether the respondent knew of the claimant's disability is less relevant given our conclusions above that the matters relied upon have not been shown to be matters arising. We refer to our conclusions at paragraph 49 above as to MK's knowledge of the claimant's mental health condition and we also conclude that at the time of the alleged discrimination none of the current management of the respondent had the necessary knowledge, actual or constructive. DTM was aware of the claimant having mental health issues at an earlier stage, but she did not communicate this information to anyone else at the respondent. In addition, whilst DTM was aware of a mental health condition, we were unable to find that even she had the required knowledge of all the aspects of the definition of disability as set out in section 6 EQA. For these reasons, we were not satisfied that what DTM was aware of imparted the sufficient actual or constructive knowledge of disability to the respondent as an organisation should this have been a determinative factor.
56. Accordingly, all the claimant's complaints made under section 15 EQA are not well founded and are dismissed.

Reasonable Adjustments Claim

57. When looking at the claimant's complaint under sections 20 and 21 EQA, we firstly refer to our conclusions at paragraph 55 that there was insufficient knowledge of disability, either actual or constructive at the time of the alleged discrimination. This in effect brings an end to the complaint but we nevertheless went on to consider the other aspects.
58. We were required to look at whether any of the PCPs identified and relied on by the claimant were applied to her and, if so, when this took place. We then had to consider whether any such PCP applied put her at a substantial disadvantage compared to non-disabled people (and what that disadvantage was), considering the appropriate comparator. We then would be required to look at the whether the respondent knew that the claimant was placed at this disadvantage at the relevant time. We finally had to consider what adjustments would have been reasonable to make to avoid any relevant disadvantage.
59. The first PCP alleged at paragraph 6.2.1 of the List of Issues is the respondent's decision to introduce the new role of Product Manager within its structure. This is a decision taken by the respondent, but we were unable to conclude that this met the requirements of being a

provision, criteria or practice considering the guidance in the caselaw above in particular the guidance set out in the authorities of *Ishola* and *Hendricks* (above). This was a one off decision, rather than a practice affecting a group of people. On this basis alone this part of the complaint fails but we also doubt whether the appointment of HW of itself put the claimant at a substantial disadvantage compared to non-disabled people. The claimant was aggrieved and felt under threat by the new role being created but there was insufficient evidence to suggest that this was in any way comparatively worse for her than for a person without her disability in the same or similar circumstances. This allegation of failure to make reasonable adjustments fails.

60. The claimant next relies on the PCP of the “process for implementing changes in management structure for existing employees” as set out at paragraph 6.2.2 of the List of Issues. The claimant did not explain what it was about the process for implementing changes that particularly caused a concern. However, we have gone on to consider whether the way in which the respondent introduced the new role more generally had a disproportionately negative impact on the claimant compared to people without the claimant’s disability. The claimant contended that due to her Anxiety she found it more difficult to understand the scope or the new role and the subsequent changes, leading her to overthink and overanalyse. We were not satisfied that the claimant had adequately shown that this was the case. We did find that the claimant did not fully understand the scope of the new Product Manager role following the meeting held with her and MK/GD (see paragraph 9.8), but it was not clear whether this was in way related to her disability as opposed to general lack of clarity about what the role would look like. The respondent contended that the respondent continually repeated the reassurance that HW’s position was not a threat to hers, but the claimant chose not to accept or believe that this was the case, and we accepted this submission. This allegation also is not well founded.
61. The final PCP that the claimant relies upon is an alleged practice of the respondent of postponing, delaying and rescheduling meetings at short notice. This relates to the events towards the end of the claimant’s employment when MK postponed the probationary review meeting (paragraph 9.46) and then rescheduled the planned continuation meeting on 10 September 2021 (paragraph 9.49). Whilst these events did occur, for the same reasons as set out in paragraph 61 above, we were not satisfied that these events amounted to a provision, criteria or practice operated by the respondent. This was a decision affecting just the claimant on this occasion and on previous occasions when meetings were held with the claimant, there was no suggestion that these were similarly delayed, rescheduled, or postponed (see paragraphs 9.14 and 9.39). Both such meetings were requested by the claimant and were

agreed to by MK and appear to have been held promptly. Therefore, this complaint fails on this basis and is not made out.

62. The claimant has therefore not made out her complaints under sections 20 and 21 EQA and such complaints are all dismissed.

Employment Judge Flood

Date: 4 July 2023