EMPLOYMENT TRIBUNALS

Heard at: London South **On:** 4-8, 11-13 September 2023

Claimant: Miss R Watson

Respondent: (1) Ms S Parrott
(2) Achieving for Children Community Interest Company

Before: Employment Judge Ramsden

Members Mrs Dengate

Mr Dixon

Representation:

Claimant In person

Respondent Ms E Skinner, Counsel

JUDGMENT

1. The Second Respondent's name is amended to Achieving for Children Community Interest Company.

2. Each of the Claimant's claims fail.

3. An Order is made the that any documents entered on the Register or otherwise forming part of the public record of this hearing are to anonymise the names of each of the Claimant's son and mother.

REASONS

4. These written reasons are provided at the request of the Claimant following oral reasons given on 13 September 2023.

Background

5. The Claimant began working for the Second Respondent - a Community Interest Company registered with company number 08878185 – on 4 September 2019. She took up the post of Post 16 Outreach Learning Mentor.
6. The Second Respondent provides services to support children and young people in the remit of the three local authorities which own it, those being the Royal London Borough of Kingston upon Thames, the London Borough of Richmond and the Royal Borough of Windsor and Maidenhead. Part of the Second Respondent's provision is through a "virtual school", and it was in that department that the Claimant worked.
7. The Claimant's post involved supporting care leavers who are aged 16 to 18, entailing lone working as well as visiting students out of the Borough in which the Second Respondent's organisation was based.
8. The First Respondent was the Claimant's indirect line manager, the Headteacher of the Second Respondent's Virtual School. The Claimant was directly managed by Paul Chapman, the Deputy Headteacher of the Virtual School. Mr Chapman in turn was line managed by the First Respondent, who was in turn managed by Linda Ferguson, the Second Respondent's then-Director of Children's Social Care and Early Help.
9. At all times and for all relevant purposes, the Second Respondent accepts that the First Respondent acted in her capacity as its employee and on its behalf.
10. Both Respondents accept that the Claimant was, at all material times, disabled for the purposes of the Equality Act 2010 (the **2010 Act**) by reason of her:

    a. anxiety and depression; and

    b. dyslexia,

    but they each contend that:

    c. in the case of her anxiety and depression, they were unaware that the Claimant was disabled by this reason throughout her employment because they did not know her anxiety and depression were "long-term"; and

    d. while they were informed by the Claimant shortly after a meeting on 23 October 2019 that she had dyslexia, they were not aware until after the

Claimant's employment had terminated that it had a "substantial" adverse effect.

11. The claims the Claimant now brings relate to her treatment during her employment with the Second Respondent, by it and by the First Respondent, which she alleges amounts to disability discrimination.

12. It is worth noting that one of the events with which this claim is concerned is the making of safeguarding referrals by the First Respondent on behalf of the Second Respondent in respect of the Claimant's son. The relevance of those referrals to the Claimant's claims is described below, but it is important to note that **the truth or accuracy of the information contained in those safeguarding referrals has not been adjudicated upon by the Tribunal**.

13. The Claimant resigned with immediate effect from her employment with the Second Respondent on 6 November 2020, citing a fundamental breach of trust and confidence.

The claims

14. The Claimant claims (with some clarifications made at the outset of this hearing) that both Respondents:

    a. treated the Claimant less favourably than it and she, respectively, treats or would treat others because of the Claimant's protected characteristic of disability, by:

        i. extending the Claimant's probation period three times, on each of 11 February 2020, 22 May 2020, and 25 June 2020 – the Claimant points to her anxiety and depression and her dyslexia as the reason for this treatment;

        ii. excluding the Claimant from meetings relating to her employment and health occurring on and/or set out in emails on 16 November 2019, and 8 January, 9, 25 and 29 June, 2 July, and 8 and 10 November, each of 2020 – the disability that the Claimant says was the reason for this treatment was her anxiety and depression;

        iii. consciously giving the Claimant more work than she could handle on each of 6, 11, 18 and 25 February 2020 – which she says was by reason of her anxiety and depression and her dyslexia;

        iv. making, on 26 March 2020, an allegation to social services about the Claimant's parenting - the disability that the Claimant says was the reason for this treatment was her anxiety and depression;

        v. failing to deal with the Claimant's grievance (made on 5 June 2020), including a lack of investigation, lack of progression and delay to the outcome - the Claimant says was treated in this way because of her anxiety and depression; and

vi. constructively dismissing the Claimant on 6 November 2020 - the disability that the Claimant says was the reason for this treatment was both her anxiety and depression and her dyslexia,

together, the **Direct Discrimination Complaints**;

b. discriminated against the Claimant by treating her unfavourably as described in each of the six complaints set out in paragraph a. above because of something arising out of her disabilities (together, the **Discrimination Arising Complaints**). The Claimant says that the following things arise in consequence of her disabilities of anxiety and depression and dyslexia:

The Claimant asked for reasonable adjustments to workload, travel requirements and other working practices on 18 December 2019;

c. applied each of the following provisions, criteria or practices:

i. a level of workload to the role of Post 16 Outreach Learning Mentor; and

ii. a practice of more than one person being able to assign work to persons in the role of Post 16 Outreach Learning Mentor

(together, the **PCPs**), which the Claimant says put her at a substantial disadvantage compared with someone without her disabilities,

when the Respondents knew at the relevant times that she was disabled for 2010 Act purposes by reason of each of her dyslexia and her anxiety and depression; and

the Second Respondent failed to take such steps as were reasonable to take to avoid the disadvantage, those being:

iii. a reduced workload;

iv. more time for specific tasks;

v. support within the organisation for workload;

vi. one source of line management instruction to avoid conflicting instructions; and

vii. avoiding giving the Claimant multiple tasks at one time,

together, the **Asserted RAs**,

with the Claimant's complaints that the Second Respondent failed to meet its duties to make reasonable adjustments on these bases referred to collectively as the **RA Complaints**; and

d. engaged in unwanted conduct related to the Claimant's disabilities which had the purpose or effect of:

i. violating the Claimant's dignity; or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant,

by:

i. on 23 October 2019, the First Respondent ridiculing the Claimant's spelling and writing speed in front of colleagues, and undermining the Claimant's work;

ii. on 24 January 2020, the First Respondent addressing each staff member by name except for the Claimant in a meeting;

iii. on 25 February 2020, the First Respondent requiring the Claimant to travel to two different places at once, necessitating a 75 mile trip;

iv. on 18 February 2020, the Claimant was given less time than she needed to complete tasks;

v. on 13 March 2020, the First Respondent reprimanded the Claimant for not asking for permission for funding for students when she had been given permission by her line manager, Paul Chapman; and

vi. on 26 March 2020, the First Respondent made an allegation to social services about the Claimant's parenting,

together, the **Harassment Complaints**.

15. The Respondents resist each of these complaints. Specifically, the Respondents aver that:

a. in relation to the Direct Discrimination Complaints:

i. (i) while the Claimant's probation period was extended three times as alleged, (ii) the Claimant was excluded from the meetings or email discussions she has identified about her employment and health, and (iv) the First Respondent did, on 26 March 2020, make a report to social services of information received by the Respondents about the Claimant's parenting, none of those acts or omissions were less favourable treatment others because of the Claimant's protected characteristic of disability. The Respondents say that:

1. they would have treated Mr Chapman or Christina Buckley (the actual comparators identified by the Claimant), or a hypothetical comparator without the Claimant's disabilities, in the same way as they treated the Claimant as regards the extension of their probation period had their absence levels been the same as the Claimant's;

2. they would have treated a hypothetical comparator without the Claimant's disabilities in the same way as regards their exclusion from meetings or email discussions about that comparator's employment and health; and

3. they would have treated a hypothetical comparator without the Claimant's disabilities in the same way as regards reporting to social services information received by the Respondents about the Claimant's parenting;

ii. as regards (iii), the Respondents did not consciously give the Claimant more work than she could handle on any of 6, 11, 18 or 25 February 2020;

iii. in relation to (v), they did not fail to deal with the Claimant's grievance – they were unable to investigate it or pursue it any further because the Claimant was unable or unwilling to discuss it; and

iv. as for (vi), the Claimant was not constructively dismissed;

b. as regards the Discrimination Arising Complaints:

while the acts listed at (i), (ii) and (iv) did occur, they did not occur because the Claimant asked for adjustments to her workload, travel requirements and other working practices on 18 December 2019;

the acts listed at (iii), (v) and (vi) did not occur; and

if the Tribunal finds that those matters listed at any of (i) to (vi) did occur and amounted to unfavourable treatment because the Claimant asked for those adjustments, the Respondents contend that:

i. in relation to extending the Claimant's probation period, their doing so was a proportionate means of achieving the legitimate aim of providing an opportunity for the Claimant to demonstrate her suitability for the role;

ii. as for excluding the Claimant from meetings relating to her employment and health, their doing so was a proportionate means of achieving the legitimate aim of providing an opportunity for management to have confidential discussions with Human Resources (**HR**) and/or Occupational Health (**OH**);

iii. as regards consciously giving the Claimant more work than she could handle on each of 6, 11, 18 and 25 February 2020, their doing so was a proportionate means of achieving the legitimate aim of providing an efficient service;

iv. in relation to making, on 26 March 2020, an allegation to social services about the Claimant's parenting, their provision of information by that referral (and the referral made the following day)

was a proportionate means of achieving the legitimate aim of complying with the duty to report safeguarding concerns;

v. as for failing to deal with the Claimant's grievance, their doing so was a proportionate means of achieving the legitimate aim of providing an efficient service; and

vi. in relation to constructively dismissing the Claimant, again, their doing so was a proportionate means of achieving the legitimate aim of providing an efficient service;

c. as for the RA Complaints, the Respondents say firstly that they did not know, and nor could they reasonably be expected to know, that the Claimant was disabled for 2010 Act purposes by reason either of dyslexia or anxiety and depression throughout the Claimant's employment, and therefore the duty to make reasonable adjustments never arose. Furthermore, they say that:

i. the Claimant has failed to particularise any substantial disadvantage caused by her anxiety and depression; and

ii. while the Claimant has particularised a substantial disadvantage caused by her dyslexia (namely, that written work took her longer because it took her longer to process or write things), the Respondents took all reasonable steps to avoid that disadvantage;

d. in relation to the Harassment Complaints:

i. the matters alleged in (i) to (iv) above did not occur – the First Respondent did not ridicule the Claimant, the First Respondent has no recollection of failing to identify the Claimant by name in the meeting, the First Respondent did not require the Claimant to travel to two different places at once, and the Respondents deny that insufficient time was given to the Claimant to complete the task;

ii. as for (v), the Respondents say that (on 13, not 24, March 2020) the First Respondent corrected the Claimant for failing to follow the correct procedure; and

iii. (vi) (the safeguarding referral) did occur,

but in any event, none of those incidents:

related to the Claimant's disabilities, or

had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant; and

e. all complaints that pre-date 6 March 2020 are outside the primary time limit for bringing a claim, and it is not just and equitable to extend time.

16. The issues to be decided in the substantive hearing to determine the Claimant's claims were set out in the Case Management Orders of **29 March 2022**, with some aspects clarified in this hearing, as described below.

The hearing

17. This took place over eight days by cloud video platform. The Respondents were both represented by Ms Skinner, Counsel. The Claimant represented herself.

18. At the commencement of the hearing, the Panel sought clarification on:

    a. whether the List of Issues in the Respondent's bundle was agreed; and

    b. certain aspects of that List of Issues which were not clear to the Tribunal (such as which of the aims put forward by the Respondents as "legitimate" related to which acts asserted by the Claimant as unfavourable treatment under section 15 of the 2010 Act, and the nature of the PCPs asserted by the Claimant). Those clarifications are reflected in the summary of the Claimant's claims above.

19. Following clarification of the content of the List of Issues, the Respondents sought permission to amend the part of their amended Grounds of Resistance concerning the "reasonable adjustments" claims brought by the Claimant. The Claimant did not object to that application. The Panel considered the amended paragraphs submitted by the Respondents were a clarification of arguments already made rather than an amendment *per se*, but even if this should rightly be viewed as an "amendment", the balance of injustice and hardship weighed in favour of allowing it, as:

    a. the Claimant was already apprised of the Respondents' position on these matters and so was not materially prejudiced by the change;

    b. the "amendment" was needed in light of clarification of the Claimant's claims that the Panel sought in order to determine her claims; and

    c. no new facts were relied upon.

20. Unfortunately, the Bundle had not been agreed by the parties, so some time was taken to establish what documentation was to be in evidence before the Tribunal. The Respondents had submitted a "main" bundle of 887 pages, together with an "additional" bundle of a further 384 pages. The Claimant, arguing that the Respondents' bundles contained some documents she did not want included and omitted some documents to which she wished to refer, had prepared her own bundle, of 890 pages, much of which the Tribunal was informed duplicated contents of the Respondents' two bundles. After some initial discussion, the Claimant did not object to the inclusion of any of the documents in the Respondents' two bundles (her initial concern had been about the inclusion of some documents relating to her disabilities, but when the Employment Judge

explained to her that some of her claims related to matters about the impact of her disabilities on her for which medical evidence may be relevant, she withdrew that objection). The parties asked the Tribunal to admit some further documents to those in the three bundles, those being:

a. a further bundle of medical evidence provided by the Respondent (the admission of which the Claimant did not then object to), running to 35 pages;

b. a three-page document entitled "Grant Confirmation", to which the Claimant wished to refer, the inclusion of which was not objected to by the Respondents; and

c. a three-page document entitled "25 Mar 2020 email and attachment", which the Respondents wished to admit in relation to the accuracy of the information in the Respondents' bundle about the content of the report made by Ms Young-Thomas to the First Respondent on that date. The Claimant did not object to its inclusion.

Each of these three additional documents were admitted into evidence, and consequently the agreed evidence "bundle" ran to 2,202 pages in aggregate, much of which involves duplication.

21. The Tribunal heard evidence from the Claimant on her own behalf, and from the First Respondent, Mr Foster, Mr Chapman, Ms Ferguson and Ms Young-Thomas on behalf of both Respondents. The Claimant cross-examined each of the Respondents' witnesses.

22. Counsel for the Respondents applied for a correction of the name of the Second Respondent to reflect its correct legal name, Achieving for Children Community Interest Company. The Claimant did not object to this correction, and the Tribunal made that clerical amendment.

23. The Claimant had requested an adjustment to the conduct of the hearing to provide for regular breaks, due to her dyslexia and her depression and anxiety. It was agreed with the Claimant at the outset that she would tell the Tribunal when she needed breaks (which was the Claimant's preference to having scheduled breaks), and the Employment Judge also offered breaks during the proceedings. On numerous occasions the Claimant expressed a wish for breaks to be short, or refused offers of breaks, because she (understandably) just wanted to get her evidence or cross-examination done.

24. On a few occasions, the Claimant expressed a wish to curtail her cross-examination. The Employment Judge encouraged the Claimant to instead take a break, and the Claimant's wish to finish or continue her cross-examination of the relevant Respondent witness was assessed again after the break (the length of which was confirmed by the Claimant as adequate) was over. Only on one occasion did that result in the Claimant consciously cutting-short her cross-examination of a Respondent witness, that witness being the First Respondent.

25. The Panel, Ms Skinner and each of the Respondent witnesses gave the Claimant all the time she needed when it came to pauses to find documents in the Bundle (which was more complicated than it should have been, due the parties' inability to agree a single bundle at the outset, and the mismatch between the pagination of the bundle and the pdf page number). Similar patience was needed for each witness and for the Panel, given the deficiencies with the bundle.

26. If the Claimant, or indeed any witness, did not understand the question put to them, it was rephrased by Ms Skinner, the Claimant (when she was cross-examining another witness), or on occasion, by the Employment Judge.

27. The hearing caused visible agitation and distress at times to each of the Claimant and the First Respondent. The Tribunal endeavoured to be sympathetic and reassuring in those times – offering breaks, and acknowledging how difficult it must be for those individuals to face questions about the events with which this hearing was concerned.

28. Each of adjustments/responses is in-line with the suggestions in the Equal Treatment Bench Book to ensure full participation in the hearing by a person with dyslexia, and by a person with mental ill health – but in any event were considered by the Panel to be appropriate in this highly-charged case.

29. The Panel also asked the parties for representations as to whether it should make any Orders concerning privacy or restrictions on disclosure in relation to these proceedings, given that the subject-matter of the safeguarding referrals engage the rights of the Claimant's son provided by Article 8 of the European Convention on Human Rights.

30. The Respondents supported an Order anonymising the Claimant's son in the Tribunal's judgment and in the public record of the case, including the parties' witness statements and the hearing bundle (an **Anonymity Order**).

31. The Respondents observed that the Claimant had gone to some lengths to publicise her case against them with her MP, journalists, etc., and consequently the Respondents' position was that any such order would need to encompass the Claimant and both of the Respondents in order to effectively protect the Claimant's son's Article 8 rights as regards the safeguarding allegations.

32. The Claimant supported an Anonymity Order being made in respect of her son, and requested that one also be made in respect of her mother in light of the inclusion of personal health information pertaining to her mother in the bundle.

33. The Claimant did not consider that any Anonymity Order was required in respect of herself or the Respondents. She observed that her son's school, her current employer, and her son himself, is aware of the case, though her son is not aware of some of the details of the allegations made.

The facts

34. Much of the relevant factual background is not in dispute. Where there is factual dispute, it is between the Claimant on the one hand and the two Respondents on the other. There is no disagreement between the Respondents.

35. When the Claimant was applying for her role with the Second Respondent, she ticked a box on the application form to confirm that she had a disability.

36. One pre-condition to the Claimant commencing employment with the Second Respondent was that she passed an OH check. The Claimant was informed that she had passed that check on 19 August 2019, i.e., before her employment commenced.

37. The first six months of the Claimant's employment was described in her contract of employment as a "probationary period", and that clause of her contract stated that:

    "*[Her] suitability for employment will be assessed over 6 months in line with [the Second Respondent's] probationary scheme*".

    i.e., over the period 4 September 2019 to 4 March 2020.

38. Although the Claimant had a Diagnostic Assessment Report concerning her dyslexia and information about the adjustments made for her dyslexia when she was at university, she did not share that report or information with the Respondents during her employment with the Second Respondent. The Claimant had no discussions with the First Respondent or Mr Chapman about her dyslexia prior to 23 October 2019.

39. A meeting was held on 23 October 2019, involving discussion of a spreadsheet containing data on children not in education, employment or training (**NEET**) in anticipation of sharing that document with Ofsted (the **23 October NEET Meeting**). The spreadsheet was projected onto a whiteboard and the Claimant was responsible for typing the changes discussed into that document in "real time". This kind of task meant that the Claimant's spelling and typing speed – two things that she finds challenging because of her dyslexia - were on display to the group of about 15 to 20 people. The First Respondent, who was chairing the 23 October NEET Meeting, was responsible for ensuring that it ran efficiently and there were a significant number of children to discuss. While exactly what was said and the way it was said is the subject of dispute, it is accepted by the Respondents that the First Respondent asked the Claimant to correct the typos in the spreadsheet, and that she may well have attempted to chivvy the meeting along so that the required work could be covered in the time with words to the effect that "we have a lot to get through", indicating to the Claimant that she needed to speed up.

40. There are two key points of disagreement between the parties concerning that meeting:

a. The Claimant says that the First Respondent went further than chivvying the meeting generally and asking her specifically to correct the typos in the document. The Claimant says that the First Respondent ridiculed her spelling and typing speed in front of her colleagues. While neither the First Respondent nor the Claimant (the only witnesses before the Tribunal who were present) can remember the exact words used by the First Respondent, the First Respondent has a markedly different recollection to that of the Claimant, with the First Respondent saying that she asked for the typos to be corrected, and the Claimant saying that the words used were to the effect of "*hurry up and get on with it*". Mr Chapman, who was not present at the 23 October NEET Meeting, observed that it would be out-of-character for the First Respondent to use those or equivalent words.

a. Another point of disagreement between them is whether the Claimant left the meeting crying – the Claimant says she did, whereas the First Respondent does not recall this. The First Respondent says that it was only after the 23 October NEET Meeting that the Claimant was crying, and that she only learned of that fact when informed by Mr Chapman. The First Respondent and Mr Chapman say that, when the three of them gathered in the First Respondent's office, the First Respondent apologised for causing the Claimant's distress.

41. The Claimant was involved in a road traffic incident on 13 November 2019 which contributed to her experiencing an emotional breakdown. The Claimant was absent from work for the following two working days. On 18 November 2019 she provided the Second Respondent with a Statement of Fitness to Work from her GP, who advised that, because of "*Anxiety states*", she was fit to work but that she should work from home for her first week back, i.e., 18 to 25 November 2019. In fact, the Second Respondent also reduced her working hours for that and one further week, so that she was to finish work at 3:30pm in the period 18 to 29 November 2019 inclusive.

42. On 16 November 2019 (a Saturday), Mr Chapman emailed the HR helpdesk seeking advice. Mr Chapman noted that others in the team at the Second Respondent had been in touch with the Claimant since the road traffic incident on 13 November, and that they had passed information to him that the Claimant had been suffering from "*stress*" and "*suicide ideation*". His email refers to his having spoken to the Claimant the day before his email, on 15 November 2019, when she had said that she was ready to return to work. His email included the following request:

"*Where do I stand with everything, how do I support? What do you advise is the best way forward. Other staff referred to above have suggested that OH need to be involved BEFORE we "agree" for her to come back. Technically she has not told me anything at all yet, other than she was, unwell and had attended hospital*".

43. The replies Mr Chapman received from the HR team on 18 November 2019 included the following:

"*If the employee returns today and there is no sick note from her GP you cannot force her to go home.*

"*I would advise that you have a return to work meeting and find out exactly is going on with the employee, as a lot of the information you have received is second hand from colleagues.*

"*You could ask if she would like to be referred to Occ Health as the employee must agree to this.*"

As well as, from Nigel Foster in that HR team:

"*If as part of the [return to work] discussion the employee does open up to you about stress, depression, anxiety issues then it may also be appropriate to make an Occupational Health referral…*"

44. The Claimant and Mr Chapman met on 18 November 2019, at which there was discussion about her health and wellbeing, and about support that could be provided to the Claimant in relation to her dyslexia. This document refers to:

"*Discussion around whether we can support with dyslexia in any way, perhaps through technology. RW to have follow up conversation.*"

45. In addition, the First Respondent emailed Mr Chapman on 21 November 2019 in the following terms:

"*Looking at this from all angles I thought about whether we could purchase some equipment to help with the Dyslexia. Please see below.*

"*If RW would benefit from any technology please let me know and we can look into how to get this. I feel we need to know the level of Dyslexia, this is sensitive as we cannot pry regarding medical details – best to go through a list such as this and ask, based on her experience, what would help.*" [A list followed.]

46. On 18 December 2019, the Claimant self-referred to the Second Respondent's OH team by telephone. No transcript of that telephone call is available, but the Claimant says that she self-referred:

"*to seek support regarding making reasonable adjustments in the context of my Dyslexia (learning disability) and depression/anxiety (mental health disability) due to concerns that the work environment would further exacerbate my health*".

The evidence from the Respondents is that the self-referral concerned the Claimant's mental health. Mr Foster emailed Mr Chapman on 18 December 2020 as follows:

"*Hi Paul*

"I am now aware that a member of staff has self referred to Occupational Health due to anxiety and depression that she is suffering. From the discussion I have

had with the head of OH it would seem that this individual is becoming concerned at being able to cope at work again and may be heading for another crisis. I understand that OH have made an appointment to see the staff member and they will provide you with a report that may include recommendations.

"I feel you may need to have a conversation with the staff member concerned to assess her suitability to be at work and I would recommend that part of your discussion should centre on reasonable adjustments that you may be able to make that would support the staff member. This might include working reduced hours, reduced days and certainly an adapted workload to enable the individual to manage in the workplace.

"There is also an issue that if this individual is suffering from mental health issues how will this impact on the nature of the work that she undertakes that is clearly involved with young persons that can be immensely challenging. You may do well to undertake a risk assessment of the duties that the individual is required to perform and put appropriate measures in places to protect both the staff member and the client base."

47. The Claimant was absent from work on that day and the following three.

48. On 18 December 2019, the Claimant provided the Second Respondent with a Statement of Fitness to Work from her GP, who advised that, due to "*Anxiety and Stress*", she was fit to work, but suggested that she "*may benefit from a reduced caseload and reduced travel to handle the pressure at work*" for one month, i.e., to 17 January 2020.

49. The last day of that four-day period of absence was 20 December 2019, the final day of the Virtual School term. The First Respondent and Mr Chapman, as teachers employed by the Virtual School, were on leave during the school holidays. The Claimant's non-teaching role meant that she was not automatically on leave (save for Bank Holidays over that period). However, the First Respondent and Mr Chapman, after consultation with OH, decided to put the Claimant on leave over the two-week Christmas break. The First Respondent wrote to the Claimant in the following terms on 20 December 2019:

"*I am sorry that you have not been well this week. Paul and I have considered the way forward and I have decided that it would be best if you took time off during Christmas to recover.*

"You are not required to come into the school or to work from home.

"I very much want you to be able to meet the demands of the Post 16 Outreach Worker role and we are keen to support you in achieving this.

"To date we have offered you a week working from home; reduced hours as long as you needed them; adjustments to ensure your dyslexia is supported, regular Line Management meetings and AfC Virtual School and Social Work Managers have been reminded of the referral routes into your service. You and I have

discussed that Outreach staff keep a calendar of their meetings and when you are fully booked then colleagues need to wait for your next available appointment.

"Most especially Paul and I have asked you to let us know what your pressures are so we can modify your workload or change your duties where needed. We have asked that you let us know as soon as you start feeling overwhelmed so we can put measures in place to support you.

"I have raised my concerns regarding your health with Occupational Health and we will arrange an opportunity for you to meet with them next term.

"Rochelle, please know that my praise of your reduction of children not in education, employment and training is heart felt. You have great potential which we are keen to help you develop.

"Wishing you a restful and restorative Christmas and much happiness in the New Year."

50. The Claimant did, in fact, do some work over the Christmas holiday period, sending a number of emails.

51. The reference in the First Respondent's email of 20 December 2019 to her having "*raised [her] concerns with Occupational Health*" is a reference to telephone calls and email exchanges between her and Lorna Mansell, the head of the OH team, whereby the First Respondent sought advice from Ms Mansell about, among other things, whether it was appropriate to make a formal referral to OH in respect of the Claimant. In fact, the First Respondent had been in contact with OH in relation to the Claimant since at least 21 November 2019. The First Respondent had not made a formal referral of the Claimant to OH by this time.

52. The Claimant did not return to work after the Christmas break, and provided a Statement of Fitness to Work from her GP, who advised that she was not fit to work for the period 1 to 17 January 2020, due to "*viral illness, anxiety*". It is not clear exactly which day in early January this was presented to the Second Respondent.

53. A meeting of various members of the Second Respondent's team, including the Claimant, occurred on 24 January 2020, chaired by the First Respondent. What occurred at this meeting is a matter of dispute. The Claimant avers that at the meeting of 24 January 2020 the First Respondent addressed each staff member by name and sought their views on a particular matter, but excluded the Claimant (and this is treated as the eleventh disputed fact in the Findings of Fact section below). The First Respondent:

    a. Does not recall doing this;

    b. Says that this "*was not raised at the time, nor after the meeting direct with me, nor via line management at any time*"; and

    c. Observes in her witness statement that: "*Every attempt is made to welcome everyone at all meetings however there are times when human*

oversight may mean someone is missed. It would never be my deliberate intention to welcome everyone except one person and it was not the case on this occasion."

54. On 6 February 2020, Mr Chapman asked the Claimant to attend a meeting about NEETs in the Royal Borough of Windsor and Maidenhead. That meeting was to be held in Twickenham. The Claimant replied as follows:

"*I have been asked to do several things including* [a list followed] *by each of you including yourself Paul, Claire and yourself Suzanne* [the First Respondent] *and other stuff related to the referrals I have been given which also naturally involve working the LCT and other agencies. I am having work past my working hours to complete all these tasks and I am still behind. I have already met with Tayyaba. I do not have the capacity… How many young people do you expect me to work with at one time? Maybe if there was a reasonable limit as to how many students I worked with I would have the capacity to attend other things such as RBWM NEET meeting or attend other events. It is clear to me that no one within the VS is communicating about how many referrals and tasks they are giving to me and this is not a isolated incident this is a recurring theme and needs to stop.*"

55. In oral evidence before the Tribunal, the Frist Respondent said that she was pleased to receive this email, because it set out the Claimant's perception of her role. The First Respondent noted that, in her opinion, the Claimant's caseload of 22 was reasonable, in comparison to the Claimant's predecessor in post, and the Claimant's counterpart in the other region. The First Respondent observed that Mr Chapman's caseload was 120.

56. On 7 February 2020 the Claimant was verbally informed by Mr Chapman in a meeting that the Second Respondent was extending her probation period, which was due to end on 4 March 2020, to 3 June 2020. The relevant decision-makers were the First Respondent, Mr Chapman and Mr Foster. The notes of the meeting include:

"*You have been working on the appraisal objectives listed above but our ability to assess your suitability for the job role has been impacted by your extended absence. We will therefore be extending your Probation period by three months… During the next three months we will be monitoring your performance and it will be important for you to have good attendance. To this end it will be important for you to share with us at an early stage any difficulties you are facing regarding management of your workload. We are very keen to enable you to succeed and want to be able to support you….*

"No concerns re conduct, but please do note that sometimes requests to do things are made by the Headteacher or Deputy Headteacher which should be done. If there's any issue with a request please do tell me early on so a solution can be found."

57. On 11 February 2020 the Claimant telephoned the HR team at the Second Respondent to discuss her workload. No transcript was taken of that telephone conversation, but the matter was escalated by a member of the Second Respondent's HR team to Mr Foster, with a summary of what the Claimant said:

"*Rochelle… feels she is having to take on tasks that should be being taken on by senior members of staff including having to work outside her working hours in order to complete these tasks.*

"Due to the above pressures Rochelle was hospitalised for 2 weeks and suffered a mental breakdown and had 2 weeks of sickness absence during her 6 month probation.

"Rochelle wants to know how this will affect her probation and whether this needs to be extended – I have explained this is at the manager's discretion…

"Rochelle would like to speak further with HR – are you able to please provide any further advice?"

58. Mr Foster then emailed the Claimant on the same day:

"*I am aware of your situation and know that management has made the decision to extend your probationary period by three months that will have the effect of making your probation end date 3 June 2020. The probationary period has been extended to afford you the opportunity to demonstrate that you can maintain satisfactory attendance and this further period will allow management to assess your overall suitability for the role as they have felt unable to assess this due to the time that you had to have off.*

"I have sent a probation extension letter to Paul for him to issue to you and this explains the position for you.

"With regards to your comments about your workload, if you feel that it is unsustainably high and you are being required to do things outside the remit of your role I would encourage you to speak to Paul and explain your concerns. Clearly during your probationary period you should be supported to achieve a satisfactory level of performance in all aspects of your role.

"I know Paul and Suzanne want to support you and want you to succeed in the role, including passing the extended probationary period.

"I hope this clarifies the position for you."

59. Later that day, a probation extension letter was sent to the Claimant, which included:

"*The reasons for this extension are:*

- *"You have incurred a high level of sickness absence during your probationary period to date and further time is required for you to demonstrate that you can effect and maintain a satisfactory level of*

attendance and that you can maintain a satisfactory level of performance in all aspects of your role…

"Throughout the extended probationary period your line manager will closely monitor your attendance and performance and meet with your regularly to discuss your progress…

"Please be advised that should your performance not improve to the required standard in the time-frame set, then a further meeting will be convened, at which your continued employment, and potential termination of contract, will be considered."

60. On 18 February 2020, Ann Mason, an employee of the Second Respondent who worked in a different part of the Second Respondent's operations than the Virtual School, forwarded an email to the First Respondent. That email was a request from Ian Dodds, the Director of Children's Services for Royal Borough of Kingston upon Thames and London Borough of Richmond upon Thames, for a report needed for 24 February 2020, the subject-matter of which fell within the operational remit of the Virtual School.

    The required report was to be on the subject of care leavers who were NEET, and was to set out the then-current situation with those children and explain what was being done to reduce the numbers who were NEET. This therefore concerned the Claimant's area of the Virtual School.

    The First Respondent, who was on holiday at the time, telephoned the Claimant about the report, and her email back to Ms Mason, copying the Claimant and others, summarises the allocation of work that was made to the Claimant in that telephone call:

    "*I have spoken to Rochelle and Marc [the Virtual School Data Manager] today. Rochelle will use the RBWM report we wrote for Ofsted as a model to report our activities for Post 16/NEET.*

    "Rochelle has a meeting booked with Arnaud and Marc can supply data for Year 12/13.

    "Rochelle is getting the paper to me for Friday and I can sign off and get to Ian by the Monday deadline.

    "Thank you Rochelle for getting this report together to outline all the great work you are doing in partnership with our colleagues."

61. The Claimant says that the First Respondent gave her less time than she needed to complete tasks on 18 February 2020 – this is disputed by the Respondents.

62. The Claimant sent the draft report to the First Respondent by the 21 February 2020 deadline, while the First Respondent was still on annual leave.

63. On 23 February 2020 (Sunday), the First Respondent emailed the Claimant, Marc and Mr Chapman about the draft report, and what needed to be done in

order to finalise it for the submission deadline the following day. That email included the following:

"*There are so many things that I have enjoyed about this report… Thank you so much! …*

"What needs to happen now?

"Marc – please delete reference to RBWM stats but give stats for Kingston as well as Richmond…

"Rochelle – I have added interventions in point 3 Referrals via AHT/DH can you edit/amend/add to as appropriate please.

"Marc/Rochelle – obtain from leaving care the EET overview which will enable you to breakdown students who are in University, Employment, Apprenticeships. This needs to be represented in a pie chart (as with RBWM report) and gives the positive story to set against the NEET figures.

"I have edited the wording of the report to reduce it to 6 pages and we need to keep it to this length."

64. On 24 February 2020 the Claimant made some amendments to the draft report, which she considered were what had been asked of her. The revised report was sent to the First Respondent, but she considered further changes were necessary and within the scope of the tasks assigned on 23 February 2020, as (as set out in her witness statement and consistent with her oral evidence):

"*The report was submitted to me without the previously requested detail of the NEET categories. This was a brief exercise of looking at the spreadsheet counting how many were in prison, how many in work, how many in college etc.*"

The First Respondent therefore emailed the Claimant, at 6:05pm on 24 February, asking for that breakdown to be added to the report. Given the time of day the email was sent, the Claimant only saw that email the following day.

65. On 25 February 2020 at 9:06 am, the Claimant replied to the First Respondent's request for the breakdown to be added in the following terms, copying Marc and Mr Chapman:

"*Hi Suzanne*

I am out of the office all day today and will only be in [the Virtual School's office] briefly this morning.

Best wishes".

66. Mr Chapman replied seven minutes later to the Claimant, copying Marc but not the First Respondent:

"*I think that the bit mentioned by Suzanne is quite easy to slot in… It shouldn't take more than about 10 mins I think. Marc if you have the chance when Rochelle*

is in [the Virtual School's office] *then please can you assist with that small task. Thanks!*

"Let me know if there's anything I can do. I think Suzanne may not like the reply you sent Rochelle so probs good if it can be tied up!"

67. The Claimant replied to Mr Chapman:

"*I have several other tasks I have not completed and are overdue and I have a PEP to go to at 11:30 and will be travelling to Havering College for 3pm. As I have previously mentioned I am having to constantly work outside my working hours to try and complete my work which is still not completed. The task for me will not take 10 minutes I have Dyslexia. Before Half Term you said you would help me to complete that part of the task Suzanne gave me* [i.e., the 18 February assignment] *and it wasn't done.*

"I will do it today as I need to double check this information lines up with Arnaud's tracker."

68. Mr Chapman replied:

"*Hi there I can help! However, I don't have access to Arnaud's tracker. I emailed prior to half-term to try to clarify WHO is NEET so that we can break them up into categories…*"

The First Respondent then replied to the Claimant's 9:06 am email:

"*Hi*

This is for the Chief Executive Officer of Achieving for Children and needs to be a priority for today.

Thanks

Suzanne".

The Claimant had not completed the task by the time she left for the meeting in Havering, and when she got there, she received a telephone call instructing her to return to the office to complete the task – which she did, leaving the office after 8pm that evening when the task was complete. The 'round trip' from the Virtual Office to the meeting in Havering and back was around 75 miles.

69. The parties disagree as to whether the First Respondent required the Claimant to travel to two different places at once, necessitating a 75-mile round-trip, on 25 February 2020. The Claimant says that the First Respondent did, the Respondents deny this.

70. On 27 February 2020, the Claimant met with Mr Chapman for a catch-up meeting. Mr Chapman then emailed her the following day with a summary of what they had discussed, which included:

"*1. You do a great job with the young people you work with – you really are diligent and it's noted!! Thank you…*

3. Focus on what is in the appraisal targets – you need and want to show evidence of meeting those…

4. You asked if you were at risk of "not passing probation" I said that this was true for anyone on probation but that they key thing is to evidence what you do in line with the objectives, and of course it does without saying in line with the job description itself.

5. I encourage you to treat emails from managers with a higher priority. If you have any doubts about work or how to prioritise then ask me and I will help…

7. We also discussed how you reply to emails. You assured me that have not meant to be or to sound rude in any way but there frustrations about workload sometimes. I do not want you to work outside of work hours unless agreed ahead of time and that should be RARE…

8. You reminded me that you are dyslexic and I note that you may need time to process something and I need to make sure I am clear in communications!

That pretty much covers things I think unless there is anything else you want to add – and please do!!..."

71. The Claimant replied: "*Thanks for your email and capturing our conversation yesterday.*"

72. On 13 March 2020, the Claimant was asked to attend a meeting with the First Respondent and Mr Chapman. Various matters were discussed at this meeting, including the view of the First Respondent and Mr Chapman that the Claimant was failing to follow the correct procedure regarding sourcing student tuition funding. It is agreed between the parties that the First Respondent and Mr Chapman were critical of the Claimant's application to an external charity, Richmond Land Parish, for funding to pay for tuition for two students in the Claimant's post-16 cohort, though it is not agreed whether this represented a change of heart on the part of Mr Chapman (i.e., whether the Claimant was reprimanded for doing something she had been given permission by Mr Chapman to do).

73. The Respondents contend that the application the Claimant made for funding to Richmond Parish Land was in breach of the correct procedure in place at the Second Respondent, which required her to liaise with the Virtual School Headteacher, i.e., the First Respondent, before making such an application. The Claimant says there was no established procedure, and that Mr Chapman was aware and supportive of her application to Richmond Parish Land for the c£10,000 funding for tuition for two students. In support of both her contentions the Claimant has pointed to the following evidence:

    a. On 29 January 2020, another member of the Second Respondent organisation emailed Mr Chapman, copying the Claimant, to ask about one of the two students, saying:

"*[X student] is one of my new cases. [Y] was the previous worker. I understand from [X student] that she received authorisation for additional funding for her tuition. Could you give me an update about the current situation with this funding?*"

On 30 January 2020 Mr Chapman replied, copying in the Claimant:

"*I don't think the virtual school agreed funding did we? Rochelle did you find it somewhere else?*"

The reference to "[*finding*] *it somewhere else*", the Claimant says, shows that there was no established procedure.

b. On 5 March 2020 the Claimant emailed a colleague at the Second Respondent, copying Mr Chapman, where she referred to the fact that she had been in touch with Richmond Parish Land, and that she was due to speak about this further with a contact at that organisation. In the email chain that followed, Mr Chapman wrote:

"*Fab! Good stuff Rochelle*".

This, the Claimant avers, shows Mr Chapman's support for what she was doing, and did not indicate that there was a process necessitating pre-authorisation from the First Respondent before pursuing this possible source of funding.

c. On 17 March 2020, the Claimant sent an email to, among others, Mr Chapman, in the following terms:

"*Hi All*

"Just to let you know an urgent application for B to receive additional tuition has been submitted. I will let you know further information once I hear back from Richmond Parish Land Charity …".

74. The Respondents have not provided any evidence that Mr Chapman replied to that email referencing an established procedure that the Claimant's application had bypassed. The Claimant says that this is because there was no such procedure.

75. The tone of the 13 March 2020 meeting is also a matter of disagreement between them.

a. The Claimant says that it amounted to the First Respondent undermining her work.

b. The First Respondent and Mr Chapman describe it differently, with Mr Chapman, when asked in October 2020 about his impression of that meeting, saying to the First Respondent:

"*The meeting we had in your office was a gentle meeting where you highlighted to Rochelle a number of issues that we had been talking about. In particular how requests for money, especially large sums of money*

should not come as a surprise to other senior leaders and that the correct channels needed to be followed when requests were being made. Then secondly, the need to respond to emails swiftly when requests were being made from the Headteacher or the DHT in particular."

76. On the evening of Friday 20 March 2020, Tavana Young-Thomas, a friend of the Claimant's at the time and a colleague of hers at the Second Respondent, spoke on the telephone with the Claimant while Ms Young-Thomas was still in the offices of the Second Respondent. It is not disputed that:

    a. The Claimant told Ms Young-Thomas that she felt suicidal;

    b. Ms Young-Thomas later informed the First Respondent of that fact;

    c. The Claimant cited significant personal financial circumstances, as well as circumstances relating to her ex-partner, which contributed to those feelings; and

    d. Ms Young-Thomas informed the First Respondent that the Claimant had been feeling suicidal ever since she had given birth to her son who, at that time, was four years old.

    The First Respondent asked Ms Young-Thomas to write up that report and send it to her.

77. On Monday 23 March 2020, the country went into national lockdown. The First Respondent attempted to contact the Claimant, initially without success, but – despite the First Respondent's witness statement saying otherwise – evidence supplied by the Claimant (in her bundle, paginated 325) shows that the Claimant did reply to the First Respondent's email on the same day, and was in email contact with Mr Chapman (see the Claimant's bundle, the page paginated with 326).

78. On 24 March 2020 the Claimant met (virtually) with the First Respondent and Mr Chapman, where she informed them that she was fine to work. The First Respondent requested that the Claimant consult her GP and obtain a Statement of Fitness to Work. The First Respondent informed the Claimant that a psychological assessment would be arranged with OH.

79. The next day, 25 March 2020, the Claimant emailed Mr Chapman, repeating that she was fit for work. The First Respondent emailed the Claimant as follows:

    "*I have heard from Paul that you consider yourself fit for work and have been working today.*

    "I am writing to underline the request made yesterday that you should not work until we have a Fit for Work note from your Doctors.

    "There are significant concerns regarding your health and wellbeing at present and I must insist that you stop work until we have medical confirmation that you are well enough to continue."

80. Also on 25 March 2020, Ms Young-Thomas sent a written report of the concerns she had described orally to the First Respondent about concerns over the Claimant's mental health, and sent it to the First Respondent. That written report contained additional detail to the situation as the First Respondent had understood it on 20 March, concerning the potential neglect of the Claimant's son.

81. The First Respondent contacted her line manager, Ms Ferguson, to seek her advice on next steps. They agreed that the information presented made a safeguarding referral in respect of the Claimant's son appropriate and necessary. The Claimant vehemently denies the truthfulness of Ms Young-Thomas' allegations as regards her son (a factual issue which the Tribunal is not required to and has not determined), but the Claimant accepts that the Respondents, when presented with this information, were obliged to make a safeguarding referral.

82. The First Respondent's evidence is that she sought the advice of Ms Ferguson not because there was any uncertainty in her mind as to whether a referral needed to be made – both were and remain adamant that it did need to and should be made – but because the First Respondent had concerns about the potential impact on the Claimant when the referral was made. It was agreed by them, though, that the potential risk to the child had to take priority.

83. The First Respondent telephoned the agency that receives safeguarding referrals from professionals and the public, the Single Point of Access (**SPA**), and the SPA asked her to complete the online referral form, which the First Respondent did on 26 March 2020 (the **SPA Referral**). The SPA Referral contained, among other content, the following statements:

    "***History of your agency's involvement with the child, family or parent:*** *Rochelle Watson started working for AfC Virtual School in September 2019 and has mental health difficulties... I am concerned for Rochelle's mental health… I am making this referral out of concern for the young person and in the hope that support can be provided to the family.*"

84. The First Respondent liaised with Mr Chapman, Mr Foster in HR, and Ms Mansell in OH, as she was concerned to ensure that the Claimant was not working if she was a threat to herself or others, particularly bearing in mind the vulnerability of some of the students in the Claimant's portfolio of work. The First Respondent emailed the Claimant, insisting that she as "*not to work until further notice*".

85. The Claimant replied:

    "*I have spoke to my GP and they have advised me I am fit for work…*

    "I have been proactive in seeking out support for two of the main issues which has been affecting my well-being and have added extreme pressure to my everyday living. This support is ongoing and my family and support network are aware of this.

"Thank you both for all your help and support."

She presented the Respondents with a Statement of Fitness to Work which indicated that she may be fit to work taking account of "*a phased return to work*", and recommended that the Claimant "*work from home*" for one month.

86. Later that same day, on 26 March 2020, in a video meeting in the afternoon, the First Respondent informed the Claimant that the Second Respondent was placing the Claimant on enforced leave for the subsequent two weeks to enable her to rest and (the Respondents intended) to meet with OH. The Claimant emailed a summary of their discussion on 26 March 2020 to the First Respondent and Mr Chapman the following day:

"*Here is a summary of our video call conversation yesterday:*

1. Despite advising me to speak to my doctor to find out if I am fit for work you have spoken to Human Resources and Occupational Health who have advised you I should take two weeks paid gardening leave to reflect on my situation and rest.

2. Occupational Health would like to complete their own psychiatric assessment to assess my mental state.

3. As a Headteacher you have a responsibility to safeguard everyone and you have been advised by your line manager to make a referral to the Signal Point of Access (SPA) team based on safeguarding concerns members of staff in the Virtual School have raised about my son … due to serious allegations I am not mentally fit to look after my son.

As I understand your judgement of this situation is based on allegations which have been made are from other members of staff."

87. On 27 March 2020, the First Respondent was informed by the SPA that, given the Claimant's address, the safeguarding report about the Claimant's son needed instead to be made to Merton Children's Services. The First Respondent made a second referral by telephone on the same day (the **Merton Referral**). The notes taken by Merton Children's Services of that call made by the First Respondent to it include the following information:

"*The referrer … raised concerns about potential child neglect due to mother's mental health difficulties… Mother has been employed by AfC since September 2019 and is currently on probation. Mental had a mental health breakdown in Nov 2019…*"

88. The Claimant alleges that, when making the SPA Referral and the Merton Referral, the First Respondent embellished the reports made to her by Ms Young-Thomas. Both Respondents dispute this. The following documentary evidence was available to the Tribunal on this subject:

    a. A copy of the notes taken by the First Respondent from her oral conversation with Ms Young-Thomas on 20 March 2020, and Ms Young-

Thomas' written report to the First Respondent on 25 March 2020. Ms Young-Thomas confirmed that the disclosed notes and report are in the terms she supplied them to the First Respondent;

b. A copy of the SPA Referral is included in the bundle; and

c. As the Merton Referral was made orally and the First Respondent did not take a note of its contents, the only record of what was said by the First Respondent to Merton Children's Services is their notes of that telephone call.

89. There are three ways in which the Claimant considers the SPA Referral and the Merton Referral to "embellish" Ms Young-Thomas' reports to the First Respondent:

a. The SPA Referral stated:

"*It was also reported to the referrer by team members that Rochelle was living with her aunt, "her own home was too messy"…*"

b. The Merton Referral included the following:

"*In addition, referrer/employer advised that Rochelle can present as "oppositional and strong-willed".*"

c. The Merton Referral also included:

"*Family appears emotionally charged.*"

90. The First Respondent confirmed the gardening leave arrangement and the reasons for it in writing on 30 March 2020:

"*This [the enforced leave] is to provide you time to rest and for Occupational Health to arrange their own assessment of your current condition. This is to ensure that you are not working when in fact you need to be resting and to identify what further support can be put in place if required.*"

The last day of this enforced leave period was 3 April 2020.

91. The First Respondent's evidence is that she had hoped that OH would refer the Claimant during the enforced leave period, and that medical clearance confirming the Claimant was fit to work would be obtained during this period of enforced leave. This is supported by an email from her on 31 March 2020 to Mr Foster:

"*We are in the second week of gardening leave. I wondered if a referral to the OH Psychiatrist had been done and what we would do if an appointment cannot be arranged by Friday.*"

The Respondents' evidence is that the COVD-19 pandemic placed a huge strain on medical professionals, and it was not possible to get the requisite OH referral over that two-week period.

92. The First Respondent corresponded with Mr Foster in HR and Ms Mansell in OH about what should be done if the OH appointment did not proceed, or the OH

report was not available, before the Claimant's scheduled return to work. The First Respondent wrote to HR on 2 April 2020:

"*OH suggest, and I would agree, that Rochelle could return to work but directed to carry out administrative tasks from home (obviously). No contact with children or external partners.*"

93. This is what in fact occurred, and on 5 April 2020 the Claimant returned to work on restricted duties pending the outcome of an OH report.

94. The First Respondent chased up OH and HR regarding the outstanding OH assessment on 22 April 2020, and again on 5 May 2020.

95. On 14 May 2020, the First Respondent received a request to complete an online OH referral, which she did on the same day. Also on 14 May 2020, OH requested that the First Respondent and Mr Chapman put together a chronology outlining the events and occurrences relevant to their OH referral of the Claimant.

96. On 22 May 2020 the Second Respondent (the decision taken by the First Respondent, Mr Chapman and Mr Foster) extended the Claimant's period of probationary employment to 30 June 2020 because:

"*It has not yet proved possible to assess you in all aspects of your role due to the current Covid – 19 lockdown and the period of time that you were placed on leave*".

Later on in the letter it stated:

"*Please be advised that should your performance not improve to the required standard in the time-frame set, then a further meeting will be convened, at which your continued employment, and potential termination of contract, will be considered.*"

97. The Claimant wrote to Mr Chapman on 31 May 2020 in the following terms:

"*I have reflected on this letter this whole week and I am gravely concerned about the contents of the letter and I am not in agreement with this letter. Subject to my "job performance" my job role has been restricted by Suzanne since returning back to work in April after being advised by Suzanne to take time off work. I have sought independent advice and I will be taking this matter further.*"

98. On 5 June 2020 the Claimant filed the Claim Form that commenced these proceedings, and she lodged a grievance against the First Respondent with Ms Ferguson. The focus of the Claimant's complaint was "*ongoing harassment I have been experiencing from Suzanne Parrott for several months*". It expressed the view that: "*Prior to my health deteriorating I have sought help from several areas of AfC and there has been not been any genuine attempt to accommodate my heavy workload and chaotic work system the Virtual School work by, however, I perceive my voice and experiences have been minimised. I am appalled by Suzanne's behaviour … to use her power and authority to exploit my*

mental health disability to undermine my parenting capacity and defame my character for her own personal agenda."

99. The parties disagree as to whether the actions/inactions on the part of the Second Respondent following receipt of that grievance should properly be regarded as failing to deal with the grievance.

100. The OH assessment took place on 8 June 2020, and a report was produced the following day. The Claimant was asked to consent to its release to someone in the management team of the Second Respondent, but she refused that request.

101. On 12 June 2020 Ms Ferguson acknowledged the Claimant's grievance.

102. On 15 June 2020, Ms Ferguson wrote to the Claimant to seek to try to resolve the Claimant's grievance informally by attending a meeting with the First Respondent and a third party, but the Claimant declined this on 16 June 2020, as she did not think it would be dealt with fairly by the First Respondent.

103. On the same date, Ms Ferguson offered to meet with the Claimant herself to informally discuss the Claimant's concerns. The Claimant, replying the same day, initially expressed a willingness to do so with a notetaker or someone to record the conversation present. However, when Ms Ferguson suggested someone from HR to attend and take notes, the Claimant said that she wanted to "*have an independent witness or record the conversation*", and confirmed (on 18 June 2020) that she did not consider HR to be independent. She continued: "*I believe throughout this process it is in my best interest to have an independent witness or I would have to leave the matter to be thoroughly investigated by the tribunal employment court.*"

104. When Ms Ferguson enquired (on 21 June 2020) who the Claimant would regard as a suitable person to attend with her, the Claimant replied (on 23 June): "*I would like someone to attend who is independent from AfC. I would also like to ask if there has been an investigation into my grievance as yet?*".

105. On 26 June 2020, Mr Chapman emailed the Claimant observing that:

"*We have offered support re your dyslexia, which at the time you declined. We can discuss this further of course, and we are keen to support any further reasonable adjustments you would like us to consider.'There have been many adjustments to your role… These have included time to work from home previously, not needing to come in to work during the Christmas period, supporting you to do less interface with young people and other offers.*"

The Claimant replied later that day, which included the following:

"*No support has been offered regarding my dyslexia… Although you have written there have been adjustments made to my role, there have been no realistic adjustments made hence why I have tried to seek support about this in which nothing has been done.*"

106. A further extension to the Claimant's probation period was effected by the Second Respondent on 25 June 2020, extending that period to 24 August 2020, and this was again the result of a decision taken by the First Respondent, Mr Chapman and Mr Foster. The reasons for the extension given in the letter were:

    a. "*It has not yet proved possible to assess you in all aspects of your role due to the current Covid – 19 lockdown and the period of time that you were placed on leave and then on restricted duties, a situation that continues. Management want to afford you further support and time to demonstrate that you can perform in all aspects of the role*.

    b. "*The Occupational Health report following your consultation with Dr Parsons is still awaited and management wants to be sure it takes account of any recommendations and or adjustments that may be contained in the report.*"

107. Ms Ferguson responded to the Claimant's 23 June 2020 email about her grievance on 29 June 2020:

    "*In the circumstances, I propose that we go ahead and progress with investigating your grievance. I have allocated this piece of work to a senior manager from RBWM who is independent of the Virtual School... Are you happy for us to proceed in this way?*"

    The Claimant agreed on 29 June 2020, and Ms Ferguson appointed Alison Crossick, who was at that time a senior manager elsewhere in the Second Respondent (independent of the Virtual School) to be the investigating officer, and informed the Claimant of that fact.

108. On 2 July 2020, Ms Ferguson emailed the Claimant:

    "*I understand that the Virtual School is still awaiting the Occupational Health report which will provide* [the Second Respondent] *with medical guidance as to whether you are able to return to full duties. A request for this document was made again on 29 June, 2020.*

    "It is our aspiration that you will be able to safely resume your Post 16 Outreach activities. It will therefore be important to meet with your line manager, Paul Chapman, to support you in the steps back to full duties and to talk through any concerns you may have."

109. On 3 July 2020, the Claimant emailed Ms Ferguson, complaining about the way the Respondents has shared her personal information, and stating that the referral made to OH in respect of her contained untrue information, noting that:

    "*There have been other statements made against me without knowledge and behind my back which I do not feel comfortable meeting with Paul or anyone else from* [the Second Respondent] *at this moment in time…*

"It also appears by your email you have not taken none of the contents of my grievance seriously including being accused of not demonstrating my strengths and my work performance not being good enough.

"Based on this email I will not have any correspondence with anyone from [the Second Respondent] *including yourself or Alison as I believe my grievance and employment will be treated with bias as it has been in the past.*"

110. On 23 July 2020, Ms Ferguson wrote again to the Claimant:

"*I am genuinely sorry that you clearly feel that I have not taken seriously the contents of your grievance and that my email was accusing you of not demonstrating your strengths or your work not being good enough. That was never my intention… My email about your coming back to work was that you would have 'the time you need to demonstrate your strengths' – you obviously cannot do that when you are not undertaking the role and I wanted to ensure that you have every opportunity to do so.*

"Now that a couple of weeks have passed, and you have had some time to reflect, I just wanted to check that you are still of the position that you do not want your grievance to be investigated?...

"I would also like to discuss with you whether you would reconsider me having sight of the Occupational Health Report. I would want to strongly emphasize that this is not about making any judgements about your health, but purely so that we can consider any reasonable adjustments or other options to support you back into the workplace."

111. The Claimant was not fit for work for the period 8 August to 4 November 2020, due to "*stress at work*".

112. The Claimant's probation period was extended for the fourth time on 18 August 2020, to 23 October 2020, to enable the Claimant's grievance to be investigated. (This fourth extension is not the subject of complaint by the Claimant.) The decision to do so was communicated to the Claimant by Ms Ferguson, as Ms Ferguson considered it would be "*better coming from [her]*".

113. On 7 September 2020 the Claimant emailed Ms Ferguson to clarify that she had not said that she did not want her grievance investigated, but the way her concerns had been dealt with had "*not been fair and slanderous*". Ms Ferguson replied on the same day, apologised if she had misunderstood, and sought confirmation from the Claimant by the end of the week that she wanted her grievance investigated. Ms Ferguson repeated that it would be investigated by a manager more senior than the First Respondent and someone independent of the Claimant's line management.

114. On 11 September 2020 the Claimant complained to Ms Ferguson that the grievance investigation had not taken place, and said that it could still go ahead "*to clarify the information and evidence I have sent in*".

115. The Claimant informed Ms Ferguson on 29 September 2020 that she would not be returning to work for the foreseeable future while her Employment Tribunal dispute was ongoing. The Claimant said:

"*Please cease to have any verbal or written communication with me until this matter is investigated and settled by the Tribunal Employment Court.*"

No further steps were taken by the Second Respondent to resolve the Claimant's grievance.

116. On 6 November 2020 the Claimant resigned with immediate effect, citing "*a fundamental breach of trust and confidence*" by the Respondents.

117. The First Respondent was involved in meetings or emails regarding the Claimant's employment and health on eight occasions, where the Claimant was not part of those discussions:

    a. 8 January 2020, when Mr Foster emailed the First Respondent;

    b. 9 June 2020, when Mr Foster emailed the First Respondent;

    c. 25 June 2020, when the First Respondent met with Mr Chapman and Mr Foster;

    d. 29 June 2020, when the First Respondent called or emailed Ms Ferguson and Mr Foster;

    e. 2 July 2020, when Ms Ferguson emailed the First Respondent;

    f. Also 2 July 2020, when there was an email and a meeting between the First Respondent, Ms Ferguson and Mr Foster;

    g. 8 November 2020, when Ms Ferguson emailed Mr Foster and the First Respondent; and

    h. 10 November 2020, when the First Respondent emailed Mr Foster, Ms Ferguson and "Anna".

118. The Second Respondent, through the actions of Mr Chapman, also discussed the Claimant's employment and health in an email to the Second Respondent's OH team on 16 November 2019. This discussion, unlike those listed above, did not include the First Respondent.

Findings concerning disputed facts

The first disputed fact: From which date did the Respondents know the Claimant was disabled for 2010 Act purposes by reason of her dyslexia?

119. A key area of disagreement between the parties is when, if at all, the Respondents had knowledge during the Claimant's employment that the Claimant was disabled for 2010 Act purposes.

Did the Claimant tell the Second Respondent that she was disabled for 2010 Act purposes by reason of dyslexia at the time of her recruitment?

120. The Respondents accept that they knew of the Claimant's dyslexia on 23 October 2019, after the 23 October NEET Meeting. The Claimant says that she told them as part of her recruitment and onboarding process.

121. The Claimant's oral evidence - though there is nothing in her witness statement to this effect - is that she informed the Second Respondent's OH team (at that time provided by the Royal London Borough of Kingston upon Thames) about the fact she had the disabilities of dyslexia and anxiety and depression as part of the recruitment process applicable to her appointment in September 2019, and that she made clear that this impairment amounted to a disability for 2010 Act purposes (which would, as indicated by paragraph 5.17 of the Code, attribute knowledge to the Second Respondent). The Claimant says that there was no follow-up with her by the OH team to enquire about those conditions.

122. The Claimant has unfortunately not produced any evidence that she informed OH in September 2019 about the severity of her dyslexia, and while the Respondents have said that neither the First Respondent nor its OH service supplier at the time – Kingston upon Thames local authority - has any record of this, the Respondents' evidence on this point is less than definitive as Kingston upon Thames has subsequently outsourced its own OH service, and the supplier (to which some historic OH records previously in the possession of Kingston upon Thames may well have been sent) has not completed its searches for records pertaining to the Claimant. This leaves the Tribunal to determine what happened.

123. The Respondents say that:

    a. The Claimant did no more than tick a box to confirm she had a disability - with no further information about any such disability provided.

    a. If OH had been informed as the Claimant claims, OH would have (i) acted on that information, (ii) sought to understand how those impairments affected the Claimant, and (iii) informed the First Respondent of those matters.

    b. If OH had been informed as the Claimant claims, there would be a record of that fact, and reasonable searches have not identified any such record. Searches have been conducted:

        i. by the Second Respondent of its own records;

        ii. at Kingston local authority; and

        iii. at the company to which Kingston's OH services has been outsourced.

    No record has been found by the Second Respondent or Kingston local authority. At the dates of this hearing, no definitive response had been received by the Second Respondent from the company to which Kingston's OH services

has been outsourced. The Respondents contend that the apparent absence of such a record is strongly suggestive of the fact that the Claimant never shared any detail about her disabilities with OH at the time of her recruitment.

124. On the one hand, it would be most surprising if, when faced with a form where the Claimant had ticked a box to confirm that she had a disability, the Second Respondent's OH function did not make enquiries of the Claimant as to the nature of the disability/ies, whether it/they might be expected to impact on the work required of the advertised position, and whether the Claimant needed any adjustments to ameliorate any such impact.

125. On the other hand, if OH had made such enquiries, the Tribunal's firm expectation would be that, if the Claimant had informed them as she says she did of dyslexia and anxiety and depression amounting to disabilities, OH would have passed that information on to Ms Parrott as a person involved in the recruitment for the post, and/or Mr Chapman as the line manager for the new recruit. OH should have liaised with them about any challenges to the needs of the role being met if the potential recruit were to be appointed, and what adjustments were reasonable to make. Ms Parrott and Mr Chapman's evidence is that OH did not tell them this, and the Tribunal finds their evidence on this point to be credible, for the following reasons:

    a. the First Respondent's oral evidence to the Tribunal (consistent with her written witness statement) was persuasive of the facts that she was surprised to learn on 23 October 2019 of the Claimant's dyslexia, and that she was genuinely upset that the Claimant was distressed about what had happened in the 23 October NEET Meeting;

    b. Mr Chapman's evidence is also that he was surprised to learn of the Claimant's dyslexia on this date;

    c. there is clear correspondence in the aftermath of the 23 October NEET Meeting where they consider what can be done to support the Claimant's dyslexia (e.g., the return to work meeting of 18 November 2019), and that correspondence is suggestive of the fact that this was new information to them (e.g., the emails between the First Respondent and Mr Chapman of 21 and 25 November 2019); and

    d. the Claimant already had a Diagnostic Assessment Report (obtained when she was university) that summarised the impact of her dyslexia and made recommendations for support. The Claimant agrees with the Respondents that she did not provide them with a copy of this report. It would have been natural, had OH asked her about the impact of her dyslexia, for this report to have been shared with them by the Claimant.

126. It is possible that OH were informed and they failed to pass that information on to the Respondents. It is significant, though, that the burden of proving that the Claimant told OH at the time she was being recruited about her dyslexia lies on

her. We think it more likely than not, in light of her comment under cross-examination on a different point that "*I had to downplay what I was going through because I needed the job for me and my son*", that the Claimant downplayed any impairment she discussed with OH following their enquiries as to why she had ticked the box, and OH therefore did not consider that it needed to engage with the First Respondent or Mr Chapmam about any such impairment(s) discussed with the Claimant, i.e., that the Claimant presented any such condition as not having a "substantial" impact.

Did the Respondents learn the Claimant was disabled for 2010 Act purposes by reason of dyslexia on 23 October 2019, after the 23 October NEET Meeting?

127. The parties agree that the Claimant informed the First Respondent and Mr Chapman of the fact she has dyslexia on this date. The Respondents say, though, that the information shared with them by the Claimant led them to conclude that her dyslexia was mild and did not require adjustments. If that was the case, they would not have known that the Claimant was disabled for 2010 Act purposes on that date, as the impairment would not meet the "substantial" condition in section 6(1)(b).

128. The evidence in support of the Respondents' position is:

    a. As the Claimant agrees, she did not provide them with a copy of the Diagnostic Assessment Report she had obtained in 2017 (at any point during her employment. The closest she came to doing so was the fact that she referred the existence of the report in her meeting with OH on 8 June 2020); and

    b. The Claimant's witness statement does not refer to the conversation that took place on 23 October 2019 with the First Respondent and Mr Chapman. When criticising the Respondents for not offering her more support for her dyslexia, the Claimant's focus is on subsequent dates. It may be inferred from this that, as the Respondents claim, while they were aware of her dyslexia from this date, they did not appreciate that its impact was "substantial".

129. We find that the Respondents did not know that the Claimant was disabled by reason of her dyslexia on 23 October 2019.

Did the Respondents learn the Claimant was disabled for 2010 Act purposes by reason of dyslexia after the Claimant's road traffic incident on 13 November 2019?

130. While the Statement of Fitness to Work obtained by the Claimant following the road traffic incident on 13 November 2019 referred to "*Anxiety states*", there is some suggestion in the documents that the Respondents were also considering the possible contribution of the Claimant's dyslexia at this time.

131. In his record of the Claimant's return to work interview of 18 November 2019, Mr Chapman noted that they had a discussion around "*whether we can support dyslexia in any way, perhaps through technology*". In addition, the First

Respondent emailed Mr Chapman on 21 November 2019: "*Looking at this from all angles I thought about whether we could purchase some equipment to help with the Dyslexia.*"

132. The reference of the First Respondent to "*Looking at this from all angles*" suggests that she is making a possible connection between the Claimant's anxiety and her dyslexia, but that that is a proactive consideration, rather than that the Claimant has cited her dyslexia at this time as contributing to her anxiety.

133. The position that the Claimant had not, by this time, told the Respondents of the true impact of her dyslexia – i.e., that it was "substantial" - is supported by the further terms of the First Respondent's 21 November 2019 email to Mr Chapman: "*I feel we need to know the level of Dyslexia, this is sensitive as we cannot pry regarding medical details – best to go through a list such as this and ask, based on her experience, what would help*", and based on this evidence, we find that the Respondents did not know by that point that the Claimant was disabled by reason of her dyslexia.

Did the Respondents learn the Claimant was disabled for 2010 Act purposes by reason of dyslexia on 18 December 2019, when they became aware that the Claimant had self-referred to OH?

134. The Claimant's evidence is that the subject of her self-referral was both her anxiety and depression *and* her dyslexia. However, the evidence from the Respondents is that it related only to her anxiety and depression (see Mr Foster's email to Mr Chapman of 18 December 2019, quoted above).

135. Shortly thereafter, on 20 December 2019, the First Respondent wrote to the Claimant to the effect that she was not required to work over the school Christmas holiday, and that letter observed that: "*To date we have offered you… adjustments to ensure your dyslexia is supported…*". The Claimant disputes that such support had been offered (and disputed in June 2020 that any support had ever been offered regarding her dyslexia), but the reference to the Claimant's dyslexia in this letter shows that the impact of her dyslexia was being considered by the Respondents.

136. Again, the Tribunal has limited evidence of the Respondents' knowledge as at that time, and the burden falls on the Claimant to prove that they did know her dyslexia was substantial at the time. We find that she has not discharged the burden – there is no evidence of her telling the Respondents that fact, and some evidence suggesting that support had been declined, which would have indicated to the Respondents that the impact on the Claimant was not substantial.

Did the Respondents learn the Claimant was disabled for 2010 Act purposes by reason of dyslexia on 25 February 2020?

137. As set out above, the Claimant emailed Mr Chapman on 25 February 2020, in connection with the completion of the report for the Director of Children's

Services, saying that the task she was asked to complete "*will not take me 10 minutes I have Dyslexia.*"

138. The Tribunal finds that, at this point, the Respondents knew that the impact on the Claimant was "substantial", and therefore satisfied the 2010 Act test.

The second disputed fact: From which date could the Respondents have reasonably been expected to know that the Claimant was disabled for 2010 Act purposes by reason of her dyslexia?

139. In the same way as for her dyslexia, the Claimant says that she informed OH before the commencement of her employment with the Second Respondent that she was disabled by reason of anxiety and depression. There are various other points in time when it is possible that the Respondents, if they didn't already know that the Claimant was disabled for 2010 Act purposes by reason of anxiety and depression became aware, or could reasonably be expected to know, those being:

    a. On 18 November 2019, when the Claimant supplied her first Statement of Fitness to Work, which referred to "*anxiety states*", and when Mr Foster, in correspondence with Mr Chapman, refers to the possibility of the Claimant opening up to Mr Chapman in a return to work meeting about "*stress, depression, anxiety issues*";

    b. On 18 December 2019, the Claimant self-referred to OH and HR was advised of that fact, and when the Claimant supplied her second Fit Note, which cited her "*Anxiety and stress*";

    c. In early January 2020, when the Claimant supplied her third Fit Note, which referred to her having a "*viral illness, anxiety*";

    d. On 20 March 2020, when the First Respondent was made aware of the fact that the Claimant was contemplating suicide, and that the Claimant had been experiencing suicidal feelings since the birth of her son, more than four years previously;

    e. On 25 March 2020, when Ms Young-Thomas's written report of the incident of 20 March 2020 was provided to the First Respondent;

    f. When the Claimant submitted her grievance on 5 June 2020;

    g. When the Claimant supplied her Statement of Fitness to Work dated 8 September 2020, which Statement declared her unfit to work due to "*stress at work*" until 4 November 2020, which was nearly a year from the first occasion the Claimant had been absent from work due to anxiety or stress; or

    never, given that:

h. there was not a complete 12-month period between the Claimant's first anxiety/stress/depression-related absence and her last one; or

i. the anxiety/stress triggers for the Claimant's absence could initially at least be regarded as connected to the road traffic incident with which the Claimant was involved on 13 November. The period of work-related anxiety/stress did not exceed 12 months (one means by which an impairment can be shown to be long-term for the purposes of paragraph 2(1) of Part 1 of Schedule 1 of the 2010 Act) before the Claimant resigned.

140. In light of the evidence available of the state of the Respondents' actual knowledge at each of:

a. September 2019, when the Claimant was recruited;

b. 23 October 2019, following the 23 October NEET Meeting;

c. in the aftermath of the road traffic incident involving the Claimant in November 2019;

d. immediately following the Claimant's self-referral to OH on 18 December 2019; and

e. the Claimant's correspondence with Mr Chapman in February 2020,

we find that the Second Respondent should have referred the Claimant to OH when the First Respondent and Mr Chapman learned of the Claimant's dyslexia, i.e., 23 October 2019. Her dyslexia was clearly an underlying, permanent condition, and the Respondents should have made reasonable enquiries beyond simply asking the Claimant in line management meetings. The Claimant was understandably anxious about the fact she was still on her probation period, and a formal meeting with OH specifically about her dyslexia and to establish its impact would have been appropriate. This approach would have been consistent with the expectation set out at paragraph 5.15 of the Code that: "*An employer must do all they can reasonably be expected to do to find out if a worker has a disability*".

141. The Respondents' position is that, even if they had made an OH referral earlier than 14 May 2020, the Claimant would not have disclosed the extent of her impairments, both in relation to her dyslexia and her anxiety and depression, and therefore that, as per the case of *A Ltd*, they should not be fixed with imputed knowledge that the Claimant was disabled for 2010 Act purposes in relation to either condition. In support of this contention they point to:

a. The emails from the First Respondent and Mr Chapman where they record that adjustments had been offered and declined (referred to in the First Respondent's 20 December 2019 letter to the Claimant, implied by the fact that the possible adjustments were discussed at the meeting between the Claimant and Mr Chapman of 18 November 2019 but no adjustments were put in place, suggested by the fact that the First Respondent and Mr

Chapman corresponded about offering the Claimant some technology to assist with her dyslexia in November 2019, and referred to as having been offered on 25 November 2019 in a meeting on 25 June 2020 (though that June 2020 meeting was not attended by the Claimant));

b. The fact that the Claimant did not share the Diagnostic Assessment Report obtained in 2017 when she did discuss her dyslexia with the First Respondent and Mr Chapman;

c. The notes of the return to work meeting of 18 November 2019, where the Claimant presented as "*fit and well*";

d. The fact that, as the Respondents say, the Claimant did not refer to her dyslexia in her OH self-referral on 18 December 2019;

e. The Claimant's correspondence in February 2020, when she referred to the fact that she was struggling, but pointed to other factors (such as workload);

f. The fact that the Claimant was concerned to pass her probation: "*I had to downplay what I was going through because I needed the job for me and my son*" (said in cross-examination); and

g. The fact that the Claimant refused consent for the OH report eventually obtained to be shared with the Respondents.

142. However, the fact is that when the Claimant was seen by an OH physician she informed him of her dyslexia, and made reference to the Diagnostic Assessment Report, which should have been the subject of follow-up by the Respondents if they had been provided with the report. The Tribunal considers that the Respondents would have learned of the substantial impact of the Claimant's dyslexia had an OH referral been made following their discussion on 23 October 2019 (and as they already knew of the *fact* of her impairment and the nature of dyslexia is that it is a permanent and therefore *long-term* condition, the Respondents would have had the three categories of knowledge set out in *Gallop*). We therefore find that the Respondents had constructive knowledge that the Claimant's dyslexia amounted to a disability for 2010 Act purposes from this date.

The third disputed fact: From which date did the Respondents know the Claimant is disabled by reason of her anxiety and depression?

Did the Claimant tell the Second Respondent that she was disabled for 2010 Act purposes by reason of dyslexia at the time of her recruitment?

143. For the same reasons as set out above in relation to dyslexia, we find that the burden of proof rests on her to prove her assertion that she did, and we find that she has not discharged it.

Did the Respondents learn the Claimant was disabled for 2010 Act purposes by reason of anxiety and depression after the Claimant's road traffic incident on 13 November 2019?

144. The Statement of Fitness for Work when the Claimant returned to work (recommending adjustments) stated that she was suffering with "*Anxiety states*", however the Respondents maintain that they did not understand this condition to be "long-term" for 2010 Act purposes at this time. They say that they were not told of the Claimant's underlying condition, and instead understood the anxiety the Claimant was experiencing at this time to be connected to the road traffic incident and the financial difficulties she was experiencing at the time.

145. They point to the return to work meeting notes of 18 November 2019, which do not refer to any underlying mental health condition.

146. The counter-arguments to this position are that the Respondents were aware of her anxiety at least by this point, and Mr Foster's email to Mr Chapman of 18 November referred to the upcoming return to work discussion and said: "*If as part of the discussion the employee does open up to you about stress, depression, anxiety issues then it may also be appropriate to make an Occupational Health referral*", showing that the Second Respondent was conscious of at least the possibility of an unresolved mental health issue at that point.

147. However, Mr Foster's email also indicates that the Respondents did not know – they merely contemplated the possibility – of the Claimant's underlying condition.

148. We find that the Respondents did not know that the Claimant's anxiety and depression was long-term at this point, as it would surely have been recorded in the notes of the return to work meeting of 18 November 2019 if the Claimant had disclosed it at that time.

Did the Respondents learn the Claimant was disabled for 2010 Act purposes by reason of anxiety and depression on 18 December 2019, when they became aware that the Claimant had self-referred to OH?

149. The parties agree that the Claimant's self-referral to OH cited her "*anxiety and depression*" (Mr Foster's email to Mr Chapman records that fact).

150. The Respondents say that they did not know then that she was referring to an underlying condition that she had been experiencing for a number of years, but rather that that still attributed her anxiety and depression to the November road traffic incident, because the Claimant did not inform them otherwise. The Claimant's clear evidence is that, when making her self-referral, she made the long-term nature of her condition clear.

151. The Respondents argue that the Claimant consistently masked the true extent of her mental health condition out of anxiety to pass her probation period. The Claimant certainly did say in oral evidence, by way of a general statement, that "*I had to downplay what I was going through because I needed my job for me and my son*", however, given that she reached-out to OH on 18 December 2019

and referred to anxiety and depression, we consider it probable that she referred to the fact that she had an underlying mental health condition. She was asking for help, and in that context it would make no sense to downplay the impact of a condition with which she was looking for assistance.

The fourth disputed fact: From which date could the Respondents have reasonably been expected to know that the Claimant was disabled by reason of her anxiety and depression?

152. For the same reasons that we reached this conclusion in relation to the Claimant's dyslexia, we find that there is no basis for a conclusion that the Respondents had constructive knowledge of the Claimant's anxiety and depression at the time of her recruitment.

153. As set out above, the Respondents' evidence is that the first they learned of the Claimant suffering from anxiety and depression was in connection with the road traffic incident on 13 November 2019. Her Statement of Fitness to Work did not refer to an underlying mental health condition, and her return to work meeting gave Mr Chapman the impression that she was fit and well. We do not think it would have been reasonable for the Respondents to know that the Claimant was suffering from an underlying, long-term, condition at this time, and nor was a referral to OH necessary given the Claimant had been assessed by a doctor.

154. However, the Panel is of the firm view that the Claimant's self-referral to OH on 18 December 2019 should have been responded to by action on the part of the Respondents – she should have been referred to OH for an assessment of the anxiety and depression she referred to.

155. The Respondents' position is that the Tribunal should assume that the Claimant's failure to disclose the long-term nature of her anxiety and depression when she met with the Second Respondent's OH physician in June 2020 would have been mirrored in any OH referral at an earlier point in time. We disagree. The Claimant has shown, throughout these proceedings, a concern to maintain privacy about her health, but on 18 December 2019 she proactively sought to engage with OH about her anxiety and depression. We do not consider that, having done so, she would have concealed the true nature of that anxiety and depression had that been appropriately followed through. We fix the Respondents with constructive knowledge of the Claimant's anxiety and depression as amounting to a disability for 2010 Act purposes from this point (as per *Gallop*, the Respondents would have known of the impairment, of its long-term nature and of its substantial impact at that point in time).

The fifth disputed fact: What did the First Respondent say to the Claimant at the 23 October NEET Meeting?

156. The parties' conflicting positions on this are set out above, i.e., the only evidence is the differing accounts of the Claimant and the First Respondent.

157. We consider it likely, in light of all the evidence, including Mr Chapman's evidence as to the First Respondent's usual approach and our own examination of the tone of her email correspondence in the voluminous material we were taken to as part of these proceedings, that the First Respondent would certainly have chivvied the Claimant up so as to seek to keep the meeting to time and to achieve the tasks that needed to get through. As we find that she had no knowledge of the Claimant's dyslexia until after this meeting, that chivvying may well have been firm, and might have been expressed differently had the First Respondent known of the Claimant's disability. However, we do not find that the First Respondent went so far as to "undermine" the Claimant in that meeting. Had she done so, the fact that the Claimant was crying in the meeting's aftermath would not have been such a shock to the First Respondent.

The sixth disputed fact: Did the Respondents consciously give the Claimant more work than she could handle from January 2020 onwards?

158. The Claimant says that the Respondents consciously gave her too much work in the period of January 2020 onwards, an assertion the Respondents contest.

159. The Claimant has cited four examples to support her claim that they did, namely:

    a. The assignment of work to her in light of the concerns raised by the Claimant on 6 February 2020 to Mr Chapman;

    b. The assignment of work to her in light of the concerns raised by the Claimant by telephone with the Second Respondent's HR team on 11 February 2020;

    c. The assignment of work to the Claimant by the First Respondent on 18 February 2020, namely to write a report for the Director of Children's Services; and

    d. The instruction to her from the First Respondent on 25 February 2020, relating to the report for the Director of Children's Services.

160. Really, these amount to two complaints – that the assignment of work on each of 18 and 25 February 2020 was consciously inappropriate in light of the concerns raised by the Claimant on 6 and 11 February 2020.

161. This question – with its inclusion of the word "consciously" - requires an enquiry of the Respondents' intentions in the allocation of work to the Claimant from January 2020 onwards.

162. The following evidence supports the Claimant's contention that they knew she had more work than she could handle:

a. The Claimant's self-referral to OH on 18 December 2020 was, as noted above, by telephone, but Mr Foster's email to Mr Chapman about its contents said: "*it would seem that this individual is becoming concerned at being able to cope at work again… you may need to have a conversation with the staff member concerned… part of your discussion should centre on reasonable adjustments that you may be able to make that would support the staff member. This might include working reduced hours, reduced days and certainly an adapted workload to enable the individual to manage in the workplace.*" In other words, the Respondents were aware of the need to adapt her workload and, the Claimant avers, failed to do so sufficiently; and

b. The Claimant herself made this explicit in her email of 6 February 2020: "*I am having work past my working hours to complete all these tasks and I am still behind*", and in her telephone call of 11 February, in which the HR records record her as saying that she has: "*to [work] outside of her working hours in order to complete these tasks*".

163. In support of the Claimant's position that the amount of work assigned to her continued to be inappropriately heavy she points to:

a. The fact that a three-day deadline was imposed by the First Respondent for a first draft of a report for the Director of Children's Services to be produced by her (the task of 18 February 2020); and

b. The fact that the instruction from the First Respondent to complete on 25 February 2020 conflicted with pre-existing work the Claimant was due to do that day, including two external meetings one of which would necessitate travel of a 75-mile round trip. The Claimant says the First Respondent would have known of the Claimant's two external meetings, as she had access to the Claimant's calendar which showed those appointments.

164. The counter-arguments made by the Respondents are:

a. Each of the Claimant's email of 6 and telephone call of 11 February 2020 actually pointed to external factors, such as the number of people who could assign work to the Claimant and whether she was being assigned tasks that should more appropriately should have fallen on more senior members of the organisation;

b. The deadlines imposed for the 18 and 25 February 2020 tasks were imposed by the senior director who requested the report, not the First Respondent;

c. The First Respondent asked two data managers to work with the Claimant to compile the report (the 18 February task), and asked one of those data managers to assist with the 25 February task, and this was appropriate support; and

d. The First Respondent did not check the Claimant's diary, and so did not know that she had other tasks to complete that day.

165. The Tribunal finds that the Claimant's 6 February email and 11 February telephone call, whilst also citing communication issues and whether the tasks assigned to her were appropriate to be handled by her, made clear complaints about the amount of work falling to her to do.

166. The Tribunal believes that if the First Respondent thought the Claimant could not handle the tasks assigned to her on 18 and 25 February 2020, relating to a report for the Director of Children's Services, she would not have assigned them to the Claimant. The report, for a very senior director, was too important, and the deadline imposed by that director too tight, for the First Respondent to ask the Claimant to do if she could not handle it.

167. Moreover, we accept that the First Respondent did not check the Claimant's diary to establish what competing tasks she had on that day – but nor, in our view, should she be expected to have done so. Part of the Claimant's role was to manage her workload and appropriately prioritise competing tasks. The First Respondent would not expect to have to do that for her, and Mr Chapman could have been turned to for support in judging the appropriate prioritisation of the work on 25 February (as per his offer on 7 February, just a few weeks previously). It was, in the Tribunal's view, entirely reasonable for the First Respondent to expect the Claimant to complete the requested tasks on 18 and 25 February, and if she was struggling to manage or prioritise, the Claimant had already been instructed to reach out to Mr Chapman for help in such situations (both generally, as shown in the First Respondent's letter to the Claimant on 20 December 2019, and specifically, as shown by her email to Mr Chapman of 25 February 2020, where she wrote "*Before Half Term you said you would help me to complete that part of the task Suzanne gave me and it wasn't done*").

168. There are no other incidents cited by the Claimant as examples of the Respondents consciously assigning more work to her than she could handle in this period, and consequently we find this allegation not made out on the facts.

The seventh disputed fact: Was there an established procedure or protocol which applied to seeking external funding for students in the post-16 outreach programme, and if so, what was that procedure?

169. The Respondents have not pointed to any written procedure which sets out the apparently established procedure for which they contend. This does not mean that there was not an unwritten procedure, which may have been verbally shared among those who needed to understand it.

170. However, the email correspondence disclosed by the Claimant involving Mr Chapman makes it absolutely plain that Mr Chapman did not see any issue with the Claimant applying to Richmond Parish Land for tuition support. Mr Chapman

was involved in multiple emails on this subject, and positively praised the Claimant for obtaining the funding by this means. This is strongly suggestive that there was no understood procedure at the Second Respondent organisation for seeking external funding for tuition support for post-16 children – we find that there was not.

The eighth disputed fact: Had Mr Chapman encouraged the Claimant to apply for the c£10,000 for student tuition from the charity (which the Claimant subsequently did)?

171. This fact is not "disputed" as such, but is unclear, as Mr Chapman has said in his witness statement that:

"*One of the matters discussed [in the 13 March 2020 meeting] was Rochelle's applying for up to £10,000 from a charity and deciding how it should be allocated, without seeking Suzanne's permission. Whilst I do not recall having discussed this matter previously with Rochelle, it is possible that I encouraged her to apply for the funding as I was aware there is no specific funding for post 16 students.*"

172. We find that Mr Chapman's emails of 30 January and 5 March 2020 (quoted above) show that he did in fact encourage the Claimant to apply for this funding.

The ninth disputed fact: Did the First Respondent undermine the Claimant's work from January 2020 onwards?

173. Specifically, the instance the Claimant cites as demonstrating this allegation is the criticism of her made by the First Respondent in relation to her application for funds from Richmond Parish Land without first consulting with and seeking authorisation from the First Respondent. This question can therefore be reframed as: **In light of the accepted fact that the First Respondent was critical of the Claimant for not seeking the First Respondent's input before she applied for £10,000 of funds to pay for student tuition from Richmond Parish Land, did that amount to the First Respondent undermining the Claimant's work?**

174. While we accept that the Claimant would have been upset and frustrated, and would felt "knocked back" in relation to the criticism that was made of her in relation to this application – not least because it was known about and supported by Mr Chapman – we do not consider that this is sufficient to conclude that the First Respondent undermined the Claimant's work from January 2020 onwards.

175. Mr Chapman, in October 2020, described the meeting as "*gentle*", although at least one aspect of his recollection of the funding request has been shown to be unclear (he did support and encourage the Claimant's application for funds from Richmond Parish Land).

176. Even if the First Respondent (and Mr Chapman) was not "*gentle*" but was in fact critical of the process the Claimant had followed, we do not think that one criticism

would amount to *undermining* the Claimant's work. No doubt the Claimant would have felt that criticism to be unjust in light of Mr Chapman's earlier support of it, and the criticism may have been more keenly felt given it also meant a withdrawal of Mr Chapman's earlier praise, and the Claimant had likely hoped it would be a point in favour of her passing her probation period. However, the assertion that it "*undermined the Claimant's work*" is a more wide-reaching one than, in the view of the Tribunal, this incident alone supports.

The tenth disputed fact: Did the First Respondent embellish the reports made to her by Ms Young-Thomas when the First Respondent made the SPA Referral and the Merton Referral on 26 and 27 March 2020 respectively?

177. The embellishments asserted by the Claimant are described above.

178. It is clear that all three statements were made, in either or both referrals, but it falls to us to determine if these were "*embellishments*" of the information received from Ms Young-Thomas.

179. The word "embellishment" suggests the addition of unnecessary detail or gloss.

180. Ms Young-Thomas did not say, in her 20 and 25 March reports to the First Respondent, that the Claimant was "*oppositional and strong-willed*", but nor did the referrals misrepresent that Ms Young-Thomas had done so – that view was clearly presented to the referees as part of the First Respondent's assessment. There are many other details in the referrals which did not come from Ms Young-Thomas, but are things within the First Respondent's own knowledge, e.g., how long the Claimant had worked for the Second Respondent. The Tribunal does not regard the inclusion of this observation from the First Respondent as an "*embellishment*" – it is additional detail that the First Respondent, with her expertise and long-experience in the field, judged appropriate for inclusion. The Tribunal would not describe this as an unnecessary addition.

181. The second putative embellishment, that the Claimant's family appears "*emotionally charged*", is not specifically stated to be an observation by the referrer herself (i.e., the First Respondent) as opposed to an observation made by Ms Young-Thomas, but nor does it imply that this was said by Ms Young-Thomas. Again, the Tribunal notes that the First Respondent has not stated this as a fact, but has said that the Claimant's family "*appears*" to be emotionally charged. It may be that the Claimant considers that the First Respondent's experience of her family did not warrant that comment, but the Tribunal observes the First Respondent's considerable experience in the field of children's services and child protection, and consequently considers her best-placed to know the information most relevant to share with the safeguarding bodies. The Tribunal is loathed to conclude that information considered relevant by the First Respondent is unnecessary or a gloss on the truth – she is the expert in that field as to what

would be most helpful to the safeguarding body. We do not consider her observation to be an embellishment.

182. The third supposed embellishment, that the Claimant's home was "*too messy*", was presented as being made by "*team members*" of the First Respondent. No evidence was presented to the Tribunal about reports from other team members besides Ms Young-Thomas. The First Respondent is subject to statutory duties as regards safeguarding referrals, as the Claimant acknowledged. We have no reason to doubt that she had received information to that effect. The First Respondent was not saying that she herself had observed the Claimant's home, and nor would the referrals have been read in that way. We do not consider that the Claimant has shown that this was an unnecessary addition or a gloss on the information the First Respondent received.

The eleventh disputed fact: At the meeting of 24 January 2020, did the First Respondent address each staff member by name except for the Claimant?

183. The First Respondent does not think this occurred, or if it did, she says that it would be inadvertent.

184. Answering this question simply comes down to the Claimant's word against the First Respondent's – there is no other evidence for us to consider.

185. The fact that the First Respondent is less than certain about what was actually said at this meeting, more than three years ago, is credible. Equally, had this incident occurred, it would likely stick in the Claimant's mind, and so her confidence about what was said is equally believable.

186. Bearing in mind that the Claimant had not long returned to work after a period of experiencing stress and anxiety, we think it unlikely that the Claimant was excluded by the First Respondent in this meeting, whether by failing to address her by name or by not seeking her views when seeking those of everyone else. We find that this did not happen.

The twelfth disputed fact: Did the Second Respondent fail to deal with the Claimant's 5 June 2020 grievance including by failing to investigate it, failing to progress that grievance, and delay its outcome?

187. The lengths that the Second Respondent went to try to deal with the Claimant's grievance are described extensively above. It is plain to the Tribunal that the Claimant's 5 June 2020 grievance could not be dealt with – whether following the "formal" or "informal" routes described in the Second Respondent's grievance procedure – without the Claimant's participation.

188. This factual assertion made by the Claimant is not made out.

The thirteenth disputed fact: (a) Did the Second Respondent offer to make adjustments in respect of the Claimant's dyslexia on each of (i) 23 October 2019, (ii) 18 November 2019, (iii) around 21 November 2019, (iv) 20 December 2019, (v) January 2020, (vi) 27 March 2020, (vii) 25 June 2020 and (viii) 26 June 2020, and (b) did the Claimant decline those offered adjustments?

189. The Respondents say that the answer to these questions is, in each case, "yes", whereas the Claimant says both that adjustments were not offered on any of those dates (her email to Mr Chapman of 24 June 2020 states that "*there have been no adjustments or support given although I have sought support from HR or the Virtual School none was given*") and consequently that she did not decline any adjustments.

190. In respect of whether adjustments were offered:

    a. *On 23 October 2019*: The written and persuasive oral evidence of the First Respondent and Mr Chapman is that adjustments for the Claimant's dyslexia were offered upon their learning of her dyslexia. This is credible – the natural thing for an employer to do on learning of an employee's dyslexia is to "solutionalise", and to respond to that information by asking what it can do. This also makes sense in the context of the meeting that had happened earlier that day, where it is agreed that the Claimant was making more typographical errors and typing more slowly than might have been expected of a person without dyslexia, when the First Respondent was keen the meeting kept to time. It would be of benefit to the Respondents if the Claimant was given assistance to help her with her dyslexia. The Claimant says that adjustments were not offered, but we find her evidence on this point less persuasive than that of the relevant Respondent witnesses – documents produced shortly after this time refer to conversations around dyslexia (e.g., the 18 November 2019 meeting notes referred to below), and those references would seem to be a natural follow-up on a prior oral discussion. We find that adjustments for dyslexia were orally offered on this date.

    b. *On 18 November 2019*: A written note of a meeting between the Claimant and Mr Chapman appears in the bundle, which includes: "*Discussion around whether we can support with dyslexia in any way, perhaps through technology*". The document is not signed by either the Claimant or Mr Chapman, but it is credible that the meeting took place because it was labelled as a return to work meeting and coincided with the Claimant's return after absence following the 13 November road traffic incident. The Claimant denies that dyslexia support was offered in this meeting, but we prefer the evidence of the Respondents on this point, and find adjustments were offered as described in the disclosed document.

    c. *Around 21 November 2019*: The Respondents have disclosed email correspondence between the First Respondent and Mr Chapman in which

the First Respondent suggests that Mr Chapman goes through a list of possible technological assistance that could be offered to assist with dyslexia. Again, this is credible, as the First Respondent was keen to ensure that the Claimant was able to do her job effectively, and had some concerns about the Claimant's level of sickness absence. The First Respondent's email begins "*Looking at this from all angles I thought about whether we could purchase some equipment to help with the Dyslexia*", and it makes sense that she would be keen for this to be explored with the Claimant, as the First Respondent had started to think about the challenges she observed with the Claimant's performance from a different perspective. We find that at some proximate date after these emails Mr Chapman did discuss these suggestions with the Claimant.

d. *20 December 2019*: The relevant portion of the First Respondent's letter to the Claimant informing her that she was not required to work over the Christmas period has been set out above, and includes: "*To date we have offered you… adjustments to ensure your dyslexia is supported*". Even if those prior offers had not been made (and we have already found that some were), this letter would amount to an offer to do so: "*Paul and I have asked you to let us know what your pressures are so we can modify your workload or change your duties where needed.*" Assistance was clearly offered on this date.

e. *January 2020*: The Respondents have asserted that assistance with dyslexia support was offered following the Claimant's self-referral to OH on 18 December. Mr Foster emailed Mr Chapman on this date summarising the contents of the self-referral. There is no explicit reference to the Claimant's dyslexia in this report, but there is reference to "*this individual is becoming concerned at being able to cope at work again and may be heading for another crisis*", and "*your discussion should centre on reasonable adjustments that you may be able to make that would support the staff member. That might include working reduced hours, reduced days and certainly an adapted workload*". The Claimant was absent from work until January, but the Tribunal finds it probable that adjustments were discussed with her by Mr Chapman when the Claimant returned to work in January. Mr Chapman's correspondence has shown an awareness of his (at that time) inexperience in managing these kinds of issues, and a keenness to be guided by HR. We think it probable he would have followed this guidance upon the Claimant's return to work, though we observe there is no equivalent "return to work" meeting note from January 2020 to that of 18 November 2019, likely because the Respondents gave the Claimant two weeks' leave over the Christmas period rather than her being off by reason of sickness for this time. While the Claimant denies that dyslexia support was offered, we find it more credible that Mr Chapman followed Mr Foster's advice and did offer this.

f. *27 March 2020*: The First Respondent wrote to the Claimant on this date enclosing a copy of the referral the First Respondent made to social services in respect of the Claimant's son. That letter included: "*My responsibility is to you, Rochelle, to ensure that you have the necessary adjustments at work to enable you to be healthy and safe*". We find this amounts to an offer to make reasonable adjustments, and though this did not specifically refer to her dyslexia, it was a wide enough offer to encompass such adjustments, which had already been the subject of discussion between the Claimant and the First Respondent.

g. *25 June 2020*: The probation extension letter of this date refers to one of the reasons for the extension being "*The Occupational Health report following your consultation with Dr Parsons is still awaited and management wants to be sure it takes account of any recommendations and or adjustments that may be contained in that report.*" That letter expressed a willingness to make reasonable adjustments.

h. *26 June 2020*: Mr Chapman replied to an email from the Claimant, which reply contained: "*We have offered support re your dyslexia, which at the time you declined. We can discuss this further of course, and we are keen to support any further reasonable adjustments you would like us to consider.*" The Claimant denied that assertion in the email chain, but in light of the above conclusions, we find that offers of adjustments had been made, and if the Claimant had asked for adjustments as part of this correspondence, the Respondents would have considered the feasibility of any such requests. The fact that no emails have been produced – at a time when the Claimant was insistent on communicating by email rather than in verbal meetings – strongly indicates that the Claimant did not take the opportunity to seek adjustments.

191. In relation to the Respondents' contention that the Claimant declined the offers of support made:

a. 23 October, 18 November, 21 November 2019: In light of our findings that offers of support were made on these dates but there is no record of any changes being made, we find that the Claimant declined the offers of support made by the Respondents on these occasions. As shown by the Claimant's oral evidence to the Tribunal, she was extremely concerned to ensure that she passed her probation period, and so we find that she did downplay the impact of her dyslexia in this period.

b. 20 December 2019: The Claimant self-referred to OH on 18 December 2019 – she was seeking help and support at a time proximate to this letter. She did not decline the support offered.

c. 27 March 2020: This offer of support came shortly after the Claimant's 20 March mental health crisis and the safeguarding referrals concerning her son, which must have had a dramatic impact on the Claimant's life.

Moreover, in response to the Claimant's Statement of Fitness to Work covering the period 26 March to 26 June 2020, the Claimant was working from home with restricted duties. We find that the Claimant did not need to take up the offer of adjustments because adjustments had been prescribed by her GP which were being followed, and further adjustments (in the form of restricted duties) were imposed by the Second Respondent pending advice from OH on the Claimant's capacity to undertake her usual duties.

d. 25 and 26 June 2020: The relationship between the Claimant and the Respondents had broken down totally by this point, and we find that she did not take up their offer of adjustments.

192. In summary, we find that these were occasions when adjustments were offered or made by the Respondents, either for the Claimant's dyslexia specifically or adjustments generally that would have included dyslexia-related adjustments. We also find that those offers were either rejected or not taken up by the Claimant on these occasions, with the exception of the 20 December 2019 offer, which the Claimant had effectively already accepted by the time it was made due to her request for help in the form of her self-referral on 18 December to OH, and the adjustments made on 27 March 2020, which were imposed.

The fourteenth disputed fact: Did the Claimant ask for adjustments to (a) workload and (b) the arrangements for the assignment of work to her, on each of (i) 18 December 2019, (ii) 6 February 2020, and (iii) 11 February 2020?

193. Taking each of those in turn:

a. The Claimant's self-referral to OH on 18 December was done by telephone call, but Mr Foster's email to Mr Chapman setting out the content of that referral makes it plain that the Claimant was asking for adjustments to her (a) workload and (b) arrangements for the assignment of work to her on this date.

b. The Claimant's email of 6 February 2020 clearly complains that her (a) workload is too heavy and about (b) the arrangements by which work was assigned to her; and

c. The Claimant telephoned the Second Respondent's HR helpdesk on 11 February 2020, and the relevant summary of that shows that she raised issues with (a) the level of her workload, but not concerns with (b) the assignment of work.

The fifteenth disputed fact: Did the First Respondent require the Claimant to travel to two different places at once, necessitating a 75 mile trip, on 25 February 2020?

194. No, as set out above, the Tribunal finds that the First Respondent did not require the Claimant to travel to her appointments on 25 February 2020 – the First Respondent expected the Claimant to prioritise the amendments required to the draft report for the Director of Children's Services, and to rearrange any existing tasks that conflicted with that so as to be able to do so. If the Claimant needed help with prioritising, that was available – as per the First Respondent's letter to the Claimant of 20 December 2019.

The sixteenth disputed fact: Did the First Respondent give the Claimant less time than she needed to complete tasks on 18 February 2020?

195. No, as set out above, the Tribunal does not find that the First Respondent gave the Claimant less time than she needed to in order to complete the task assigned to her on 18 February 2020 - the time permitted for the task was determined by the deadline set by a third person, the Director of Children's Services, and the need for the First Respondent to be able to check that draft report in order to submit the finalised report to him by the deadline he set. Moreover, the task was assigned to the Claimant jointly with two data managers.

Law

The definition of disability for 2010 Act purposes

196. The 2010 Act defines the protected characteristic of "disability" in section 6(1) as follows:

"*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."

197. The burden of proof is on the claimant to show, on the balance of probabilities, that they were disabled at the relevant time.

198. When considering the meaning of section 6(1), the following should be considered:

a. the terms of Part 1 of Schedule 1 of the 2010 Act, entitled "Determination of disability";

b. guidance issued by the Disability Unit on matters to be taken into account in determining questions relating to the definition of disability (section 6(5)), the latest version of which was published on 8 March 2013 (the **Guidance**); and

c. the Code of Practice on Employment (2011), published by the Equality and Human Rights Commission (the **Code**)

(and, indeed, an Employment Tribunal *must* take account of (b) and/or (c) where it considers that guidance or Code relevant, pursuant to paragraph 12 of Part 1 of Schedule 1 of the 2010 Act. This is not confined to situations when the question of whether the claimant is disabled is in issue, but to all situations in which either of the Guidance or the Code is relevant).

199. For an effect to be "*substantial*" it must be "*more than minor or trivial*" (section 212(1) of the 2010 Act).

200. Paragraph 2(1) of Part 1 of Schedule 1 of the 2010 Act stipulates that:

"*the effect of an impairment is long-term if-*

a. it has lasted for at least 12 months,

b. it is likely to last for at least 12 months, or

c. *it is likely to last for the rest of the life of the person affected.*"

201. This is determined as at the date(s) of the alleged discriminatory act(s), by reference to facts and circumstances existing at that date (*McDougall v Richmond Adult Community College* [2008] EWCA Civ 4).

Knowledge of disability

202. Not all heads of disability discrimination require the respondent to know about the claimant's disability at the time of the relevant act or omission, but where knowledge is a constituent element, constructive or imputed knowledge will suffice.

203. In relation to the duty to make reasonable adjustments, paragraph 20(1) of Schedule 8 of the 2010 Act provides that:

"*A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-*

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirements."

204. The Code at paragraphs 5.14 and 5.15 provides:

"*It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed…*

"An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment."

205. Paragraph 5.17 of the Code reads:

"*If an employer's agent or employee (such as an occupational health adviser or a HR officer) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability*".

206. Actual or constructive knowledge of a claimant's disability require the respondent to have actual or constructive knowledge of the facts of each constituent part of the legal definition of disability, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) their ability to carry out normal day-to-day duties (as confirmed by the Court of Appeal in *Gallop v Newport City Council* [2014] IRLR 211).

207. If a respondent could reasonably be expected to have made further enquiries, that alone does not "fix" them with constructive knowledge. It is only where the tribunal also concludes that the further enquiries it was reasonable to make would have provided the respondent with knowledge of the claimant's disability that knowledge will be imputed (*A Ltd v Z* [2020] ICR 199). Knowledge of a claimant's disability will not be imputed if the tribunal concludes that the claimant would have hidden the true facts of her impairment had such reasonable enquiries been made.

Direct disability discrimination

208. Section 13(1) of the 2010 Act describes the prohibited conduct of direct discrimination as follows:

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

209. In other words, two conditions must be satisfied for a direct disability discrimination complaint to be made out:

    1. The employer must have treated the claimant less favourably than it treated or would treat others; and
    2. The reason for that difference in treatment is a protected characteristic.

210. The assessment of whether treatment is less favourable is an objective one, i.e., whether the tribunal finds it so, not whether the claimant perceived it as such.

211. Section 13 involves the comparison of treatment afforded the claimant against a named or hypothetical comparator ("*than A treats or would treat others*"), and section 23(1) provides that:

"*there must be no material difference between the circumstances relating to each case*" [i.e., there must be no material difference between the circumstances of the claimant and the comparator],

and where the protected characteristic in question is disability, the "*circumstances*" that should be considered are the abilities of the claimant and the comparator (section 23(2)).

212. Lord Hope, in the House of Lords decision in *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, held that, with the exception of the prohibited factor (be it sex, race or otherwise), "*all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator.*"

213. Their circumstances need not be entirely identical, though, as the Code clarifies, at paragraph 3.23, that:

"*it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator*".

214. Where there is no "real life" or "actual" comparator identified by the claimant, or where the claimant's selected comparator does not meet the conditions in section 23(1), the tribunal must construct one to determine the complaint.

215. Linden J in the EAT decision of *Gould v St John's Downshire Hill* [2020] IRLR 863 described the process of constructing a hypothetical comparator for this purpose:

"*Where a Tribunal does construct a hypothetical comparator, this requires the creation of a hypothetical 'control' whose circumstances are materially the same as those of the complainant save that the comparator does not have the protected characteristic or has not taken the protected step. The question is then whether such a person would have been treated more favourably than the claimant in those circumstances.*"

216. When answering the second question, the examination of the reason why the decision-maker acted in the way that they did, the claimant need not show that the protected characteristic was the sole reason, but it needs to have been a "*significant influence*" (Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572). It is not necessary that the decision-maker was conscious of this significant influence.

217. Lord Nicholls in *Nagarajan* observed that "*the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.*"

Discrimination arising from disability

218. Section 15 of the 2010 Act provides that:

"*(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."

219. This, as Simler J summarised in *Secretary of State for Justice v Dunn* UKEAT/0234/16/DM, means there are four elements that must be made out in order for a claim for discrimination arising from disability to succeed:

a. There must be unfavourable treatment;

b. There must be something that arises in consequence of the claimant's disability;

c. The unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability; and

d. The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

220. In addition, as per subsection (2), the respondent must have known, or should reasonably have known, that the claimant had the disability.

221. Subsections 136(2) and (3) provide that:

"*(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.*"

This means that the process of proving discrimination arising cases can be broken down into two stages.

222. Stage 1: Unfavourable treatment because of "something arising":

a. The burden of proving a *prima facie* case of discrimination sits on the claimant. They need to prove facts from which the tribunal could decide, in the absence of any other explanation, that:

i. They were subjected to unfavourable treatment;

ii. They were disabled at the relevant time;

iii. The respondent knew, or should reasonably have known, that the claimant was disabled at the relevant time;

iv. "Something arises" from the claimant's disability; and

v. The reason for the claimant's unfavourable treatment was the "something arising".

b. While there is no definition of what it means for a disabled person to be treated "*unfavourably*" in the legislation, the Code (at paragraph 5.7) sets out that:

"*This means that [the disabled person] must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment…*"

c. As HHJ Richardson put it in the EAT decision of *T-Systems Ltd v Lewis* UKEAT/0042/15/JOJ:

"*Unfavourable treatment is that which the putative discriminator does or says or omits to do or say which then places the disabled person at a disadvantage*".

d. Treatment that was advantageous to the disabled person is not "*unfavourable*" simply because the treatment could have more advantageous than it was (*Trustees of Swansea University Pension and Assurance Scheme v Williams* [2019] 1 WLR 93).

e. The causative link between the unfavourable treatment and the something that arises in consequence of the claimant's disability should be approached by way of a two-stage enquiry:

i. What caused the unfavourable treatment? This focuses on the subjective reason in the mind of the alleged discriminator, which may require an examination of the conscious or unconscious thought processes of that person; and

ii. Was the cause "something arising in consequence of the claimant's disability"? This is an objective question, which does not depend on the thought-processes of the putative discriminator.

(*Pnaiser v NHS England* [2016] IRLR 170)

f. There may be more than one reason for the employer acting in the way that it did. For it to be "something arising in consequence of the disability", that something arising must have operated on the mind of the employer, consciously or unconsciously, to a significant extent (*T-Systems v Lewis*). That "something arising" need not be the sole reason, but it must be a significant or at least more than trivial reason (*Dunn*).

223. Stage 2: Justification defence

    a. If a claimant establishes a *prima facie* case (stage 1), the analysis shifts to whether the unfavourable treatment can be justified, and the burden of proving justification sits on the respondent (*Starmer v British Airways* [2005] IRLR 862).

    b. Justification involves a three-staged analysis:

        i. Did the respondent have a legitimate aim?;

        ii. Did the respondent's treatment of the claimant achieve a legitimate aim?; and

        iii. Was the respondent's treatment of the claimant a proportionate means of pursuing that legitimate aim? In other words, was the adverse impact on the claimant reasonably necessary to achieve the legitimate aim? This is an objective assessment as to whether the appropriate balance has been struck by the respondent on the given facts (*Hardys & Hansons plc v Lax* [2005] IRLR 726). Could a lesser measure have achieved the aim?

Failure to make reasonable adjustments

224. The duty to make reasonable adjustments is set out in section 20 of the 2010 Act, and for the purposes of this case the relevant part of that duty is as follows:

    "*where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a matter in comparison with persons who are not disabled,* [A is] *to take such steps as it is reasonable to have to take to avoid the disadvantage*".

225. However, as per paragraph 20(1) of Schedule 8 of the 2010 Act:

    "*A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know… (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage…*"

226. Elias P in the EAT decision of *Project Management Institute v Latif* [2007] IRLR 579 confirmed that the claimant must not only establish that the duty has arisen, but also that it has been breached.

227. A "*prospect*" of an adjustment removing a disabled employee's disadvantage would be sufficient to make the adjustment a reasonable one, it need not be a "*real prospect*" (*Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10).

228. This effectively involves four questions:

    1. Did the respondent know (in fact, or by reason of knowledge being imputed to them because they could reasonably be expected to know) that the claimant was disabled at the relevant time?

2. If yes, did the respondent apply a provision, criterion or practice (the **PCP**)?
3. If yes, did that PCP cause the claimant (a disabled person) a substantial disadvantage?
4. If yes, was there a step that could reasonably have been taken that had a prospect of ameliorating the disadvantage?

229. The terms "*provision*", "*criterion*" and "*practice*" are to be construed widely. Although determined under the predecessor legislation, the conclusion of the House of Lords in *Archibald v Fife Council* [2004] ICR 954 that the term PCP encompasses the disabled person's terms, conditions and arrangements relating to the essential functions of their employment still applies.

230. The determination of whether the disadvantage is substantial (defined in section 212(1) of the 2010 Act as something that is "*more than minor or trivial*") is made by way of comparison with "*persons who are not disabled*". In other words, the application of the PCP must cause greater disadvantage to disabled people than to non-disabled people. This necessarily means that the PCP applies, or is capable of applying, to non-disabled people as well as to disabled ones. An arrangement will not amount to a "PCP" if it applies, and would only ever apply, to the claimant alone (*Ishola v Transport for London* [2020] ICR 1204). It may not always be necessary to identify the non-disabled comparators if that is obvious from the nature of the PCP, and if the disadvantage to the disabled person is clear (*Fareham College Corporation v Walters* [2009] IRLR 991).

231. There must be some causative nexus between the claimant's disability/ies and the substantial disadvantage (*Thompson v Vale of Glamorgan Council* EAT 0065/20).

232. Once the claimant has proven a *prima facie* case that the duty arose (i.e., steps 1 to 4 above), the burden then shifts to the respondent to show that the adjustment was not a reasonable one for it to make. There is no requirement for the claimant to have identified with precision what adjustment it was reasonable for the respondent to make, but there must be some indication as to what adjustments it is alleged that the respondent should have been made:

"*Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.*"

(*Latif*)

233. The assessment as to whether the adjustment (or "*step*") is reasonable is an objective one (*Smith v Churchills Stairlifts plc* [2006] ICR 524). Paragraph 6.28 of the Code sets out some factors which might be taken into account when deciding what is a reasonable step for an employer to have to take, those being:

a. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

b. The practicability of the step;

c. The financial and other costs of making the adjustment and the extent of any disruption caused;

d. The extent of the employer's financial or other resources;

e. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

f. The type and size of the employer.

234. A significant consideration will be the effectiveness of the proposed step (whether it would, or might, be effective in removing or reducing the disadvantage), but the relevant considerations in a given case will depend on its particular circumstances (paragraph 6.23 of the Code).

Harassment related to disability

235. 'Harassment' is defined in section 26, which includes, in subsection (1):

> "*A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*"

236. In other words, there are three elements to this test:

c. There has been unwanted conduct;

d. That has the proscribed purpose or effect; and

e. That unwanted conduct relates to a relevant protected characteristic.

237. As for "purpose or effect", the requisite threshold is high – intending to or causing upset or offence is insufficient – the language used (e.g., "violating" and "degrading") points to purposes/effects which are serious and marked (*Betsi Cadwaladr University Health Board v Hughes* EAT 0179/13 and *Land Registry v Grant* [2011] ICR 1390).

238. The question of whether conduct "*related to*" a relevant characteristic is determined by the Tribunal, not by the claimant's perception (*Tees Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495).

239. The Code, at paragraph 7.9, observes that:

"*Unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic*".

240. It gives the following example:

"*A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex. This could amount to harassment related to sex.*"

241. This less-than-causative meaning of "related to" has been considered in case law.

242. Whether conduct is "related to" a protected characteristic is an objective question, not determined by the respondent's knowledge or perception of the claimant's protected characteristic, or by their perception of whether the conduct "relates to" the claimant's protected characteristic (*Hartley v Foreign and Commonwealth Office Services* [2016] ICR D17).

243. In *Kelly v Covance Laboratories Ltd* [2016] IRLR 338 a Russian claimant worked for a company carrying out animal testing which had concerns about possible unwelcome actions by covert animal rights activists. The claimant spoke Russian, and frequently held long conversations on her mobile telephone in Russian. The claimant's manager instructed her not to speak Russian so that her conversations could be understood by English-speaking managers. When she brought a claim of racial harassment, that was dismissed by the tribunal. On appeal, the EAT found that the tribunal had been correct to conclude that the instruction did not "relate to" the claimant's race or national origins, even though it potentially could have been – it was because the claimant's line manager was suspicious of her conduct in the context of the employer's business and the risks it faced from animal rights activists.

244. Section 26(4) requires that:

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

1. *the perception of B;*
2. *the other circumstances of the case; and*
3. *whether it is reasonable for the conduct to have that effect.*"

245. This is entails both subjective (the perception of B) and objective (whether it is reasonable for the conduct to have that effect) assessments of the effect of the conduct, as well as consideration of all the other circumstances of the case. The objective assessment is particular to the claimant – was it reasonable for the conduct to have the effect on that particular claimant?

246. The Code (at paragraph 7.18) indicates that the "other circumstances of the case" could be matters such as the personal circumstances of the claimant, such as their health, mental capacity, cultural norms, and previous experience of harassment, as well as the environment in which the conduct takes place.

Constructive dismissal

247. The concept of constructive dismissal is set out in section 95(1)(c) of the Employment Rights Act 1996:

"*For the purposes of this Part an employee is dismissed by his employer if… (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*"

248. The act of dismissing an employee is capable of founding a complaint of discrimination (or victimisation) under the 2010 Act - section 39(2)(c) (and section 39(4)(c)), and the 2010 Act states clearly that references to dismissal include constructive dismissal (section 39(7)(b)).

249. Lord Denning MR, in *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 221, described the circumstances in which an employee who apparently terminates their contract of employment by resignation should be regarded as having been dismissed by their employer:

"*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.*"

250. The Court of Appeal in *Lewis v Motorworld Garages Ltd.* [1986] ICR 157 made it clear that:

    a. the cumulative effect of a course of conduct can amount to a "*significant breach going to the root of the contract*"; and

    b. while the particular incident which prompted the employee to resign might on its own be insufficient to amount to such a breach, if it was "*the last straw in a course of conduct which, when viewed in its totality, amounted to a wrongful repudiation of the contract*", that would be sufficient to entitle the employee to leave and claim that he had been constructively dismissed.

251. The term breached may be an express term of the contract, or an implied one. As the House of Lords held in the case of *Malik (A.P.) v Bank of Credit and Commerce International S.A. (In Compulsory Liquidation)* [1997] UKHL 23, conduct by an employer that is "*calculated to destroy or seriously damage the*

trust between the employer and employee" will breach the implied term of trust and confidence that is a bedrock of the employment relationship. Such a breach is capable of founding a complaint of constructive dismissal.

252. There must be a causal link between the breach by the employer and the employee's resignation (one case example is that of the Court of Appeal decision in *Meikle v Nottinghamshire County Council* [2005] ICR 1).

253. By resigning, the employee accepts the employer's repudiatory breach. If the employee waits too long after the breach before resigning, they will be taken to have affirmed the contract and consequently to have lost the right to claim constructive dismissal. As Lord Denning MR put it in *Western Excavating*, the employee:

"*must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*".

254. In summary, an employee complaining that they have been constructively dismissed must demonstrate that:

a. their employer committed a fundamental breach of the contract of employment between them (and that fundamental breach may relate to a single act or omission or a course of conduct that cumulatively meets that threshold, and the term breached may be an express or an implied one);

b. the employer's breach caused the employee to resign; and

c. the employee accepted that breach (and did not delay too long, thereby affirming the contract and losing the right to subsequently accept the breach and claim constructive dismissal).

Time

255. Claims of disability discrimination are subject to a time limit stipulated in section 123(1) of the 2010 Act, and:

"*may not be brought after the end of-*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

256. For these purposes, pursuant to subsection (3), "*conduct extending over a period is to be treated as done at the end of the period*".

Privacy and restrictions on disclosure

257. Subsections (1) to (3) of Rule 50 of the Employment Tribunals Rules of Procedure 2013 provide:

"*(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*

"*(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.*

"*(3) Such orders may include-*

(a) …

(b) An order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c) …

(d) *A restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act...*"

258. Article 6(1) of the European Convention on Human Rights reads as follows:

"***Right to a fair trial***

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

259. The starting point is the principle of open justice – justice must be done and must be seen to be done. Any derogations from that principle must be justified by reference to what is *necessary* in the interests of justice, in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

260. Article 8 of the Convention provides:

"***Right to respect for private and family life***

"*(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*

"(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

261. When considering whether it is appropriate to make an order preventing the naming of individuals, any legitimate public interest in those individuals' names being known should be taken into account. That will be a fact-and-circumstance-specific consideration. The extent of derogation sought or considered (i.e., the departure from the principle of open justice in Article 6) needs to be weighed against the degree to which Article 8 will be infringed by failing to make the privacy order. These principles are illustrated by the EAT decision in *Christie v Paul, Weiss, Rifkind, Wharton and Garrison LLP* EAT 0036/20.

262. The fact that the information has already been in the public domain does not necessarily preclude the engagement of Article 8, e.g., if only part of the information has been made public, but the nature and extent of the information already made public may affect the damage or impact that would be felt by the individual concerned (*TYU v ILA Spa Ltd* [2022] ICR 287).

263. The weighing of open justice and the competing other right (e.g., Article 8) must be done by the tribunal to determine the propriety of making any such order restricting open justice. It is not sufficient that both (or all) parties support the making of the order concerned (*X v Z Ltd* [1998] ICR 43).

Application of the law to the claims here

The Direct Discrimination Complaints

264. The Claimant has pointed to numerous acts or omissions as constituting direct disability discrimination.

265. **The first Direct Discrimination Complaint** relates to the extension of the Claimant's probation period on three occasions, being 11 February 2020, 22 May 2020, and 25 June 2020. It is not contested that the Second Respondent did these acts, with the First Respondent being a significant decision-maker in its decisions to do so.

266. The first question is whether these acts amount to less favourable treatment than the Respondents treated or would treat others. The Claimant identifies two actual comparators for this purpose, being Mr Chapman and Christina Buckley, each of

whom started employment within a view days of the Claimant, and passed their probationary periods without extension.

267. The Respondents aver that these individuals are not appropriate comparators, as Mr Chapman had only one day's sickness absence and Ms Buckley had none.

268. Section 13 of the 2010 Act requires that "*there must be no material difference between the circumstances relating to each case*".

269. As per *Nagarajan*, when assessing the suitability of a comparator, the tribunal needs to determine the grounds of the Second Respondent's decision to extend the Claimant's probationary period. In the Tribunal's view, it is plain that the reason, or one of the reasons, in the case of each extension was the Claimant's level of absence (whether sickness absence or enforced leave by the Second Respondent). Mr Chapman and Ms Buckley are therefore not appropriate comparators as they do not satisfy the requirements of section 23(1).

270. The appropriate hypothetical comparator (as per the guidance in the *Macdonald* and *Gould* cases), is a person with the same level of absence from work during their probation period as the Claimant, where the reason(s) for that absence/those absences were not disability-related, e.g., a person who has been absent for the same periods as the Claimant by reason of various non-disability-related sickness absences.

271. In the Tribunal's view, the Respondents would have treated such a hypothetical person in the same way.

272. Moreover, the Tribunal does not regard the extension of a probation period as "*less favourable treatment*". In the case where an employee reaching the end of their probation period has not demonstrated that they can perform in all aspects of the role (as was the Claimant's case), the options before the Second Respondent were to dismiss that employee or extend their probationary period. Extending the Claimant's probation period was either equal treatment if the hypothetical comparator would find their probation period also extended, or more favourable treatment if the hypothetical comparator's employment would have been terminated (so as per the *T-Systems* case, it cannot amount to less favourable treatment). The Second Respondent could, of course, have chosen to disapply the Claimant's probationary period but, as per *Trustees of Swansea University Pension and Assurance Scheme*, the fact that the treatment afforded the Claimant could have been more advantageous than it was does not render that favourable treatment "*less favourable*" for the purposes of a direct discrimination complaint. In any event, the first Direct Discrimination Complaint fails, because the extension of the Claimant's probation period on the three occasions she complains about was not less favourable treatment than the Respondents would have treated a hypothetical comparator.

273. The **second Direct Discrimination Complaint** concerns the admitted exclusion of the Claimant from various meetings relating to her employment and health.

274. The first question is whether these acts amount to less favourable treatment than the Respondents would treat others, as the Claimant relies on a hypothetical comparator.

275. In constructing the appropriate hypothetical comparator, the Tribunal must, as Linden J put it in *Gould*, "*[create] a hypothetical 'control' whose circumstances are materially the same as those of the complainant save that the comparator does not have the protected characteristic*".

276. Given the subject matter of the meetings was the Claimant's employment and health, the Tribunal considers an appropriate hypothetical comparator to be another employee of the Second Respondent whose health is of relevance to their work, but who is not disabled, e.g., a person who has had a number of non-disability-related periods of sickness absence.

277. The Tribunal considers that where the Second Respondent's managers, HR team and/or OH team wished to discuss the employment and health of that hypothetical employee, it would similarly exclude the employee from those discussions. There may be other discussions which would involve the employee, as there were other discussions in this case which involved the Claimant (e.g., her return to work meetings), but the Second Respondent's managers may well wish to keep HR and/or OH informed of the situation with the hypothetical employee, and seek advice as to the next steps, as they did in the Claimant's case. We find that there would be no difference in treatment between the Claimant and the hypothetical employee.

278. The **third Direct Discrimination Complaint** relates to the Respondents consciously giving the Claimant more work than she could handle on each of 6, 11, 18 and 25 February 2020. As noted above, we find that this treatment did not occur.

279. The **fourth Direct Discrimination Complaint** is that the Respondents made, on 26 March 2020, an allegation to social services about the Claimant's parenting. It is not disputed that *information* was passed on to social services by the Respondents, but they say that they did not make any *allegations* when doing so.

280. The first question is whether this act amounted to less favourable treatment than the Respondents would treat others (as the Claimant relies on a hypothetical comparator).

281. If the Respondents had received information raising safeguarding matters concerning a child of another, non-disabled, employee, we find that they would have passed that information on to social services as they did in this case. As the Claimant has acknowledged, the Respondents had a statutory duty to do so, and we find that they would also have complied with that duty in relation to a hypothetical comparator. The Claimant was not treated less favourably than that hypothetical comparator would have been treated.

282. The **fifth Direct Discrimination Complaint** concerns the Claimant's allegation that the Second Respondent failed to deal with the Claimant's grievance (made on 5 June 2020). As noted above, we find that this treatment did not occur.

283. Consequently, we find that none of the first five Direct Discrimination Complaints is made out.

284. The **sixth Direct Discrimination Complaint** is that the Second Respondent constructively dismissed the Claimant on 6 November 2020. This allegation amounts to an assertion that the First and Second Respondents subjected the Claimant to a discriminatory course of conduct – consisting of the other allegations of discrimination in her claim – and that the failure to deal with the Claimant's grievance was the "last straw" (as described in the Case Management Orders of EJ Corrigan on 29 March 2022). Our conclusions on this complaint therefore depend on our findings in relation to the other complaints, and so is dealt with below.

The Discrimination Arising Complaints

285. As set out above, one of the conditions that must be satisfied in order for the Claimant to prove a *prima facie* case of discrimination arising from disability is that there was unfavourable treatment of the Claimant.

286. The **first Discrimination Arising Complaint** the Claimant makes concerns the extension of her probation period on each of 11 February 2020, 22 May 2020 and 25 June 2020. For the reasons set out above, the Tribunal does not consider the extension of the Claimant's probation period to be unfavourable treatment. The alternative treatment, given the Respondents' assessment that she had not met the requisite standard to pass her probation period, was to dismiss her. Consequently, the first Discrimination Arising Complaint fails.

287. If the extension to the Claimant's probation period should, contrary to the Tribunal's view, properly be regarded as unfavourable treatment, it does arise in consequence of her disability (it is not disputed that at least some of her absence was attributable to her disabilities), and so the question becomes whether the extension of her probation period was justified, as a proportionate means of achieving a legitimate aim. The respondent's aim was to provide the Claimant with an opportunity to demonstrate her suitability for her role. This is plainly a legitimate aim – the Claimant was doing an important job working with vulnerable young people, and the Second Respondent was justified in looking to ensure, both for the Claimant's sake and that of the young people supported by the Second Respondent organisation, that she was suitable to perform it. As for whether this aim was pursued proportionately, we find that it was. While the extensions were of a longer length than the Claimant's absence, the Second Respondent was seeking to ensure that the Claimant could perform the role and, as it said in the probation extension letters, that she could maintain a satisfactory

level of attendance. We find the duration of those extensions proportionate. Consequently, even if the extension of the Claimant's probationary period was unfavourable treatment arising from her disabilities, we find that treatment justified.

288. The **second Discrimination Arising Complaint** asserted is that the Claimant was excluded from meetings relating to her employment and health on a number of occasions. As set out in paragraph 5.7 of the Code, treating a disabled person unfavourably "*means that he or she must have been put at a disadvantage*".

289. The Tribunal does not consider that the Claimant was put at a disadvantage by her exclusion from meetings about her employment and health by the members of the Second Respondent's management team with its members of its HR and/or OH functions. Indeed, discussions at some of those meetings concerned how to support the Claimant in her work, and those discussions, and therefore the help provided to her, may well have been hindered by the presence of the Claimant. Others are emails about the management of the Claimant. She was not put at a disadvantage by not being included in them.

290. Even if her exclusion should rightly be regarded as unfavourable treatment (and that treatment would, given the reason for her exclusion, arise from her disabilities), we consider it justified by the Respondent's legitimate aim of providing management with the opportunity to have confidential discussions with HR and OH. It is legitimate for management personnel to seek specialist advice and support from those functions to ensure they are best-supporting the employee and the Respondent's business needs. Other discussions/emails were had with the Claimant in addition to those from which she was excluded. We find the Respondent's legitimate aim was pursued proportionately.

291. The **third Discrimination Arising Complaint** is that the Respondents consciously gave the Claimant more work than she could handle on each of 6, 11, 18 and 25 February 2020. As set out, the Tribunal has found that this did not occur as a matter of fact.

292. The **fourth Discrimination Arising Complaint** is the making of an allegation on 26 March 2020 to social services about the Claimant's parenting. This was unfavourable treatment. The next question is whether the Claimant was disabled for 2010 Act purposes at the time of the treatment. In this case, she was, by reason of both her anxiety and depression and her dyslexia. The third question is whether the Respondents knew or could reasonably have been expected to know that she was disabled on this date. As set out above, we find that they could reasonably have been expected to know (about her dyslexia from around 23 October 2019 and her anxiety and depression from around 18 December 2019). The next enquiry is whether something arises from either or both of the Claimant's disabilities.

293. The Claimant's case is that the following arises in consequence of her disability:

"*The Claimant asked for reasonable adjustments to workload, travel requirements and other working practices on 17 December 2019, 6 February 2020 and 11 February 2020*".

She did seek adjustments to her workload on those dates, and to working practices on 6 February 2020, and her case is that she did so because of her disabilities.

294. However, the Tribunal finds that the final stage of the enquiry - whether the *reason* for the Claimant's treatment was the "*something arising*" (as described in *Pnaiser*) - is not met. We find that the fact the Claimant had sought adjustments on those dates had no bearing whatsoever on the Respondents' decision to make a safeguarding referral. The Tribunal finds that the two reasons for making the SPA Referral (and the Merton Referral the following day) were, firstly, to ensure the safety of the Claimant's son, and secondly, to comply with their statutory duties to do so. The fourth Discrimination Arising Complaint therefore also fails.

295. The **fifth Discrimination Arising Complaint** is the failure by the Respondents to deal with the Claimant's grievance – as noted above, we do not consider this made out on the facts, and so this complaint fails also.

296. So, in summary, we find that none of the first five of the Discrimination Arising Complaints is well-founded.

297. The **sixth Discrimination Arising Complaint** is that the Second Respondent constructively dismissed the Claimant. As for the direct discrimination claim relating to the allegation of constructive dismissal, this complaint depends, in part, on whether the Claimant was constructively dismissed, which assessment in turn is dependent on the outcome of the remaining discrimination complaints made by the Claimant. This complaint is therefore dealt with below.

The RA Complaints

298. The Claimant has pointed to two PCPs:

    a. The level of workload attaching to the role of the Post 16 Outreach Learning Mentor (the **Workload PCP**); and

    b. A practice of more than one person being able to assign work to the Post 16 Outreach Learning Mentor (the **Work Allocation PCP**).

299. The Tribunal concludes that these were PCPs – they satisfy the description in *Archibald*, being terms, conditions and arrangements relating to the essential functions of the Claimant's employment, and they applied to the Claimant in her role but they were not unique or particular to her (*Ishola*). The First Respondent referred to the fact that there was a predecessor in the Claimant's Post 16 Outreach Learning Mentor post, and that the Claimant had a counterpart in the other region covered by the Second Respondent organisation, and the PCPs set out above applied to those individuals.

300. The **first question**: Did the Respondents know that the Claimant was disabled at the time when one or both of these PCPs were applied to her? – The answer to this is "yes". We have found that the Respondents had constructive knowledge of the Claimant's dyslexia from around 23 October 2019, and of the Claimant's anxiety and depression from shortly after 18 December 2019.

301. The **second question**: Did the Respondents apply the PCP after that time? – Again, the answer is yes: each of the PCPs were applied to her continually throughout her employment, including after the dates when the Respondents knew of the Claimant's disabilities.

302. The **third question**: Did the application of the PCPs cause the Claimant a substantial disadvantage? The Claimant has asserted that each of her disabilities meant that the application of each of the two PCPs put her at a substantial disadvantage.

    a. However, she has not stated how either PCP caused her a substantial disadvantage because of her anxiety and depression – she has simply stated that as a fact. The Tribunal cannot identify the substantial disadvantage that is caused to her by reason of her anxiety and depression as a result of either the Workload PCP or the Work Allocation PCP, and therefore her RA Complaints connected to her anxiety and depression fail.

    b. As for her dyslexia, the Claimant has said that her dyslexia meant that written work takes her longer because it takes her longer to process or write things. This is a substantial disadvantage which is supported by the Diagnostic Assessment Report made in respect of her in 2017.

303. The **fourth question**: Was there a step that could reasonably have been taken by the Second Respondent that had a prospect of ameliorating the disadvantage? The Claimant has said that the Second Respondent could have taken the steps defined above as Asserted RAs, those being:

    a. a reduced workload;

    b. more time for specific tasks;

    c. support within organisation for workload;

    d. one source of line management instruction to avoid conflicting instructions; and

    e. avoiding giving the Claimant multiple tasks at one time.

304. The Tribunal can see that the substantial disadvantage of written work taking the Claimant longer could be ameliorated by a reduced workload, more time for specific tasks and support within the organisation for workload. The Tribunal finds that the Claimant has failed to articulate how the substantial disadvantage of written work taking her longer would be ameliorated by one source of line

management instruction to avoid conflicting instructions, or avoiding giving her multiple tasks at any one time.

305. In relation to the first three Asserted RAs, which we find would have avoided some part of the substantial disadvantage, the examination shifts to whether:

    a. The Second Respondent did in fact take those steps; and if not

    b. Whether it was reasonable for the Second Respondent to have done so.

306. The next step is to consider whether the Respondents did, in fact take those steps, and if not, if it was reasonable for them to do so.

307. As for the first Asserted RA - reduced workload - the Respondents did not reduce her workload, although they did provide help with aspects of performing the work assigned to her (e.g., in relation to the tasks assigned to the Claimant on the 18 and 25 February 2020 in connection with the production of a report for the Director of Children's Services).

308. It therefore falls to the Tribunal to consider whether the step not taken by the Respondents of reducing the Claimant's workload was a reasonable one they should have taken (as per the *Churchills Stairlifts* case).

    a. We find that it would have been an effective step: reducing the Claimant's workload would have meant that she had more time to complete her remaining tasks involving written work.

    b. There were others in the Second Respondent's organisation with sufficient familiarity and expertise to perform the work assigned to the Claimant, e.g., Mr Chapman as her line manager, and the Claimant's counterpart in Operational Area 2. However, the Second Respondent is a charitable organisation, funded by local authorities, which needs to demonstrate the effectiveness of its work in order to continue to secure funding and support. A reallocation of some of the Claimant's work to other people would mean less could be achieved by those individuals, with the knock-on effect that the children and young people falling within the remit of Mr Chapman (who already had a caseload of around 120 compared to the Claimant's 22) and the Claimant's counterpart in Operational Area 2 would have been reduced.

    c. An alternative would have been for the Second Respondent to recruit additional resource to work alongside the Claimant. However, as a charitable organisation, the Second Respondent's funds to make that adjustment are limited, and it must be assumed that doing so would reduce the Second Respondent's funds to do other aspects of its work.

309. Weighing those considerations, we find that it was not a reasonable adjustment for the Claimant's workload to be reduced.

310. As for the second Asserted RA - more time for specific tasks - as a general complaint about too much work, that would more properly be described as a

reduced workload, and so be covered by the first Asserted RA above. In relation to the specific tasks assigned to the Claimant on 18 February and 25 February 2020:

a. We find that it would have been an effective step: giving the Claimant more time to complete these tasks would have prevented the Claimant suffering the disadvantage she did due to her dyslexia;

b. However, the step was not practicable in relation to the specific incidents the Claimant relies upon – the Director of Children's Services needed the report for 24 February 2020, and it was to be provided to Education and Children's Services Committee in Richmond (one of the Second Respondent's effective owners) to demonstrate the Second Respondent's efforts to reduce the numbers of NEETs in the Borough. As Ms Parrott put it in oral evidence: "*it needed to be done*";

c. The First Respondent assigned a Data Manager to assist with the task, and Mr Chapman had made prior broad offers of help that would apply to this kind of task, but the issue was that the Claimant was the person who worked with these young people, and she was the only person able to answer the First Respondent's questions on the working draft of the report. It was not a question of financial or other resources not being available to assist the Claimant – the resource that the Second Respondent could usefully provide was provided to her; and

d. We regard as significant the fact that the Second Respondent is a charitable organisation, which is funded by use of public funds provided by its founding public body organisations. It needs to be able to justify its use of those funds in an effective manner, and this report was designed to do that.

311. In light of the above, we do not consider that more time for the specific tasks of the 18 and 25 February 2020 was a reasonable adjustment.

312. As for the third Asserted RA - support within organisation for workload - we find that that was provided.

a. The First Respondent wrote to the Claimant on 20 December 2019, which included: "*Paul and I have asked you to let us know what your pressures are so we can modify your workload or change your duties where needed. We have asked that you let us know as soon as you start feeling overwhelmed so we can put measures in place to support you.*"

b. Mr Chapman observed on 7 February 2020 that the Claimant should reach out to him if she needed help.

c. When the tasks of 18 and 25 February 2020 were assigned to the Claimant, one or two Data Managers were also involved in getting the report ready for the First Respondent's review.

d. Mr Chapman repeated his offer of help specifically in relation to the 25 February 2020 task. Mr Chapman emailed on that day in the following terms: "*Hi there I can help! However, I don't have access to Arnaud's tracker. I emailed prior to half-term to try to clarify WHO is NEET so that we can break them up into categories…*").

313. Consequently, the Claimant's RA Complaints fail.

The Harassment Complaints

314. In relation to the Harassment Complaints:

a. The **first Harassment Complaint** is that, on 23 October 2019, the First Respondent ridiculed the Claimant's spelling and writing speed in front of colleagues, and undermined the Claimant's work. As set out above, we find that that did not happen as a matter of fact.

b. The **second Harassment Complaint** is that, on 24 January 2020, the First Respondent addressed each staff member by name except for the Claimant in a meeting. As described above, we also find that this did not happen as a matter of fact.

c. The **third Harassment Complaint** is that, on 25 February 2020, the First Respondent required the Claimant to travel to two different places at once, necessitating a 75 mile trip. Again, we find that this did not happen as a matter of fact.

d. The **fourth Harassment Complaint** is that, on 18 February 2020, the Claimant was given less time than she needed to complete tasks. Once again, we find that this did not happen as a matter of fact.

e. The **fifth Harassment Complaint** is that, on 13 March 2020, the First Respondent reprimanded the Claimant for not asking for permission for funding for students when she had been given permission by her line manager, Mr Chapman. The Respondents do not dispute that this reprimanding occurred.

f. The next question, in relation to this fifth Harassment Complaint, is whether that was unwanted conduct. We find that it was. The Claimant certainly did not want to be reprimanded for what she regarded as showing initiative, achieving something beneficial for her students, and keeping her line manager informed as she did so.

g. It therefore follows that the Tribunal needs to consider whether that unwanted conduct had the proscribed purpose, or effect, of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We readily find that it did not have that purpose: the First Respondent's evidence on this point was highly persuasive – her purpose in admonishing the Claimant for

applying for that funding without prior discussion with her as Headteacher was twofold:

i. to ensure that she had oversight of external funding applications, relevant to the policy priorities of the Second Respondent as regards pushing for amendments to government funding for 16-18 year old NEETs; and

ii. to ensure equity between the cohort of young people with whom the Second Respondent was working (i.e., whether it was appropriate and proportionate for the Second Respondent to be making a funding request for two students for this sum of money when it had many more students it was working with).

h. The next question is therefore whether the unwanted conduct had the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. These are, and were intended by Parliament, to be strong words – denoting a high threshold of a behaviour's effect before it should be found to be harassment (*Betsi Cadwaladr*). This question must be answered by taking account of (a) the perception of the Claimant, (b) the other circumstances of the case, and (c) whether it is reasonable for the conduct to have that effect (as per section 26(4) of the 2010 Act).

i. The Claimant was undoubtedly very upset by the criticism, and in the Tribunal's view would justifiably have been so, given the apparent "about-turn" by the Mr Chapman, who had encouraged her to act as she did. Whilst these are strong words, the Tribunal finds that the Claimant perceived this treatment as humiliating and degrading – in the context of the other challenges facing her at the time in light of her health and the extension of her probation period. However, the Tribunal finds that while it was reasonable for her to be annoyed and frustrated by the criticism, and bitterly disappointed that her initiative was not recognised with the praise she felt it deserved, the Tribunal does not consider that it was reasonable for the conduct to have that effect. It is legitimate for management to correct a practice – whatever the good intentions were behind it – and sometimes line managers make mistakes, as we consider Mr Chapman did in this instance by also neglecting to keep the First Respondent informed. We consequently find that the fifth Harassment Complaint did not have the proscribed effect and therefore fails.

j. The **sixth Harassment Complaint** is that, on 26 March 2020, the First Respondent made an allegation to social services about the Claimant's parenting. The Respondents accept that they passed information on to the relevant authorities on 26 and 27 March 2020, though their position is that they were not making any allegations when doing so. The making of these referrals was certainly unwanted conduct.

k. The next question is whether the making of the referrals had the proscribed purpose or effect – that of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

l. As for purpose, we find that it did not. The Tribunal has already found that the Respondents' purpose in making the safeguarding referrals was twofold: to ensure the safety of the Claimant's son, and to comply with their statutory duties to make those referrals. The proscribed purpose is therefore not made out.

m. In relation to the question of whether the making of the referrals had the proscribed effect, this question must be answered by taking account of (a) the perception of the Claimant, (b) the other circumstances of the case, and (c) whether it is reasonable for the conduct to have that effect (as per section 26(4)).

n. The Claimant's evidence is clear that, while she understands why the referrals were made, the effect on her was seismic. The aspects of the referrals that she regards as "embellishments" caused her particular distress. The Tribunal finds that the reporting of this information created a degrading and humiliating environment for the Claimant.

o. The other circumstances of the case are significant on the facts here:

    i. the making of the safeguarding referrals was mandated by law;

    ii. failing to make the required safeguarding referrals would have risked damage to the standing of the First and Second Respondents in their field of work, and their work is a public good;

    iii. the Claimant was aware of these facts given her expertise and knowledge in the field through her work;

    iv. the Respondents had real, pre-existing concerns about the health and wellbeing of the Claimant, and following information received from Ms Young-Thomas, the health and wellbeing of her son, and they were looking for appropriate help and support to be provided to them both if that was needed;

    v. despite the fact that it must have been immensely difficult to do so, the First Respondent met with the Claimant to tell her about the referrals. That provided an opportunity for the First Respondent to explain what had been said and why, and to try to communicate that she was not personally making a judgement as to the accuracy of the claims of Ms Young-Thomas. In doing so, the First Respondent sought to soften, if it was possible to do so, the effect of the making of the safeguarding referrals on the Claimant's dignity, and to try to reduce the terrific impact the

referrals must have had on the Claimant's perception of her relationship with her employer; and

vi. one reason the making of the referrals had such an impact on the Claimant was that Ms Young-Thomas had been a personal friend of hers. That contributory factor to her distress was totally unconnected to the actions of the Respondents.

p. As for whether it was reasonable for the making of the referrals to have that effect on the Claimant, we find that it was reasonable for the Claimant to feel degraded and humiliated by the referrals.

q. The next question that arises is whether the making of the referrals *relates to* the Claimant's disabilities. While the content of the referrals included reference to the Claimant's anxiety and depression, we find that the referrals were not "*related to*" her disability. Recognising that "relating to" is not a test of causation, the Tribunal notes that the reasons the referrals were made were unrelated to the Claimant's disability, and (while a comparison exercised is not required) we find that the Respondents would have acted in the same way had they received the same information about a different non-disabled employee, which is a strong indicator that the making of the referrals was not "*related to*" the Claimant's disabilities. In that hypothetical case, the information about the referring employer's perception of that hypothetical employee would have been different to the information included about the Claimant – their circumstances would be different – but the inclusion in the referral of information pertaining to the Claimant's mental health was additional information, it was not the focus of the referral. On the facts here, the referral centred upon and was prompted by receipt of information from Ms Young-Thomas about the Claimant's son – and this is evident from the fact that the First Respondent knew about the Claimant's contemplation of suicide – an extreme mental health crisis - on 20 March 2020 and did not make or consider making a referral at that time. The "change" which prompted the referral was the information about potential neglect of the Claimant's son provided by Ms Young-Thomas. The unwanted conduct here related to the receipt of that information, not to the Claimant's disability (and the Panel notes the analogies between this case and the decision and analysis in the *Kelly* case cited above). The sixth Harassment Complaint therefore is not made out.

315. Therefore the Harassment Complaints also fail.

Constructive dismissal

316. The Claimant avers that the First and Second Respondents subjected her to a discriminatory course of conduct (consisting of the other allegations of

discrimination in her claim) and that the failure to deal with the Claimant's grievance was the "last straw". She therefore says that her resignation on 6 November 2020 was in fact a constructive dismissal by the Second Respondent, i.e., that:

a. a course of conduct by the Second Respondent, culminating in the failure to deal with her grievance, amounted to a fundamental breach of her contract of employment;

b. the breach caused her to resign; and

c. she resigned without affirming the contract).

317. In light of our findings on the Claimant's other discrimination claims, we find that there was no such course of conduct (nor did the putative "last straw" occur, because there was no failure to deal with her grievance). Consequently the Claimant was not constructively unfairly dismissed, and therefore the Claimant's sixth Direct Discrimination Complaint, and her sixth Discrimination Arising Complaint, both fail.

Time

318. As none of the Claimant's claims succeed, there is no need to consider whether any of those claims are out-of-time and therefore outside of the Tribunal's jurisdiction.

Privacy and restrictions on disclosure

319. As noted above, the Tribunal asked the parties to make representations on the question of whether any Orders should be made under Rule 50 of the Employment Tribunal Rules of Procedure 2013 in relation to the identity of the Claimant's son. The Claimant asked for similar consideration to be given to protecting the identity of her mother. Orders:

a. Anonymising any references to those individuals in the Tribunal's judgment;

b. Restricting reporting on those individuals by name; and

c. Restricting the disclosure of the name of those individuals in any documents forming part of the public record of this hearing,

were therefore considered. In fact, this judgment contains no named references to the Claimant's son or her mother, and so an order anonymising this judgment need not be considered further.

320. As for the remaining two privacy orders in contemplation, the starting point is the presumption that there should be no restrictions on the naming of individuals in documents forming part of the public record of this hearing or in the reporting of

it. The principle of "open" and public justice recognised in Article 6(1) of the European Convention on Human Rights requires justice to be done to be seen to be done. That is not the end of the story, though, as the Article 8 rights of the Claimant's son and mother are engaged by virtue of the fact that:

a. Contents of those documents name the Claimant's son, and make unproven allegations of his neglect (there are around 70 named references to him in connection with those allegations); and

b. The Claimant's mother is named, and some health conditions connected to her, in a small number of documents.

321. The rights of the Claimant's son and mother to respect for their private and family lives conflict with the right to a public hearing.

322. In each case, the connection of the information in the hearing bundle and witness statements regarding the Claimant's son and mother has the potential to cause them harm by creating a public record which identifies them specifically. In the case of the Claimant's son, this risks stigmatising his familial relationships, and in the case of the Claimant's mother, risks sharing personal health information attributed to her (some of which the Claimant says is inaccurate) publicly.

323. Whilst the starting point is that justice should be open, the Tribunal notes that:

a. neither the Claimant's son nor her mother is a party or a witness in these proceedings;

b. there is no legitimate public interest in naming them (as there may be in other instances, e.g., if a third party is accused of criminality in documents forming part of a public record of a case); and

c. the public understanding of the facts of this case and the reasons why it was decided in the way it was is not inhibited in any way by anonymising references to the Claimant's son and mother,

and consequently the Tribunal perceives that there is limited departure from the principle of open justice by making Orders for the anonymisation of the public record of these proceedings. We deem that limited departure necessary, appropriate and proportionate in light of the risks to the Article 8 rights of the individuals concerned identified above.

324. The Respondents have made the Tribunal aware that the Claimant has sought to publicise these proceedings widely, writing to journalists and her MP about them. The fact that the Claimant has chosen to put aspects of this case – though not the names of her son or mother – in the public domain does not change our conclusion that it is appropriate to Order that the documents forming the public record of this case should anonymise references to those individuals. If anything, that fact increases the likelihood of harm to the Claimant's son and her mother if documents naming them in a matter which is already in the public domain are made available by the Tribunal or others.

325. While this is of only minor importance in the exercise of weighing of the competing Article 6 and Article 8 rights that we have described above, we note that both parties support the making of the Order that the documents forming the Tribunal's public record of this case should anonymise references to those individuals.

326. In light of the fact that this judgment does not name those individuals, and an Order will be made ensuring that their names do not appear in the documents forming the Tribunal's public record of this case, there is no need for the Tribunal to make a restricted reporting order. The name of the Claimant's son and mother should not be connected to these proceedings unless the parties themselves make that connection, which seems highly unlikely in light of their support for the Order we are making in relation to the Tribunal's records.

Conclusions

327. For all of the above reasons, each of the Claimant's claims fail.

328. The Tribunal Orders that any documents entered on the Register or otherwise forming part of the public record of this hearing are to anonymise the names of each of the Claimant's son and mother. There is no time limit on this Order – it is evergreen.

Employment Judge Ramsden

Date **10 December 2023**

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date **14 December 2023**

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