EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Russell**

Respondent: **Blackpool Council**

Heard at: Manchester Employment Tribunal

On: 4, 5, 6, 7, 8, 11, 12 December
13 December (in Chambers)

Before: Employment Judge Dunlop
Mr J Flynn
Ms P Owen

Representation

Claimant: In person
Respondent: Mr M Mensah (Counsel)

JUDGMENT

1. The claimant was, at all material times, a disabled person by reason of fibromyalgia. She was not disabled by reason of facial disfigurement or anxiety/depression.

2. The claimant's claim of harassment under s.26 and s.40 Equality Act 2010 succeeds in part. That claimant was subject to harassment by reason of a number of WhatsApp messages which were posted to a group of which she was a member between 12 January 2021 and 17 March 2021. The Tribunal finds that messages referring to the claimant herself did not constitute or contribute to the unlawful harassment.

3. The claimant's claim that the respondent failed to comply with a duty to make reasonable adjustments under ss.20-21 and s.39 Equality Act 2010 is not well-founded, and is dismissed.

4. The claimant's claim that she was subjected to detriment on the grounds that she had made a public interest disclosure, under s.47B Employment Rights Act 1996 succeed in part. The respondent subjected the claimant to a detriment for this reason when Claire Coggan failed to invite her to join a

replacement WhatsApp group on our around 15 April 2021. The claim is not well-founded insofar as it relates to the other detriments alleged by the claimant.

5. The claimant was constructively dismissed by the respondent. The claimant's claim of unfair dismissal under s.94 and s.98 Employment Rights Act 1996 succeeds.

6. The claimant's claim of 'automatic' unfair dismissal on the grounds of having made a protected disclosure under s.103A Employment Rights Act 1996 is not well founded and is dismissed.

7. The claimant's claim that her dismissal was an act of harassment and/or an act of direct discrimination under s.26 and s.40, or under s.13 and s.39 Equality Act 2010 is not well-founded. That claim is dismissed.

8. The compensation to be awarded to the claimant will be determined at a Remedy Hearing, on a date already notified to the parties.

REASONS

Introduction

1. The claimant, Mrs Russell, was employed as a Client Finance assistant by the respondent council from March 2019 (with continuous service from August 2017) until her employment terminated, by reason of resignation, on 4 June 2021.

2. In brief summary, the work of the respondent's Client Finance team changed overnight from office-based to home-based with the onset of the covid-19 lockdown in March 2020. At the same time, the team supervisor created a WhatsApp group to enable the team to communicate.

3. Over the course of the next year, various messages were posted on the WhatsApp group which, it is common ground, were inappropriate and unprofessional. Mrs Russell reported the messages to her manager at the end of March 2021. She complains about the messages themselves, and about how the respondent handled the report that she made about them.

4. Ultimately, she resigned a few weeks after making the report, on 4 June 2021. She asserts that she was constructively dismissed.

5. As well as the claims noted above, Mrs Russell brings complaints of disability discrimination related to particular matters which are said to have occurred during the home-working period.

The Hearing

6. The first day of the hearing had been set aside as a reading day, with an initial discussion with parties through CVP. (For reasons which will become apparent

later, we permitted Mrs Russell to join the CVP hearing with her camera switched off,)

7. From the initial discussion it was clear that both parties were ready to proceed. Many of the documents in the bundle were redacted and Mrs Russell explained that there were a small number of instances where she felt that it would be necessary for the Tribunal to see an unredacted version of the document in order to understand its relevance or significance. We agreed that Mrs Russell would bring the relevant unredacted copies with her to the in-person hearing and we could discuss admitting the unredacted versions of the documents as the matter arose in evidence. Beyond that, we discussed timetabling and other administrative matters and then adjourned to read the statements and the documents. We were able to read all the documents referred to in the statements (including to look at the large volume of WhatsApp messages at the heart of the claim) in the remaining time available on Day 1.

8. We heard Mrs Russell's evidence on Day 2 and Day 3. She gave evidence on her own behalf and called no supporting witnesses We commenced the respondent's evidence on Day 4 and heard, in turn, Mr Dean Stockwell, Mr Mark Watson, Miss Claire Coggan, Miss Louise Jones, Mrs Jill Farrar and Mrs Linda Dutton throughout day 4, 5 and 6.

9. The presentation of the evidence proceeded smoothly until Day 6 (Monday), when Mrs Russell was part-way through cross-examining the respondent's last witness, Mrs Dutton. Mrs Russell explained that she suddenly felt unwell, which she put down to the stress of the proceedings and having had little sleep over the weekend. She said that she was unable to continue her questioning and proposed to simply end her cross examination. We adjourned for an early lunch break, hoping that Mrs Russell would be fit to continue when we reconvened. Unfortunately, she still did not feel well enough to continue questioning. Mrs Russell did not bring anyone with her to the hearing, so there was no one who could take over.

10. The Employment Judge canvassed with the parties the possibility of Mrs Russell handing up her list of prepared questions and the panel incorporating those into the questions they would ask of the witness. Mr Mensah took instructions and indicated that whilst the respondent did not formally object to that proposal, there was a concern that if Mrs Russell was not asking her own questions then she would not be able to follow up those questions in the way she would otherwise have wished to. Further, as she was unwell and on her own, she may not be able to make notes and use the material in her submissions.

11. The Employment Judge explained to Mrs Russell that the case law is clear that a genuinely unwell party was entitled to a postponement of the hearing, however inconvenient for the Tribunal or the other parties. However, a postponement would mean that there would be a gap of several months between the great majority of the evidence and the Tribunal's deliberations. Mrs Russell was very clear that she did not wish to apply to postpone the hearing. In the circumstances, the panel proceeded as proposed by the Employment Judge. The Judge reviewed Mrs Russell's prepared questions and, omitting those which seemed to be repetitious, or points more appropriate to submissions, put them to Mrs Dutton. Mrs Russell was offered the

opportunity at the end to ask any follow-up questions, and indicated that she had none. Questions from the panel members then proceeded as usual, and Mr Mensah was given the opportunity to re-examine Mrs Dutton (although he had no questions). The panel were satisfied that this was a fair way to conduct the proceedings in the circumstances, as it gave more opportunity to Mrs Russell to make her points than if she had simply ended her questioning early. The Employment Judge was careful to make clear to Mrs Dutton that certain questions which contained criticism of her actions, or which may have suggested that the panel had formed a particular view, were questions which were being read form Mrs Russell's list and should be viewed as her question and not a question from the panel. Finally, in deciding to proceed in this way the panel had regard to the fact that Mrs Dutton was one of the less significant witnesses, and that Mrs Russell had completed a good proportion of her cross examination before taking ill.

12. After completing Mrs Dutton's evidence in the afternoon of Day 6, the Tribunal then adjourned overnight to allow Mrs Russell some further time to recover and for the parties to exchange the written submissions that both had indicated they had prepared.

13. Each prepared a very lengthy written submission and we were grateful to both Mrs Russell and Mr Mensah for the time and effort that had obviously gone into these. Having read the written submissions in detail, we reconvened at 3pm on Day 7 to allow the parties to make any supplementary oral submissions, and to respond to each others' written submissions. By agreement, this was done by CVP and, again, Mrs Russell kept her camera off throughout. Each party made very brief oral submissions and we then adjourned for deliberations.

14. There was little need during the course of the hearing to identify service users by name and the redactions in the bundle meant that those names would not be apparent to a member of the public observing the hearing and using the bundle to follow proceedings (as happened for a couple of sessions of evidence). There was one service user who had to be identified by name as his name was relevant to the evidence. The Employment Judge directed that he should not be named in any transcript subsequently produced of the hearing. The Tribunal received an unredacted copy of page 1007 of the bundle, which contained his name. That was not added to the public version of the bundle. Similarly, the Tribunal received unredacted copies of pages 1031 and 1032 of the bundle, in order to understand the nature of a video which had been circulated on the WhatsApp group (those pages showed stills from the video). Those documents were again not added to the public version of the bundle.

15. At the end of the hearing, the parties produced a helpful Schedule of the WhatsApp messages relied on in relation to the harassment allegations, identifying which service user(s) (if any) particular messages were referring to. These identified the service users by an initial.

The Issues

16. Mrs Russell's claim form, which she prepared without legal advice, included a very long and detailed attachment running to more than 80 pages. It was very hard to understand from the claim form what claims she wished to bring. The claims were clarified over the course of two preliminary hearings, one in front

of Employment Judge Dunlop (also the judicial member of this panel) on 16 December 2021 and another in front of Employment Judge Shotter on 14 March 2022. This process resulted in the production of a List of issues, which appeared in the bundle at pages 189-195. At the outset of the hearing, the parties agreed that the List of issues was accurate and up to date and it formed the basis for both parties' submissions and for our deliberations. A copy is attached as an Annex to this Judgment.

17. Although the parties helpfully structured their submissions around the agreed list of issues, we have taken a slightly different approach, dealing with the question of disability status first, and then considering the claims in the chronological order (broadly) in which they arise.

Preliminary Issue - Disability Status

18. Mrs Russell relies on three conditions. Each of these, she says, amounts to a disability for the purposes of the claim. They are a facial deformity (Mrs Russell stated that this was a more accurate descriptor than "facial scarring" which appears in the list of issues, and the respondent took no issue with this change), fibromyalgia and depression/anxiety.

19. The respondent did not accept that Mrs Russell was disabled within the meaning of s.6 Equality Act 2010 ("EqA") by any of these conditions during her employment. This matter therefore fell to be determined as part of this final hearing. It was not dealt with as a preliminary issue within the hearing, but it is convenient to set out the evidence, arguments and our conclusions on this point as a preliminary section within this Judgment.

The Law

20. Section EqA deals with the question of 'disability status' i.e. when a person will be considered to be a disabled person for the purposes of the Act. It provides (as relevant) as follows.

> **6 Disability**
>
> **(1) A person (P) has a disability if—**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.**

21. The word "substantial" is defined in s.212(1) EqA as meaning "more than minor or trivial".

22. Section 6 is supplemented by Schedule 1 EqA and by statutory guidance (Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)). We had regard to these, and to the EHRC's Code of Practice on Employment, particularly Appendix 1 which deals with the meaning of disability.

23. Paragraph 3 of Schedule 1 addresses itself to cases of severe disfigurement and provides that:

(1) An impairment which consists of a servere disfigurement is to be treated as having a substantial adverse effect on the of the person concerned to carry out normal day-to-day activities.

24. The Act itself does not give any indication as to when a disfigurement would be considered to be "severe" although the 2011 statutory guidance states the following (paragraph B25):

> **Examples of disfigurements include scars, birthmarks, limb or postural deformation, (including restricted bodily development), or diseases of the skin. Assessing severity will be mainly a matter of the degree of the disfigurement, which may involve taking into account factors such as the nature, size and prominence of the disfigurement. However, it may be necessary to take account of where the disfigurement in question is (e.g. on the back as opposed to the face)**

25. Severity is a matter for the Tribunal to assess, although the EAT has noted that *"looking at the way in which the disfigurement has impacted upon a complainant in everyday life might be the best way of testing the issue of severity in some cases*." (See **Hutchinson 3G UK Ltd v Edwards EAT 0467/13**).

26. In relation to the more commonly-encountered conditions of fibromyalgia and anxiety/depression, the usual legal principles will apply:

27. Under paragraph 2(1) of Schedule 1 EqA the effect of the impairment is long term if it has lasted for 12 months, or is likely to last for at least 12 months. It is the effect of the impairment which the Tribunal must consider, not the existence of the impairment itself.

28. Some conditions have fluctuating effects, or they may abate entirely and then recur. Paragraph 2(2) Schedule 1 EqA provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have that effect if the effect is '*likely to recur*'. Likely to recur means that '*it could well happen*' — see para C3 of the Guidance.

29. Under paragraph 5(1) of Schedule 1 EqA, in determining whether the impairment has a substantial adverse effect on the person's ability to carry out normal day to day activities, the effects of medical treatment on the impairment should be ignored.

30. A Tribunal making a determination of disability status must focus on what a person cannot do, or can do only with difficulty, rather than on the things she can do easily. As noted in the Code, it is relevant to consider whether an impairment means that a particular activity causes pain and fatigue, even if it does not prevent Mrs Russell from undertaking it entirely.

31. In relation to the impairment of anxiety/depression we have had regard to the need to distinguish between "clinical" impairments and something which might merely be a reaction to adverse circumstances. (See **J v DLA Piper UK LLP 2010 ICR 1052 EAT**).

Facial deformity

32. In a statement prepared outlining her various medical conditions, Mrs Russell concisely and effectively described the matter giving rise to her alleged disfigurement as follows:

> **I had a Parotidectomy around December 2005. The surgeon removed the Parotid gland from the right-hand side of my face. This has resulted in a hollow in the side of my face where the gland was removed. Because the surgery involved making a large cut from my ear to my neck it has also resulted in my face being asymmetrical and my eyebrow being higher than the other.**

33. It was not disputed by the respondent that Mrs Russell had undergone the surgery as described, nor that (as she asserted) she had been offered further reconstructive surgery but declined this.

34. Mrs Russell produced a number of annotated photographs. We had regard to these but did not permit Mrs Russell to cross examine the respondent's witnesses on them. We accept that none of the respondent's witnesses noticed the alleged disfigurement whilst they worked with Mrs Russell. We considered that any opinion they expressed on the photographs would not assist us in reaching our own conclusion as to whether Mrs Russell can be considered to have a severe disfigurement. It was clear that asking them to express such an opinion was likely to be uncomfortable for all concerned.

35. The panel are unanimously of the view that Mrs Russell does not present has having any facial disfigurement. We formed this view having observed her in the hearing over the course of the five days which the parties attended in person. During the hearing we had the opportunity to see her face from various angles, and to observe her sitting still, speaking and moving around. Taking account of the fact that Mrs Russell wears her hair long due to her sensitivity about her face, we also carefully considered the photographs she had provided, in which her hair is arranged away from her face.

36. When one is aware of Mrs Russell's surgical history, the effects of that surgery are detectable in terms of the shape of the right side of her face and a (very slight) degree of asymmetry. We are satisfied, however, that someone interacting with Mrs Russell without knowledge of that history would not consider her to have any disfigurement, nor consider her appearance to be in any way remarkable. Mrs Russell has expressed the view that she looks very different now to the way she looked before the surgery, and that may indeed be the case, but having a changed appearance is not, in the opinion of the Tribunal, synonymous with disfigurement.

37. In all those circumstances, we find that any disfigurement which has been left by Mrs Russell's surgery cannot properly be described as 'severe' and that paragraph 3 of Schedule 1 is not engaged.

38. It remains open to Mrs Russell to satisfy the 'standard' section 6 definition, and we accept that there is some physical after-effect of the surgery which could constitute a disfigurement (and therefore an impairment), notwithstanding our finding that this is not "severe" and would be unlikely to be noticed by a third party. We further note in this regard that the psychological effects of disfigurement may well be significant, even where the disfigurement itself can only objectively be viewed as minor. Mrs Russell does consider that her facial deformity has a substantial adverse effect on her ability to carry out day-to-day

activities. She gave only two examples – that she hates having her photograph taken and hates appearing on camera for video conferences.

39. We accept that the use of video conferencing has become far more prevalent since the pandemic, but consider that an aversion to appearing on screen is common and that it will often be possible for participants to attend with their cameras switched off without giving rise to difficulty or concern. We also accept that, generally, having one's photo taken has become much more common with the advent of smart phones. However, the frequency of photography (as with the use of social media) is very much a matter for the individual. There are many people who dislike being included in photos for various reasons. Overall, we are not satisfied that the effect Mrs Russell describes can properly be described as a substantial adverse effect on her ability to carry out normal day to day activities.

Fibromyalgia

40. As Mr Mensah noted, the medical evidence Mrs Russell presented in order to establish disability status was very limited. In respect of fibromyalgia, there was a summary of medical records which contained a one-word entry supporting her evidence that she had been diagnosed with fibromyalgia in 2011.

41. Again, we had reference to the disability statement prepared by Mrs Russell. Mr Mensah did not suggest that she had exaggerated the effects of her condition in this statement. Mrs Russell records constant pain. She also records weakness in her legs and fatigue, including sleeping difficulties. She also records dizziness and balance problems. All of these symptoms get worse during 'flare ups' which she experiences 50-60% of the time. She has few or no symptoms only 2-5% of the time.

42. These symptoms cause difficulties for Mrs Russell in terms of walking, with her capabilities on a 'normal' day being limited to 50-100m. She also has difficulty in doing housework, due to pain and tiredness and, during 'flare-ups', she may not be able to shower without assistance.

43. Mrs Russell is on long-term pain relief medication. We were not given any specific evidence as to the 'deduced effect' of her condition – i.e. how her ability to carry out day-to-activities would be impacted if her were not taking medication. However, we consider as a matter of common sense that it is likely to be worse, at least to some extent and for some of the time.

44. Some of the respondent's witnesses pointed to the fact that Mrs Russell has experience of renovating and letting houses and has talked about engaging in activities such as, for example, laying flooring. We do not consider that doing such activities on occasion is necessarily inconsistent with the symptoms and difficulties that Mrs Russell describes, and note that there was no exploration in cross examination as to the extent of her 'hands-on' involvement in renovation.

45. We are satisfied on the evidence that we have heard that Mrs Russell is disabled by reason of fibromyalgia and was throughout her employment at the council. We find that she meets the threshold set out in s.6 without reliance on

'deduced effect'. The fact that she was also taking medication, as described above, further fortifies us in this conclusion.

46. For completeness, we note that Mrs Russell also states in the statement that she suffers from osteoarthritis (diagnosed September 2019) and degenerative disc disease (diagnosed July 2020) both these conditions are likely to have contributed to the pain she experiences, although they are not relied on as separate disabilities. Having accepted that Mrs Russell experiences pain as described we consider it would be wrong to attempt to separate out the pain attributed to the condition relied on and that attributed to another condition. (Indeed, Mr Mensah did not suggest we should do that.) Although those diagnoses were made after Mrs Russell started working for the Client Finance team, they pre-date her allegations of disability discrimination.

Anxiety/Depression

47. Mrs Russell was diagnosed with mixed anxiety and depressive disorder on 17 May 2021. This was after most of the key events in the case, which will be set out later in this Judgment. She was signed off sick from work for one month from 31 May 2021 and the reason given on the sickness certificate for her being unable to work was "depression and anxiety" and "fibromyalgia". She subsequently received further sickness certificates over many months with the same reason given. She describes symptoms of severe low mood with a consequent adverse effect on her ability to carry out day to day activities because, for example, she struggles to get out of bed before lunchtime.

48. Whilst it is safe to assume that Mrs Russell's symptoms must have started at some point before she was diagnosed in May 2021 we find that the symptoms of anxiety/depression (as distinct from fibromyalgia) emerged only after she had made her disclosure initial on 29 March and, even then, only in the course of exchanges with the respondent when she became frustrated about the respondent's reaction.

49. Assuming, in Mrs Russell's favour, that her condition surprassed the threshold of substantial adverse effect as early as 14 April 2021 (which is a key date in the chronology, as will be seen below) there is nothing at all to suggest to the Tribunal that it was (at that stage) likely to last for 12 months. On the contrary, we would take the view that this was likely to be a short-term reaction to a specific stressful situation at work. We have no evidence that Mrs Russell had any previous episodes of anxiety or depression, nor any specific vulnerability. There was no reason, as far as we can see, to suspect that this episode would become so entrenched and long-lasting as it seemingly has. That would have remained the case until well beyond Mrs Russell's resignation and termination of employment on 4 June 2021, which is the last material date for the purpose of this case.

50. On that basis, we find that Mrs Russell was not disabled by reason of anxiety/depression for the purposes of this claim.

Conclusion on disability status

51. It follows, therefore, that we have found Mrs Russell to be disabled by reason of fibromyalgia only. The question of when the respondent had knowledge of this disability is dealt with below.

Findings of Fact

Background

52. Mrs Russell started permanent employment at the respondent council in summer 2017, working for a department called 'Vitaline'. She joined the council's Client Finance team in March 2019.

53. The Client Finance team acts as Court of Protection appointed Deputy, or Department of Work and Pensions Appointee, to receive and manage funds belonging to people who lack the capacity to do so themselves. Their clients would be a mix of people, including people with learning disabilities, people with brain injuries, people with addiction issues and people with dementia. Some may have more than one issue, and the cases could be very complex.

54. The Client Finance team sits within the Awards and Advice service, which itself sits within the directorate of Revenues, Benefits and Customer Services. This part of the council is separate, in organisational terms, from Vitaline. Mrs Russell applied for, and was interviewed for her role as an external applicant would be. When she joined the team she did not know any of her new colleagues or managers.

55. Mrs Russell says that she struggled with physical aspects of the Vitaline role due to her fibromyalgia and that that was her reason for seeking an alternative role. She says that her managers at Vitaline knew about this. However, documentation from her application to the Client Finance team shows that Mrs Russell ticked a box indicating she had no disability and gave no other indication of her health condition in her application.

56. Mrs Russell also says that, at her interview, she discussed her medical condition and her reasons for wanting to leave Vitaline. There is no documentary record of the interview but the respondent's witness who were involved – Mr Stockwell and Ms Farrar – have no recollection of any medical condition being disclosed. They say that if it had been it is likely that a referral to occupational health would have been made.

57. We find that Mrs Russell was reluctant to disclose more details of her health condition than was absolutely necessary. We draw that conclusion from her completion of the application form, but also from her later conduct (discusased below) which appears to demonstrate a reluctance in disclosing information relating to her health. In those circumstances, we prefer the evidence of Mr Stockwell and Mrs Farrar that this was not disclosed at interview. We are also not prepared to make any finding of any disclosure to Vitaline managers through which knowledge can be attributed to the respondent at large in circumstances where Mrs Russell has made only generalised assertions about what was known by Vitaline managers.

58. In the year before the onset of the Covid-19 pandemic, Mrs Russell got on well in the Client Finance team and enjoyed her work. This was a small, close-knit

team comprised mostly of very long-serving council employees. One member, Mark Watson, started around the same time as Mrs Russell but he knew other members of the team already through previous roles he had held. The team was led by Claire Coggan, who was a supervisor and who distributed the work amongst the team. Miss Coggan was not a line manager and matters such as holiday requests etc would be dealt with by Mr Stockwell, who reported into Mrs Farrar. Miss Coggan was, however, a supervisor on a higher grade than the other team members and recognised as being in the leader within the team. Between them Mr Stockwell and Mrs Farrar managed around five small teams in Awards and Advice, amounting to around 35 people overall.

59. Towards the start of her employment Mrs Russell felt that another member of the team, Claire Greaves, was being 'off' with her. At Miss Coggan's suggestion she raised this with Ms Greaves. This appears to have cleared the air and the matter was resolved. In an annual appraisal meeting Mr Stockwell paised Mrs Russell for her handling of this issue and commented that Ms Greaves "had no filter", which we take to mean that she could sometimes make comments which were somewhat unprofessional or inappropriate.

60. Claire Coggan and Claire Greaves were close friends. Mrs Russell felt that they also had a somewhat 'cliquey' relationship with two other members of the team – Jody English and Mark Watson. Mrs Russell was unhappy about the nature of some of the conversations between this clique – particularly swearing, sexual innuendo and comments about the team's clients. She did not, however, raise this with anyone and we find that, before lockdown, it was not a matter of huge concern to her.

61. When the Covid-19 lockdown was announced in March 2020, the team had to quickly change from being office-based to being home-based. On 23 March 2020 Miss Coggan created a WhatsApp group to enable the team to communicate with each other. Mrs Russell was added by Ms Greaves, who had her mobile number. Miss Coggan named the group "The Dream Team." Neither Mr Stockwell nor Mrs Farrar was added to the group.

62. It is evident that the WhatsApp group was created for, and used for, work purposes. Every day the team members would use it to let each other know when they were logging on, logging off, and going for lunch. They would pass on information about calls and queries, and generally use it for all the communication which would have taken place across the bank of desks the team had used when they were in the office.

63. As well as those functional work messages, the Dream Team became a channel for personal, social communications. There were few of these messages included in our bundle but the witnesses agreed this would include things like discussions about what people had been doing socially, TV programmes, and posts about their children and families.

64. Mrs Russell has suggested that WhatsApp should not have been used for work at all as it was a form of communication that was external to the council and unmonitored by management. We accept the respondent's explanation that the Dream Team group was set up in the unprecedented circumstances of the first covid lockdown as a means of attempting to ensure the Client Finance team could continue with its work whilst its members were working remotely, and in

circumstances where the IT hardware and systems available to the team members fell far short of what would ideally be required for an effective remote working operation. From the panel's personal knowledge, and that gleaned from involvement in other cases, we find that setting up a team WhatsApp group in those circumstances was not only reasonable, but it was virtually universal amongst office-based teams in similar circumstances. We also consider that the dual work and social function of these groups was legitimate and important, providing a real support to many workers at a time of great uncertainty, upheaval and even fear.

65. The respondent's witnesses gave, at times, conflicting evidence about the WhatsApp group. Mr Stockwell (who was not a member), was adamant that the group was entirely social, although other witnesses (including Ms Coggan and Mr Watson who were members) conceded to a greater or lesser extent that it was used for work-related purposes as explained above. For the avoidance of doubt, we reject the evidence of Mr Stockwell on this point and find that the group was an important facet of the working life of the team from its inception, and that the managers were aware of this. There were other WhatsApp groups set up for at least some of the other teams within the directorate, which the managers also knew about.

66. As the pandemic period progressed and remote working became more established, the WhatsApp group became less essential and there were fewer work-related messages. This was because other software became available and various IT issues were resolved. However, the group was still being used for work-related messages, including the daily communication about logging in and out, until it was disbanded in April 2021. It would have been possible, from about September or October 2020, to direct the teams to use the chat function of Microsoft Teams for the purposes of their instant message communications. That software had become available to the council and was being used for virtual meetings. The managers took no steps to do this. We find that was because it simply didn't occur to them that there were any problems with the WhatsApp groups.

67. Unbeknownst to the managers, however, there was a problem with the Dream Team WhatsApp group. From the outset, a proportion of the messages posted had been unprofessional and inappropriate. Our bundle contained the message threads that Mrs Russell relied on for this case. These were not the only messages she found unpalatable, but they were the ones which, in her view, constituted unlawful harassment of her by reference to various protected characteristics and/or fell within (or demonstrated) the categories of wrongdoing set out in s.43B ERA.

The WhatsApp messages

68. We depart from the chronology here to set out some findings about the body of messages which were relied upon by Mrs Russell. They included messages sent throughout the period of time from the commencement of the group in late March 2020, to Mrs Russell's disclosures in late March 2021.

69. There were a lot of messages in our bundle – extending to well over 1,000 pages of screenshots, although many were repeated, often more than once. Mrs Russell claims that by being exposed to these messages she was

subjected to harassment within s.26 EqA. A helpful schedule prepared by the parties and handed up at the end of the hearing identified 66 messages/threads which were said to be related to various EqA protected characteristics. Mrs Russell also contended that some of the messages evidenced conduct which would fall within s.43B(1) Employment Rights Act 1996 ("ERA") categories of wrongdoing, which meant that by informing her employer about them she was making a protected disclosure.

70. In our view it is important within the Judgment to give a flavour of the sort of messages which were being sent in order to protect against any reader forming an assumption either that the comments were not serious at all, or that they were far more egregious than was actually the case. It is impracticable to produce all of the messages Mrs Russell relied on, but we intend to summarise below some of the more and less serious examples. It is also worth recording that, perhaps inevitably, the panel members took slightly different views as to the level of inappropriateness of the various messages. Although we make some observations here about messages which we have selected as being more or less serious, our discussions about whether the content of the messages meets the various legal tests which are applicable in this case will come later.

Messages related to Mrs Russell directly

71. Mrs Russell complained about an exchange dating from 16 September 2020 when a team member wrote "*Just answered a call from you Jackie but it went dead*" and Mr Watson commented "*she's started already*". Mrs Russell took this to be a reference to her being quiet or uncommunicative.

72. Mrs Russell complained about an exchange dating from 6 October 2020. The group were discussing someone outside the team who had referred to "Claire" as "awesome" and debating which Claire was being referred to. In response to a comment "*Er he knew very well which one I was!! He even said the quiet one!*" Mr Watson had quipped "*He meant Jackie [thumbs-up emoji]*". Mrs Russell later replied "*Even being bullied on my week off [thumbs-up emoji]*".

73. There were a couple of further exchanges which Mrs Russell gave as examples of messages 'aimed' at her. In one something is referred to as being "*Jackie's fault for spilling the beans*" and Miss Coggan comments *"We will have to think of a way of getting her back [thumbs up emoji]*". It is clear to the Tribunal that this was jovial, and that there was no real criticism of Mrs Russell. In another Miss Coggan directs a "middle finger" emoji at Mr Watson, saying it is on behalf of Mrs Russell "*because she wouldn't dare*". Again, the whole exchange is clearly jovial but also shows Miss Coggan being supportive of Mrs Russell.

Messages showing unprofessional conduct, including (alleged) breaches of the council's legal obligations

74. At the lower end of the scale, one exchange from August 2020 was about a team member returning from holiday and collecting her work laptop from her mum's house where it had been left for safe-keeping. Another team member commented: "*bless you leaving laptop with mum then it didn't get nicked! Mine would have been on the kitchen table with the curtains open!"* We struggle to find anything inappropriate about this sort of joking reference, which highlights

the conscientiousness of the colleague who went away. The person posting may or may not take a more cavalier approach to their own laptop security, but simply by making a joke of this nature they haven't done anything wrong.

75. In the middle of the scale there were numerous examples of team members making adverse comments about clients' use of money. For example from July 2020 a team member notes about a client "*He spent 500 yesterday*" Another team member responds: "*And he's in a hostel*". In another example from the same month Ms Greaves laughs at a service user wanting to spend £300 on a pair of diamond earrings "*I actually snorted when she said it."*

76. There were some examples where the messages appeared to be making a political point. For example thread 46 where one of the Claire's expressed the view that "*the benefit system is screwed, some people genuinely need it. Others just get way too much*". Several team members agreed, and Kira commented "*It's shocking how much some of our clients have*." There were further comments that it would be a "*nightmare*" explaining to clients in April that "*they've got less money and are back paying tax*" (referring to anticipated post-covid changes to state benefits).

77. A different sort of unprofessionalism is evident in a thread of messages instigated by Miss Coggan in September 2020, during her involvement in the (confidential) recruitment process for a vacancy on the team. She shared information from candidates' applications (including the internal candidate whom she clearly favoured) and the team speculated on the age and gender of candidates (in what was presumably a name-blind exercise). This thread ended with the comment "*Why start being professional now.*"

78. In terms of messages which were unprofessional, and arguably showed breaches of the council's obligations towards its service users, one extended thread dated 16 March 2021, was of particular concern. The context for this message thread was that a social worker had visited the house of an elderly man who had moved into a care home. The service user had mental health problems and a tendency to hoard belongings. The social worker had been unable to readily find the financial documents/information which the Client Finance team would need, and had instead removed various bags of belongings on the basis that a member of the team would go through them in the office. Claire Greaves had undertaken this task. As she went through the bags, she posted photos to the Dream Team group along with some commentary. Other members of the team responded and commented on the photos. The tone of the conversation was extremely disrespectful and mocking – for example there were comments that Ms Greaves appeared to have found body parts belonging to the service user's deceased wife, and a photo of CD or DVD disks with handwritten labels suggesting pornographic content, which were ridiculed at length. Ms Greaves also posted a photo of a physical photograph she had found of the service user, which was entirely unwarranted. Posting this picture was an infringement the service users' dignity that exacerbated the effect of the other photos/comments by making him more identifiable.

79. All of the managers who gave evidence before us expressed their shock and regret at the content of the messages which had been posted in the group. Of

all the messages, this thread appeared to be the one which the managers considered to be the most concerning, and we concur with that view.

Messages showing (alleged) criminal conduct

80. There was one message, in particular, which Mrs Russell contended evidenced criminal conduct. The message dated from 30 September 2020 and, in it, Claire Greaves, referring to a service user, stated "*I've stalked the shit out of him on Facebook, there is nothing poor about him! I've no sympathy he's a piss-taker*." Mrs Russell was adamant that the reference to stalking meant that a criminal offence had taken place. It is important to include this message in our overall summary given the focus it received during the hearing.

Messages of a sexual nature

81. A large number of the message threads highlighted by Mrs Russell fall into this category. There are some which we consider to be completely innocuous. For example, thread 6 from the parties' schedule, is an exchange about a team member potentially flirting with a contact or colleague (not a service user). In thread 42 a team member is exasperated about the information required to apply for a corporate bank card and says "*she is going to ask for my knicker size and inside leg measurement next*". Another team member asks whether the bank card will be set up for the whole team to use adding "*I doubt we wear the same size knickers*." In context, these seem to the panel to be straightforward humorous comments which nobody could reasonably take objection to.

82. A far greater number of messages contain mild sexual innuendo which many people would find inappropriate in a modern working environment. Many other people, we recognise, would see nothing wrong with comments at this level and view them as also essentially innocuous. Examples include repeated use of phrases such as "*bringing up the rear*," "*batting for both sides*" or "*it was this big*" in a context which is clearly intended to be both sexual and humorous.

83. We do not consider that any of the messages of a sexual nature are particularly egregious taken in isolation. There was a complaint that there had been a video posted of a naked woman. Whilst the implication at first seemed to be that someone on the group was disseminating pornographic content, the reality proved to be somewhat different. A video was posted to the group which had been forwarded many times to different WhatsApp accounts. It is a recording of a remote classroom lesson. Whilst one child is participating in the video call in the foreground a woman, presumably his mother or other family member, walks around unclothed in the background, evidently not realising that she is on camera. This was a clip which 'went viral' during the pandemic, with millions of people finding it amusing (although doubtless not those involved). Whilst sharing the video with a work WhatsApp group might be ill-judged and suggest a juvenile sense of humour, it is very different to sharing pornographic content.

84. Having said that none of these messages were particularly egregious on their own terms, we do note that the effect of messages can be cumulative, and this is something which we return to below.

Messages related to (service users') race

85. There were only two message threads said to relate to race, so we will explain the content of each of them.

86. The first dates from 8 October 2020. It arises out of a discussion about a team member's family member, who is working in a school. It is said that she has been "*kicked, punched and spat at today*". Another team member commented that they understood the school to be "*quite orderly*" then the initial poster replied "*Lot of gypsy families apparently, though this kid she's with isn't, he's just a little shit*." Mr Mensah argued that this was not a derogatory comment against "gypsy" families, as the child in question was noted not to be one. We agree with Mrs Russell that there is a derogatory implication to comment, taken in context. The suggestion is that a school is less likely to be orderly with lots of gypsy families, and that children from those families may well behave in the way described.

87. The second thread, dating from 10 November 2020, mentioned the name of a new client. The name was evidently of foreign origin and there was a joke about giving the client to Jody because she had difficulty pronouncing unusual names. We were provided an unredacted version of the message so we could see the name in question. Mr Watson commented "*please call him rectum by accident*". Despite Mr Mensah's submissions that this comment simply related to Jody's difficulties with pronounciation, we find it is a comment which is related to the service user's race, as it was a joke about his name, which is inter-twined with his ethnic origin. We do take account of the fact that the joke with reasonable expectation that the service user would never be aware of it.

88. We find that it is a serious matter for *any* offensive racial comments to appear on a WhatsApp group used for work-related purposes by council employees. However, we also note these were two isolated examples over a period of a year, and these particular examples are at lower end of the scale of comments which could have been made.

Messages related to (service users') age

89. Again, there are two comments said to relate to age so we will explain them both.

90. The first dates from May 2020 and makes a reference to a particular social worker being "wet behind the ears". We find that to be an innocuous reference to someone who is inexperienced, whether through their youth or length of service.

91. The second dates from 17 February 2021 and refers to a particular generation as "*all think[ing] their bloody entitled*". Whilst this is a comment which clearly relates to age in a broad sense, we cannot accept that any right-thinking person would take offence at it in this casual context.

Messages related to (service users') disability

92. There were large number of messages which were critical of service users and/or which made jokes at their expense. Mrs Russell said that these messages were related to disability, as the service users were all disabled.

93. Although Mr Mensah at one point asserted that not all of the team's service users would be disabled. We find it to be highly unlikely that an adult who lacks mental capacity to manage their own financial affairs such that they have to be managed by the council as Court of Protection appointed Deputy (or appointee for the purposes of receipt of state benefits) would fail to meet the test in s.6 Equality Act 2010. It would not be relevant, for example, if they did not qualify for Personal Independence Payment benefit. Even if we are prepared to accept that there may be the odd service user who, through some quirk, could properly be regarded as not disabled, the respondent did not suggest that any of the specific service users discussed in the messages (whose names and circumstances are known to the respondent) were not disabled individuals. Further, we consider that Mrs Russell reasonably held the view that the particular service users were disabled.

94. We therefore proceeded on the basis that every comment about a service user was a comment about a person with a disability. However, it does not automatically follow that every comment (or even every unprofessional or inappropriate comment) about a service user is a comment related to that person's protected characteristic of disability.

95. An example of this is thread 50, where a team member states that one of his clients has been arrested for making threats to kill and another team member responds "*Ffs we're getting a shit class of clients lately, what's happened to all them little old* lady's *we used to get?"* The disability of the service users provides the background context to the discussion, but no more.

96. An example of a less serious type of comment which might arguably relate to a particular service user's disability is a thread from March 2021 in which the team poke fun in quite cruel terms at a service user who has asked them to order him some white socks and sandals, including posting pictures of a pair of feet wearing socks and sandals together.

97. Broadly, our view was that most of the comments making fun of a service users, were properly considered to be related to disability. The individuals concerned would not be in the position of having the team involved in their personal lives were it not for their disabilities, and many of the comments making jokes at their expense arise out of their perceived naivety, their inability to manage money, and their inability to fit in with social norms. Those are matters likely to be related to the type of disability (learning difficulties etc) which the service users had.

98. It is more difficult to see that comments relating to criminal activity are related to disability. That may well depend on the context of the individual case.

99. The most serious examples of messages which make fun at the expense of service users and are, in our view, clearly related to the disabilities of those users, are as follows:

    97.1 A message thread from 28 September 2020 in which Claire Greaves refers to a service user as being a "spray it when you say it type", referring to a habit of some service users with learning difficulties spitting as they speak.

97.2 Thread 46: This related to an exchange involving Miss Coggan and Ms Greaves during which they refer to Ms Graves "doing her LD face" and "LD voice". Mrs Russell contends that this was a reference to a "learning disability" face and voice. It wasn't entirely clear if the respondent accepted that this was the meaning of the acronym LD but to the extent this was disputed, we accept that it was. We further reject the suggestion that Ms Greaves was intending to make a joke about her teenage son by making this reference. That may have been how the on-going joke had started, as described by Miss Coggan, but the exchange that we were referred to was clearly intended to ridicule people with learning disabilities generally, and was, in our judgment, rightly considered by Mrs Russell to be highly offensive.

97.3 Finally, the thread described above relating to the hoarder client and Ms Greaves' posts as she went through his bags of belongings.

General observations about the WhatsApp messages

100. There are a number of threads which demonstrate the team referring to their service users in casual, and often unprofessional language. The Tribunal is well aware that any team with 'clients' will inevitably talk about those clients. That is human nature, and it would include teachers talking about school pupils, hospital staff talking about patients, lawyers talking about clients or, as in this case, administrators talking about service users. In a private setting, those comments will often express frustration, annoyance, exasperation and similar feelings. They may well include frank opinions which the clients themselves may be offended by, and which may cause embarrassment to the organisation if they became known. In the context of the covid-19 lockdown, the Dream Team group took the place of verbal conversation for this team. It provided them with a forum to express, privately, the feelings of frustration and so on that are an inevitable part of almost every job. The role of the Tribunal is not to 'approve' or 'disapprove' of the messages themselves, it is to determine whether the claims Mrs Russell has made succeed, applying the relevant legal tests in each case.

101. When the messages are viewed one after the other, in these quantities, the impression given is of a deluge of material which is inappropriate/unprofessional at the least. When assessing the content, however, and particularly for the purposes of the harassment claim, we have to take account of the fact that the messages we saw were sent over the period of a full year and formed only a small proportion of the overall content of the WhatsApp group chat. The witnesses speculated that the quantity of inappropriate messages was perhaps between 5-15% of the total. The number of separate messages/threads each month which were said to constitute or contribute to harassment of Mrs Russell were in single figures, and often low single figures.

102. We find that the inappropriate messages were virtually all intended to be humorous, or in some cases exaggerated for comedic effect. This is clear from the context of each exchange. Whilst members of the team were no doubt frustrated or annoyed by service users, social workers, and workers in the wider

council and DWP from time to time, we find that there was no genuine threat or malice contained in any of the messages.

103. We find that Mrs Russell had a tendency to take a rather literal view of the things that she read. She genuinely perceived a level of threat or malice in some of the messages that goes far beyond what we, objectively, consider to be justified.

104. We note further that there was a culture clash within the team. Some team members found communication and camaraderie important. This meant that they were 'gossipy' in the office and made frequent posts on the Dream Team. Specifically, this was Miss Coggan, Ms Greaves, Mr Watson and Ms English. We don't agree with Mrs Russell that this was necessarily to the detriment of their work – people have different styles of working. Mrs Russell (and, perhaps, some of the other team members) preferred to get on with her work quietly with minimal interruption. In the office, she was happy to chat socially with her colleagues, but she was then able to get her head down and withdraw from the gossip when she wanted to do so. Leaving aside the unprofessional nature of some of the messages, she found the Dream Team group an irritant and a drain on her energy. She contributed to it as necessary for work, but not otherwise. She felt obliged to continue to receive and read the messages, including when she was on non-working days or on leave.

105. We find that through summer and autumn 2020 Mrs Russell was becoming increasingly unhappy about the WhatsApp group. We find that she resented the volume of messages and the intrusion into her life. She felt unable to 'switch off' from the group on her non-working days (she worked part time) or on her leave days. Whilst the general volume of messages was an issue, we also find that she was unhappy about the unprofessional content of some messages, particularly those involving service users. She had been uncomfortable with some of the attitudes displayed in the office, but the WhatsApp group had amplified those concerns. It is a truism that inappropriate "banter" often looks worse when written down, and also that tone is harder to judge in written communication.

106. The person who should have set the tone of the WhatsApp group and ensure that it was, and remained, free of inappropriate content was Miss Coggan. She had set the group up and was the supervisor within the team. Unfortunately, Miss Coggan not only tolerated inappropriate posts, but she appeared to encourage them and often made inappropriate posts of her own.

107. Miss Coggan, Mr Watson, Ms Greaves and the others understood that they were sending such communications in a private circle of trust. They felt that no harm was being done as no one outside the group would ever know. They were all aware, however, that the tone and content of the messages were not appropriate and that they should not be sending them. This is reflected in a message from Mr Watson in September 2020 stating that "*An outsider on here would shut us down within a week*", as well as Miss Coggan's comment (referred to above) "*why start being professional now?"*

108. In our view it is likely that if Mrs Russell (or anyone else) had simply responded to a couple of the earlier exchanges by saying something along the lines of 'hold on, that's not really appropriate' the other team members would

have tempered their behaviour and the problem would not have become entrenched. However, we accept Mrs Russell's evidence that she did not feel able to raise the issue in this way. She had seen messages criticising colleagues outside the team (such as social workers) who had annoyed members of the team; she knew that her supervisor was not only failing to stop the conduct, but actively participating in it; she was one of the newest members of the team and certainly the newest in terms of how long the individuals had known one another.

Working during the pandemic

109. From fairly early in the pandemic, Mr Stockwell and Mrs Farrar instigated weekly team meetings by video conference. These took place initially via Skype and then by Teams, when that software was introduced. Although operational matters would sometimes be discussed, these meetings were primarily 'keeping in touch' meetings designed to raise foster team relationships and morale whilst the teams were physically separated. Mrs Russell said very little at the Client Finance team meetings. This was because she did not wish her face to appear on screen. The video conference software would minimise or hide users who had not spoken, with larger videos shown of the people who were contributing.

110. We accept as a matter of fact that neither Mr Stockwell nor Mrs Farrar thought that the fact that Mrs Russell was not speaking during the meetings was a cause for concern. She had been one of the quieter team members in the office (albeit not silent) and there were numerous people across the teams they managed who chose not to speak very much in the virtual weekly meetings. Mrs Russell never expressly raised any concern or, for example, asked if it would be okay for her to participate with her camera off. If she had asked that, they would have been very happy to agree to it.

111. The period from the commencement of remote working (23 March 2020) to Mrs Russell's later disclosures about the WhatsApp group (29 March 2021) was almost exactly one year. During this period neither Mr Stockwell nor Mrs Farrar ever had a one-to-one meeting with Mrs Russell, nor did they check in with her about how she was coping with remote working and with her role generally. As Mrs Farrar has said in her witness statement, Mrs Russell was considered to be very conscientious and there were no problems with her timekeeping, her attendance or her performance and no suggestions that she was struggling.

112. On 6 October 2020 Mrs Russell sent a short email to Miss Coggan asking if it was a requirement to be part of the WhatsApp group or if she could delete it, and whether Miss Coggan could email her the information she needed for work. This email was sent late at night from her iPad, and therefore came from her personal email address rather than her work email address. Unfortunately, the email was never delivered to Miss Coggan's account. We accept Miss Coggan's evidence that she took this up with IT at a much later date, and discovered that the email had been received by the respondent's server but had not been forwarded to her due to firewall protocols.

113. Having received no reply to her email, Mrs Russell did not take further steps to raise the matter either with Miss Coggan, or with Mr Stockwell or Mrs Farrar.

We find, however, that the WhatsApp messages continued to make her feel uncomfortable. She believed (wrongly) that Miss Coggan had ignored her email, which only added to her reticence in raising the matter again. As she became more and more unhappy about the messages we accept that her worry was also starting to have a negative effect on her health, with her fibromyalgia symptoms increasing around this time.

Team meeting incident

114. An incident happened during a team meeting conducted by video conference around September/October 2020 in which Mark Watson made reference to Mrs Russell being quiet, and she stated that she didn't speak on meetings due to not wishing her face to appear on screen. Mark Watson then made some further comment about this, in a teasing way. Mrs Russel's evidence is that he said he was going to 'highlight' her and that her face then appeared in full screen on her own device and, she assumed, on those being used by other participants. She flipped the laptop screen upwards to take the camera away from her face, before disconnecting and reconnecting. Mr Watson's evidence was that the software being used (probably Teams, but possibly Skype) had no facility to enable him to 'highlight' another participant in this way, but that he commented (as a joke, and incorrectly), that he had highlighted Mrs Russell on his screen and was going to print off a picture to use as wallpaper at home (a 'joke' that he had made in relation to other team members at different points).

115. Broadly, we prefer Mr Watson's account as we found his evidence about the capabilities of the software (or at least his use of it) to be credible. We find it is likely that Mrs Russell saw her face appear on screen because she had spoken (to answer the query about why she was quiet) and that she then panicked. She may well have disconnected from the meeting and rejoined, but the other participants did not notice this as it was not unusual for connections to come and go.

Christmas present incident

116. In December 2020 Miss Coggan wanted to give Christmas presents to each of the team to thank them for their hard work during the year. She asked Mrs Farrar for Mrs Russell's address, which was provided. She dropped the present at the door without trying to speak to Mrs Russell and did the same with each team member (covid restrictions were then in force). Mrs Russell later sent an email thanking Miss Coggan for the gift.

117. Mrs Farrar accepted that giving out Mrs Russell's address without seeking her permission was a "breach of data protection". Without descending too far into the details of the Data Protection Act 2018 (which gives effect to the EU's General Data Protection Regulation (GDPR)) or the respondent's policies, we take the view that Mrs Farrar's concession was probably correct in a technical sense. However, we also find that this is the sort of action which would take place in workplaces up and down the country (particularly in the context of covid and remote working) and that neither Miss Coggan nor Mrs Farrar can reasonably be criticised for it. We also find that whilst Mrs Russell may have been mildly taken aback by this, she was not concerned about the fact that her address had been given to Miss Coggan at the time when it happened.

Rota and homeworking query

118. In summer 2020 the respondent had instigated a rota system under which members of the Client Finance team attended the office to do work which could not be done remotely. It was intended that one member of the team would be present every Tuesday and every Thursday. With around eight team members participating in the rota, each individual attended approximately one day in every four weeks. Team members could (and did) swap the days on which they attended (using the Dream Team group to arrange the swaps) which resulted in a more irregular pattern. For example, an employee might end up attending twice in three weeks, and then not for another five or six weeks, but it worked out at once every four weeks on average. When they attended the office, members of the Client Finance team might well see Mr Stockwell and/or Mrs Farrar, who were working from the office at least some of the time by that stage. The nature of the rota meant that they would not see other members of the Client Finance team.

119. By email dated 16 December 2020 Mrs Russell raised a query with Mr Stockwell about her Christmas leave and also said that she wanted to "*put in a request to work permanently from home*". She queried whether this would go to Mr Stockwell or to HR. Mr Stockwell replied to say he would get back to her, but noted that there was no indication at that point as to when temporary home working would come to an end.

120. We find that Mr Stockwell did not consider the request to be a priority in circumstances where Mrs Russell was currently working from home for the vast majority of her working time, and there was, as he said, no indication of when that would end.

121. Mrs Russell's evidence is that her health was deteriorating by this point due to the stress brought on by the WhatsApp messages and that even coming into the office on a limited basis in accordance with the rota was difficult. She was also dreading a potential return to the office when she would have to physically work alongside the members of the team whom she had now formed a very low opinion of. We broadly accept this evidence, although we find that Mrs Russell's aversion to the thought of a return to the office crystallised over time. At the time of making this initial enquiry, it was not such an urgent priority for her as she now suggests.

122. There was a conversation between Mrs Russell and Mr Stockwell in December, around the time the email was sent, but we find that Mrs Russell did not add anything substantive to what she had said in the email. If Mrs Russell had made it clear that her request was to come off the rota, then Mr Stockwell would have appreciated that this was a matter which required a decision, rather than being put off.

123. There was a further conversation in January. We find that in this conversation Mrs Russell explained to Mr Stockwell that she suffered from fibromyalgia and that her condition had been getting worse in recent months and causing her problems sleeping. She explained that this was the reason she felt she needed to work from home. In evidence, Mr Stockwell denied that he had been told of this health condition in the conversation. However, the

respondent's Grounds of Resistance state, at paragraph 26 "*The Respondent became aware of Mrs Russell's condition of Fibromyalgia in January 2021 when she disclosed it to her manager Mr Stockwell when discussing her working from home request*."

124. The respondent has never applied to amend the relevant part of the Grounds of Resistance and resile from that concession, despite Mr Stockwell giving evidence that he had had no such conversation. We consider that the respondent is bound by this concession, but we also find that it is very likely to be true. It is difficult to imagine how such a statement would have found its way into the Grounds of Resistance other than as a result of information obtained, directly or indirectly, from Mr Stockwell. The Grounds of Resistance were prepared in August 2021, a date much closer to the conversation in January 2021 than either the date when Mr Stockwell was preparing his witness statement, or the date on which he was giving evidence to us. Further, we find Mrs Russell's account of the conversation, including discussion of Mr Stockwell's daughter also having fibromyalgia, to be credible.

125. Although we find that Mrs Russell did discuss her health condition (specifically, fibromyalgia) in January 2021, we also find that she was still being circumspect about her reasons for wanting to work from home. These were partly to do with her fibromyalgia (which we accept had worsened) but were more directly related to her negative feelings about the WhatsApp messages and the attitudes on the part of her colleagues which she felt were demonstrated by the messages. She did not feel able to work in person with the other members of the team, but was not yet ready to disclose that.

126. We also find that Mrs Russell still did not specifically tell Mr Stockwell that coming in on the rota was a current problem for her, as opposed to anticipating a future problem with returning to the office on a more regular basis. We do not accept that the minimal requirement to attend the office approximately once every four weeks, in the absence of any other team member, was itself particularly problematic for Mrs Russell. Although she has told us during the hearing that it was, she has not really explained the rationale for this, and her communications about working from home during the currency of her employment were all forward-looking, seeking reassurance that she would not have to return to office on a more regular basis, rather than raising a current concern about the rota.

Mrs Russell's initial disclosure

127. Mrs Russell's level of discomfort about the messages had been increasing during the time the group was in operation. In October, she was uncomfortable enough to ask Miss Coggan if she could leave the group (in the failed email) and in December, she was uncomfortable enough to begin to pursue assurances about working from home.

128. Between the start of January and the end of March, Mrs Russell's level of discomfort escalated again. She was concerned during this time about various messages of a similar nature to those which had been posted previously. However, we find that one message thread, dated 16 March 2021, was of particular concern. That was the extended commentary by Ms Greaves as she went through bags containing a client's belongings, and the associated

comments from other team members. We have already described this thread and referred to it being probably the 'worst' example contained within the bundle.

129. A couple of weeks after this exchange, Mrs Russell contacted Mr Stockwell on a Teams call to ask him if she needed to be on the WhatsApp group. This led to a telephone conversation in which Mrs Russell explained her discomfort and informed Mr Stockwell that the WhatsApp group was being used inappropriately. This conversation is relied upon as a protected disclosure ("PD1"). Mr Stockwell asked Mrs Russell if she would be prepared to put the information in writing, which she did in a fairly lengthy email date 29 March 2021 (PD2). At the end of the hearing, the respondent conceded that both of these communications were protected disclosures within the meaning of s43B ERA.

130. Mrs Russell did not attach screenshots to her email, but instead typed out the content of some of the messages she had found offensive. In some instances where the threads were longer (including in relation to the "bags" thread described above) she simply summarised the nature of the thread in a sentence or so. The messages which Mrs Russell chose to reference in her disclosure are spread, in time, throughout the period during which the group was operating.

131. In her conversation with Mr Stockwell, Mrs Russell requested that her name not be passed on to Miss Coggan as the person who had raised the issue, as she believed Miss Coggan would share this information with Ms Greaves and she was concerned about the consequences of that. Mrs Russell stated that she said in this initial conversation that she was "ok with" her name being shared "later down the line" as part of an investigation under the Whistleblowing Policy. Mr Stockwell said that he did not recall this, and that he simply reassured her that the matter would be "kept confidential at this stage". We prefer Mrs Russell's evidence on this point; she had thought carefully before making the disclosure, in part, because she realised that she may well be identified of the source. She also referred in later correspondence to this part of the conversation with Mr Stockwell and has been consistent in her account.

132. Once the written disclosure had been produced, Mr Stockwell's only action was to escalate the issue to Mrs Farrar. He did not take any responsibility for supporting Mrs Russell and did not engage with the specific comments made in her letter that "*the comments are causing my stress and my illness to flare up*" and referring back to the previous working from home request and commenting that she "*dreads the day I have to work back in the office*".

Escalation and Initial Response

133. Having received a copy of the email from Mr Stockwell, Mrs Farrar contacted Mrs Russell via Teams and they had a conversation. Mrs Russell's evidence is that Mrs Farrar said "*I take it you want this dealt with formally*" and that she agreed. We accept this evidence, although we note that there was no discussion between Mrs Farrar and Mrs Russell about what "dealt with formally" would actually mean, particularly in relation to whether Mrs Russell's identity could be kept confidential. This is alleged to be PD3.

134. Mrs Farrer quickly escalated the matter to Miss Jones (who was the Head of Service and Mrs Farrar's manager). Miss Jones emailed HR for advice. Specifically, she emailed Susan Simister, who was the HR contact for this area of the business. Ms Simister did not give evidence to us. Miss Jones forwarded Mrs Russell's 29 March email to Ms Simister and commented that the content "*is not appropriate, is disrespectful to both service users, managers and team members and appears to discuss what should be confidential information*". she went on to query whether it would be appropriate to "*use the whistleblowing process here to start an investigation by someone in risk services who may be able to access the group and therefore see who these posts are from?".* She describes Mrs Russell as being "*brave*" to come forward and notes that she does not want to "*put her in an awkward position*".

135. Ms Simister then had a conversation with Tracy Greenhalgh, who is the respondent's Head of Service for Risk and Audit (a senior manager, at a broadly equivalent level to Miss Jones). Ms Greenhalgh also did not give evidence, but there is a record of the conversation in an email dated 8 April 2021, which sets out Ms Simister's reply to Miss Jones and Mrs Farrar. The email records that Ms Greenhalgh had said that "*the problem with WhatsApp is that it's encrypted end to end and it's very difficult to get any information from.*"

136. The Tribunal panel had great difficulty in understanding why it did not occur to any of the four managers involved to this point, nor Ms Simister, that it might be a good idea to have a conversation with Mrs Russell to ask if she was prepared to identify those involved and/or if she was willing and able provide screen shots of the messages.

137. The email from Ms Simister went on to say that "*Tracy doesn't believe that this would be something that would be dealt with under the whistleblowing policy and doesn't believe the investigation would achieve anything at this time."* We are reluctant to be too critical of Miss Greenhalgh in circumstances where she has not given evidence and we do not know the extent of the information conveyed to her by Ms Simister. It is clear to the Tribunal, however, that this is exactly the sort of circumstance which the respondent's Whistleblowing Policy *is* designed to deal with, and it is concerning that the Head of Risk and Audit failed to appreciate that, regardless of whether that was her own failing or due to the poor quality of information she received once the matter had been escalated through several levels of management.

138. Had the matter been dealt with under the Whistleblowing Policy there would have been various safeguards put in place for Mrs Russell – including simple matters such as communicating with her and keeping her informed. The use of that policy would also have funneled the respondent's managers towards considering whether disciplinary action was appropriate.

139. Ms Simister instead recommended that an instruction was given not to use WhatsApp for work related matters and, if further problems occurred, they could potentially be pursued as a failure to comply with a management instruction. Miss Dutton, who is the Head of HR and became involved in matters later, expressed regret that Ms Simister did not challenge the view taken by Ms Greenhalgh, and suggested that a significant difference in their respective grades might be a reason for that.

140. The poor advice from Ms Simister/Ms Greenhalgh was not questioned by Mrs Farrar or Miss Jones, both of whom appeared content with an informal resolution notwithstanding the views expressed to us about the seriousness of the matter, and the views that had been expressed in Miss Jones's email when she raised the matter to Ms Simister.

141. Subsequently, Mrs Farrar and Miss Jones held a meeting with Miss Coggan on 12 April 2021. They told Miss Coggan there had been reports of inappropriate messages in the Client Finance team Whatsapp group. Miss Coggan acknowledged that there had been such messages. (Again, the managers failed to explore whether copies of the messages could be obtained from Miss Coggan herself.) Miss Coggan asked if Mrs Russell was responsible for the reporting and was told that that information would not be disclosed. Miss Coggan believed, from this point, that Mrs Russell was responsible for reporting the activity on the group, although her suspicions were not confirmed until a much later date.

142. On 14 April Mrs Farrar sent a message to all the teams she managed acknowledging the usefulness of WhatsApp groups during the pandemic but informing them that team chat groups would now be set up on Microsoft Teams. The email stated "*obviously existing WhatsApp groups can continue privately but please could you put anything relating to work on teams from now on?*" Despite the fact that Miss Coggan had already been made aware of the disclosure, and indicated that she suspected Mrs Russell was behind it, there was nothing said in this email about inappropriate content within WhatsApp groups. Mrs Russell was (understandably in our view) concerned that the respondent was taking no steps to ensure that staff members did not simply continue to post inappropriate messages as 'banter' within the new 'social' WhatsApp group. She wanted the messages to stop, not simply for the respondent to distance itself from the actions of its employees.

143. Following this email there was discussion of the change within the Dream Team group. Miss Coggan initially posted that she was *"Happy to keep the WhatsApp group going for chat and banter purposes but obviously anyone who wants to leave the group can by all means and won't miss out on any work related matter as it will all be in teams now.*"

The new WhatsApp group

144. The following morning, however, Miss Coggan posted again saying that she would instead create a new WhatsApp group for those purposes, which team members would be invited to join. Mrs Russell never received an invitation to join the new group. In the respondent's response and in Miss Coggan's witness statement a somewhat convoluted explanation was given about Miss Coggan not having Mrs Russell's mobile number. In giving evidence, Miss Coggan candidly accepted that "her suspicion" that Mrs Russell had reported the messages in the Dream Team group was the reason that she did not invite her to join the new group. Her evidence, in response to that question from Mrs Russell was:

> *"Yes. It wasn't that black and white. My suspicions led me to think you felt uncomfortable being on a group on that platform."*

Every other team member was invited and did join. At a later date, new recruits to the team were also invited to join and did so. The new group was used for social messages and not generally for work chat, although occasionally members would say if they were having problems logging on (and therefore couldn't access Teams).

Mrs Russell's decision to resign

145. On 19 April Mrs Russell emailed Miss Jones, asking if the actions that had been taken (i.e. the email to close the Whatsapp groups, and the conversation with Miss Coggan) were to be the full extent of the respondent's response. She recounted the earlier conversation with Mrs Farrar when she had asked for the matter to be dealt with formally. Mrs Russell expressly quoted from the respondent's Whistleblowing Policy, and in particular the obligation to keep employees informed of the steps being taken in response. She also raised a concern about being excluded from the new WhatsApp group. She stated that she had originally not included the names of those responsible for the messages and that she had not been asked for them, but noted that "*the matter is not going to go away, and has in fact escalated*". This is said to be PD4.

146. Miss Jones responded on 22 April, informing Mrs Russell that she had taken advice from HR and that the whistleblowing policy did not apply. This is a long email, written in terms no doubt intended to be reassuring. The bottom line, however, is that the respondent was not proposing to take any further action, either about the original messages, or about Mrs Russell's concerns as to how she was now being treated, including exclusion from the new WhatsApp group.

147. Mrs Russell was not prepared to let matters lie. After attempting to contact HR herself, she eventually spoke to Linda Dutton, the Head of Service, having found her contact details in the Whistleblowing Policy. Mrs Dutton received the call from Mrs Russell 'out of the blue' and immediately asked Mrs Russell if she was able to send screenshots of the messages. Mrs Russell subsequently sent screenshots of the messages referred to in her original disclosure (not the full extent of messages relied on in these proceedings) within two days, on 25 April. Mrs Russell refers to her conversation with Mrs Dutton as PD5, and her emails sending across the screen shots as PD6.

148. Mrs Dutton emailed Mrs Russell on 27 April at 15.34. She recapped on the steps that had been taken and said *"I know from our conversation that you felt more was required and I would therefore very much like to understand what else you hoped would happen"* before going on to say *"my understanding is that you had wished your concerns to remain confidential and informal"* and requesting that Mrs Russell suggest *"what additional action you would wish us to consider which you believe to be possible whilst keeping your concerns confidential and informal."*

149. We find that Mrs Dutton's belief that Mrs Russell wished the concerns to be dealt with confidentially and informally was genuine. However, it was not a belief which was justified on the basis of Mrs Russell's communications. By this time she had clearly indicated on several occasions that she wanted formal action to be taken. Although she may not have expressly stated that she was happy to be identified, it is also clear from the narrative we have set out that she had acknowledged the practical reality that Miss Coggan had guessed who

was responsible for the report and her anonymity was already lost. Again, this would have been clear to Mrs Dutton if she had carefully read all the correspondence which had been exchanged, or if the other managers involved had presented an accurate picture to her. For whatever reason, find that by this point it was the respondent, rather than Mrs Russell, which was preoccupied by the idea of confidentiality. Mrs Russell felt she was continually saying that she wanted the matter dealt with formally, but not being listened to. She also felt the respondent using the issue of confidentiality as an excuse not to deal with the matter formally and that (in a phrase used in her witness statement) the serious matters she had raised were being "swept under the carpet".

150. Mrs Dutton told us that by sending the email at 15.34 she wanted to prompt Mrs Russell to agree to participate in a formal investigation. It would have been much better if she had come out and said that directly.

151. Mrs Russell said in both her witness statement and in her live evidence that she decided, upon receipt of this email, that she was going to resign. We accept that evidence, and also accept that she resolved not to resign immediately primarily because she wanted to continue to push for a formal investigation which was necessary, in her view, to ensure that service users were protected going forward.

152. This is an appropriate point at which to record that Mrs Russell had independent financial means, and was under no immediate financial pressure to remain in her job, or to secure a new one before leaving. The timing of her resignation was therefore, to a greater extent than in many cases, within her own control.

153. At 16.31 Mrs Russell replied to Mrs Dutton's email in robust terms. Key points of this email are, firstly, that she reiterated that she asked for her name to be kept confidential initially but had been clear from her first conversation with Mr Stockwell that she was prepared for it to be disclosed at a later date in line with Whistleblowing Policy. Secondly, she stated "*I also do not feel that it is up to me to tell you what I hoped would happen. I would say that I* cannot *understand how it could possibly be dealt with when I was not asked for names of who had put these posts on the group*." Thirdly, she questioned what the point is of the Whistleblowing Policy if it is not being followed. This is relied on as PD7.

154. Mrs Dutton forwarded the email to Miss Jones (who had been cc'd by Mrs Russell in any event and Janet Roberts (one of Mrs Dutton's HR managers). She copied Ms Greenhalgh. Her brief covering email asks Miss Jones and Ms Roberts to work together to progress this to a formal investigation to consider if disciplinary action is required.

155. Mrs Dutton acknowledged in evidence that it was highly unlikely that any disciplinary action would have resulted from the WhatsApp messages were it not for Mrs Russell persisting in pursuing the matter with her. She further acknowledged that there were deficiencies in the way the matter had been dealt with which the council regretted. We find that, despite Mr Mensah's submissions that the door had never closed on the possibility of a formal investigation, Mrs Dutton's concession was correct and astute. Were it not for Mrs Russell continuing to pursue this matter, somewhat doggedly, in the face

of Tracy Greenhalgh's refusal to progress it, the messages would never have been formally investigated and the disciplinary action which was ultimately taken would never have occurred.

156. At 16.51 on 27 April, Mrs Dutton replied to Mrs Russell explaining that a formal investigation would now take place and that an investigating officer would be appointed who would then be in touch to interview her. She stated that "*What happens following that and what policy is applicable will depend upon the* outcome *of the investigation."* The email concluded with a suggestion that Mrs Russell could contact Ms Roberts if she needed any support.

157. There was no proactive attempt to meet with Mrs Russell to talk through how it would practically work for both her and her colleagues to work as part of the same team whilst the investigation took place. This need not have been impossible, particularly given the amount of working from home which was still taking place, but it did require the respondent's managers to recognise a potential issue and engage with it, which they do not appear to have done. Related to this, there was Mrs Russell's outstanding request for permanent home working, which had been referenced in her 29 March disclosure and had been effectively ignored by everyone to whom that email had been forwarded. It should also be noted, however, that Mrs Russell herself had not continued to raise the working from home after she sent that email.

158. On 30 April Miss Jones met Mrs Russell. The meeting revolved around an occupational health referral that was being made as a result of Mrs Russell saying that she was becoming stressed due to perceived retaliation from the team (principally being excluded from the new group). It did not address the matters mentioned above. Miss Jones did apologise for the fact that the matter had not been dealt with formally from the outset. Mrs Russell's statements in this meeting are relied on as being PD8.

159. The investigation did not proceed as Mrs Dutton's email indicated, with Mrs Russell being interviewed first. Instead, we were told, the respondent's disciplinary policy required preliminary interviews to take place first with those suspected of misconduct. Only when this preliminary investigation was complete would the process move to the formal investigation stage, as described by Mrs Dutton. This was not explained to Mrs Russell.

160. On 12 May Mrs Russell's occupational health appointment took place and the report was received from occupational health the same day. The report advised that the formal procedure (i.e. the investigation) should be "*brought to a resolution as soon as possible*" and also advised frequent communication between Mrs Russell and her managers. The report further recommended that the council consider paying for therapy sessions for Mrs Russell.

161. On 13 May Mrs Russell emailed Miss Jones with a further set of screen shots. This related to the exchange involving Miss Coggan and Ms Greaves during which they refer to Ms Graves "doing her LD face" and "LD voice". This email with its attachments is relied on as being PD9.

162. On 17 May, having been in touch with ACAS, Mrs Russell raised a grievance to Mr Stockwell. The grievance concerned the actions of Miss

Coggan following Mrs Russell's initial disclosure. This is relied on as being PD10.

163. On 21 May, Mrs Russell emailed Miss Jones and Mrs Farrer again on various matters. This included the comments that Mr Watson had made about her being 'quiet' and the Teams meeting incident, both of which she had evidently been ruminating on. She pointed out that she had heard nothing about the investigation which was supposed to be taking place, and questioned whether the council were going to offer to pay for therapy as suggested by occupational health. For the first time, she specifically asked to be removed from the office rota. Mrs Farrer replied on the same day. To her credit she was obviously keen for Mrs Russell to receive a reply before the weekend (it was a Friday). She said that she would arrange for someone else to cover Mrs Russell's day in the office. She also said that she had been unable to open the OH report and had asked for it to be sent in a different format, but that the recommendations, including for therapy sessions, would be followed. This email demonstrates that it really wasn't a big issue for the respondent to arrange for Mrs Russell not to be included on the rota when that was specifically requested and where Mrs Russell's reasons for not wanting to be in were clear. It is unfortunate both that Mrs Russell did not make the request so explicitly before this, but also that the respondent did not proactively engage with the question of how what support she would need in the context of the investigation.

164. On 24 May, Mrs Russell sent a letter stating that she was now working "under protest", that she considered that the respondent had breached her contract of employment and that the respondent should not interpret her continuing to work as being an acceptance of the breach.

165. On 25 May, having still not been contacted as part of any investigation, Mrs Russell emailed Miss Jones with further examples of screenshots which she believed ought to be investigated. This is relied on as PD12.

166. On 27 May, Mrs Russell emailed Ms Roberts asking for an update on the investigation.

167. On 1 June, Mrs Russell was signed off work for one month with fibromyalgia symptoms, and depression and anxiety. On the same day, Miss Jones sent an email following her return from leave. This confirmed that Mrs Russell would not be required to attend the office on her return to work from sickness absence. This email explained that a preliminary investigation would take place first, following which the investigator would meet with Mrs Russell if a full investigation was recommended. It seems from the email that even the preliminary investigation had not yet commenced. Miss Jones notes that the timescale for an investigation within the disciplinary policy is 8 weeks, but that this cannot always be met. On the same date, Mr Stockwell responded to Mrs Russell's grievance.

168. On 2 June Mrs Russell again emailed Miss Jones with a list of all of the screenshots that she was concerned about, and attachments with the screen shots themselves. This is relied on as PD13.

169. On 3 June Miss Jones emailed Mrs Russell to inform her that a preliminary investigating officer had been appointed.

170. On 4 June Mrs Russell spoke to Miss Jones and informed her of her intention to resign. On the same date she sent an email resigning with immediate effect. The resignation letter contains a detailed account covering many of the matters set out above. It states that Mrs Russell believes she has been constructively dismissed. We find that Mrs Russell sent her letter on this date because an investigator had now been appointed and her self-appointed task of ensuring this happened was now complete. Her resignation letter put into effect her private decision to resign, which had remained unchanged since 27 April 2024.

171. Miss Jones responded to Mrs Russell's resignation letter by email dated 9 June 2021. Miss Jones attempted to persuade Mrs Russell to reconsider her position and suggested that she could be redeployed into another role away from the Client Finance team. We will not rehearse details of further correspondence as that is not relevant to the decision we have reached. We do record, however, that the matter did proceed to a formal disciplinary investigation. Mrs Russell was interviewed on 30 July 2021. The investigation resulted in disciplinary warnings being issued to Miss Coggan, Ms Greaves and Mr Watson in December 2021.

Submissions

172. As noted above, both parties prepared extensive and thorough written submissions. The panel benefitted greatly from the effort that had gone into these. We will not attempt to summarise them here, but make reference below to various specific points advanced by each side.

Relevant Legal Principles, discussion and conclusions

173. This is a relatively complex case, with several discrete claims being advanced by Mrs Russell. This Judgment will deal with each these in turn setting out the applicable legal principles and then our discussion and conclusions. As noted above, we have dealt with the claims in broadly chronological order, rather than in the order they appear in the list of issues. The questions as formulated in the list of issues appear in italics below.

Harassment – Legal Principles

174. Section 26 of the Equality Act 2010 provides (as relevant) as follows:

> **(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**

175. The leading case on harassment is **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**. In particular, we took account of the guidance set out in paragraphs 13-16 of that decision as to how the Tribunal should approach harassment claims. In his submissions, Mr Mensah rightly emphasised the

comment from paragraph 22 of the Judgment that "*it is also important not to* encourage *a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."* Mr Mensah also helpfully set out various cases which update the **Dhaliwal** guidance, including **Bakkali v Greater Manchester (South) t/a Stage Coach Manchester [2018] ICR 1481** and **Pemberton v Inwood [2018] EWCA Civ 564** and we had regard to the statements of principle contained in those authorities, as well as all of the points made in Mr Mensah's commendably neutral summary of the legal principles to be applied.

176. One point which distinguishes this case from most harassment cases considered by the Tribunal is that the majority of the alleged harassment is said to be directed towards other people, and not towards Mrs Russell herself. The law only requires that the conduct is "unwanted" and that it is "related to" a relevant protected characteristic. This means that an employee can be subject to harassment as a result of offensive comments which are not directed at them, including where they do not themselves share the relevant protected characteristic.

177. Paragraphs 7.9-7.10 of the EHRC Employment Code confirms that conduct will fall within s.26 EqA where it is related to the worker's own *protected* characteristic, or where there is any connection with a protected characteristic, *whether or not the worker has that characteristic him or herself*. The Code gives the example of a white worker who is offended by a black colleague being subjected to racially abusive language.

178. The editors of the IDS Employment Law Handbooks suggest that in such circumstances "*the white worker might find it more difficult to show that he or she had been personally affected to such a degree that his or her own dignity had been violated or that the working environment was offensive to him or her. The conduct might have to be particularly serious to overcome this hurdle.*" (Volume 5; paragraph 18.89). We consider that this observation accords with common sense, and fits with the exhortation in **Dhaliwal** about avoiding the encouragement of a culture of hypersensitivity.

179. We touch finally on the case of **Conteh v Parking Paertners Ltd [2011] ICR 341, EAT**, which was relied on by Mr Mensah as authority for the proposition that "*The employer does not 'create' the banned environment merely by inaction or by not dealing with the problem in the way the claimant thinks it ought to have done*." The claimant in that case was a parking attendant and the context in which the claim arose was that she had been subject to racial abuse by a third party and was dissatisfied with the response her employer had taken. We did not find this authority to be of assistance in the present circumstances where the unwanted conduct complained about is that of the claimant's colleagues and supervisor. Although Mrs Russell has criticised the respondent's response to her concerns, she does not assert that those failures themselves constituted harassment under the EqA.

Issue 6 – Harassment related to [Mrs Russell's] disability

6.1 Did the respondent do the following alleged things:
6.1.1. Comments made by Mark Watson in the Whatsapp group about the claimant being "quiet".

6.1.2 On or around October 2020 Mark Watson putting the claimant's face on the full screen of a video call in response to her comment that she did not like her face appearing on screen.

180. We have set out the content of messages relating to Mrs Russell being "quiet" at paragraphs 71-73 above.

181. In relation to the issue about the video call, we refer to our findings at paragraphs 112-113 above.

6.2 If so was that unwanted conduct?

182. Although each of these matters may, objectively, seem very minor, we accept that they were unwanted by Mrs Russell. In this context it is significant that the WhatsApp exchanges Mrs Russell complains about were included in the fourteen messages/threads which formed Mrs Russell's original disclosure to Mr Stockwell.

6.3 Was allegation 6.1.1 related to her disability of fibromyalgia?

183. Mrs Russell's case is that she was "quiet" and got on with her work because her fibromyalgia meant that she had to conserve her energy. She suggests that this was known to other members of the team. We are satisfied that Mr Watson did not know about this disability and, regardless of whether he did or not, we find there is no evidence of a sufficient link between Mrs Russell's disability and the perception of her as 'quiet' to justify a finding that any of the comments given as examples were related to her disability.

6.,4 Was allegation 6.1.2 related to her disability of facial [deformity]?

184. We have found that Mrs Russell is not disabled by reason of a facial deformity. We conclude that Mr Watson's actions and comments on the Teams call cannot therefore be related to a protected characteristic. We keep in mind that Mrs Russell need not have the characteristic herself for s.26 to be engaged. If, for example, Mr Watson had made explicit derogatory comments about people with physical deformities, then those could have been comments related to a protected characteristic. In the specific circumstances of this case, the comments and actions were specifically about Mrs Russell not wanting to appear on screen, and not directly concerned with her own appearance, or with anyone else's appearance. We therefore find they cannot be said to be related to a relevant protected characteristic.

6.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.6 If not, did it have that effect? The Tribunal will take account of the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect?

185. Strictly speaking, issues 6.5 and 6.6 do not arise given our findings above. For completeness, however, we think it helpful to note that even if we had found these comments did relate to protected characteristics we would find that they

did not amount to harassment. We are satisfied that Mr Watson's purpose was to be humorous and he did not intend for these comments/actions to be offensive in any way.

186. In terms of the effect of the conduct, although we accept that this was unwanted conduct towards Mrs Russell, she has not persuaded us that she genuinely felt that this conduct (as opposed to other matters in the case) violated her dignity or created the sort of environment proscribed by s.26. If it did, then we find that the respondent is correct to characterise such a response as "hypersensitive". In the words of the statute, it was not reasonable for the comments/actions to have that effect.

Issue 7: Harassment related to various characteristics

7.1 Did the respondent do the following alleged things:
7.1.1.Various team members making inappropriate and/or offensive comments about service users via the WhatsApp group chat between 6 May 2020 and 17 March 2021?

187. For the purposes of closing submissions, the parties prepared a schedule of 65 message threads (some short, some longer) which contained impugned comments relevant to this part of the harassment claim. We also took into account the "bags" thread, which was referenced in the schedule although for some reason not numbered.

188. There is no dispute of fact between the parties as to the content of the messages that were posted. It would be disproportionate to include them all in this Judgment and we refer to the summary we have given at paragraphs 81-97 above.

189. Aside from possibly two or three examples which are completely innocuous in our view, we agree with Mrs Russell (and indeed the respondent's witnesses) that the messages produced are inappropriate and unprofessional, and that a number of them can properly be described as offensive. Although we have not recorded a finding about each individual message/thread, as a panel, we have considered and discussed each thread in the Schedule.

190. We noted during our deliberations that the list of issues had restricted the factual enquiry in this part of the case to messages containing comments about service users (as per the wording replicated above). It is clear, however, that Mrs Russell's claim also concerned some comments which were unrelated to service users. This was particularly the case with the comments (said to be) of a sexual nature, many of which referred to staff members of third parties, and some of which were not in reference to specific people at all. Mr Mensah did not seek to restrict us to considering comments related to service users only in his submissions, and the Schedule of comments relied on for the harassment claim was agreed by both parties, and included comments which did not refer to service users. In those circumstances, we are satisfied that we are not bound by the list of issues in that respect.

7.2 If so, was that unwanted conduct?

191. We accept that the communication of the inappropriate and/or offensive messages was unwanted conduct from Mrs Russell's perspective. We have no doubt that Mrs Russell was deeply offended by the WhatsApp messages taken as a whole. We reject the suggestion put forward by the respondent that this was, to some degree, a cynical stance adopted by her for the purposes of pursuing the claim.

7.3 Was it related to one or more protected characteristics?
7.4 Alternatively, was it conduct of a sexual nature?

192. The small number of comments which Mrs Russell has identified as being related to age and race, we accept are related to those characteristics.

193. In relation to the comments identified as being related to sex (in the sense of biological sex/gender), and/or of a sexual nature, we accept that the vast majority of these comments are so related. We do not consider that comments about 'flirting' or 'knicker size' are necessarily comments of a sexual nature, and find that they were not in the context of these messages.

194. We have made findings above to the effect that some, but not all, of the comments about disabled service users can properly be classed as comments "relating" to disability. We have also set out what we considered to be the most serious comments relating to disability.

7.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.6 If not, did it have that effect? The Tribunal will take account of the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect?

195. We are satisfied that the purpose of these comments was for the members of the team that were participating to entertain and amuse each other and, to some extent, to provide an outlet for the frustrations of their work. In doing so, they were aware that they were acting inappropriately, but we are satisfied that it was no part of anyone's purpose to violate Mrs Russell's dignity or to create the proscribed environment.

196. We do not consider that the messages can reasonably be said to have had the effect of violating Mrs Russell's dignity. They were not directed at her and were not so offensive as to have that effect notwithstanding that fact.

197. We do accept, however, as a result of the messages taken as a whole, Mrs Russell found her working environment to be intimidating, hostile and offensive. That effect was caused both by messages which related to protected characteristics and those which did not.

198. Mr Mensah appeared to suggest in his submissions that we must analyse each comment which did relate to protected characteristics to determine whether it was reasonable for it to have that effect on Mrs Russell.

199. We disagree. The harassment test relates to the creation of an environment which is offensive, intimidating, humiliating etc. In our judgement the effect of the comments must be taken cumulatively. It is a matter of common sense that one 'off colour' remark taken in isolation will have a very different effect to a continued exposure to very many similar remarks as a permanent feature of a working environment. Many (indeed almost all) of the comments in this case are not grossly offensive when taken in isolation. Where, for example, a group of colleagues intentionally use mild sexual innuendo such as "*bringing up the rear*," "*batting for both sides*" or "*it was this big*" for comedic effect we consider that it is essential to look at the frequency and volume of those comments, as well as all the surrounding circumstances, to determine whether the proscribed environment was created.

200. We find that Mrs Russell is hypersentive to a degree. We find, for example, that she genuinely believed certain comments were 'intimidating' and created an intimidating environment. We do not consider that any of the comments, read in context, can properly and objectively be considered to be intimidating.

201. We are not persuaded that the comments did have the proscribed effect on Mrs Russell initially. If they did, this was not objectively reasonable. As time passed, there was less need to use the WhatsApp group for work purposes and the repeated nature of the inappropriate comments took an increased toll on Mrs Russell. We find that she was uncomfortable with the comments in October 2020, when she sent the failed email to Miss Coggan, and in December 2020, when she made the request to work from home. At neither of these points, however, had the effect become so pronounced as to create the proscribed environment.

202. In our judgment, the effect of the messages built up gradually. We are fully satisfied that by the end of March 2021, when Mrs Russell disclosed the existence of the messages, the overall effect was that an environment had been created which she reasonably found to be hostile and offensive. Had it not been, Mrs Russell would have been unlikely to take the serious step of making her disclosure. We therefore have to ask ourselves at which point the line was crossed? We find that this happened at some point in January 2021, probably around the time of the exchange involving an 'LD face' and 'LD voice', which Miss Russell found to be particularly offensive.

203. We therefore find that the test for harassment is made out between 12 January 2021 and 17 March 2021 (this is date of the "bags" thread, and the last date relied on the list of issues). Although we have referred specifically to a comment relating to disability in triggering the start date for that period, we find that all of the comments in the harassment schedule within this period contributed to the harassment, with the exception of thread 50 (a political comment not related to disability, as discussed above) and thread 55 (related to age, but entirely innocuous in the view of the panel). We do note that the panel considered some of the other comments in this period to be very close to innocuous, but we are satisfied that they each contributed something, however minor, to the environment which Mrs Russell was subjected to at that time. Further, all of the comments in this period have to be viewed against the backdrop of the earlier comments.

204. The respondent accepts responsibility for the comments made by its employees in the WhatsApp group. Therefore, we find the respondent is liable for the unlawful harassment which Mrs Russell was subjected to.

205. As identified in the List of issues, time limit issues arise in respect of events which took place before 25 February 2021. We find that the actions of the respondent's employees in making comments on the WhatsApp group amount to a course of continuing conduct between the dates we have identified – 12 January 2021 and 17 March 2021. It would be entirely artificial to separate the comments by date or by protected characteristic) when we have found that it is the cumulative effect of the comments which gave rise to the proscribed environment. On that basis, the claim has been brought in time in respect of all of the conduct which we have found to constitute unlawful harassment. We would equally be satisfied, if necessary, that it is just and equitable to extend time to permit Mrs Russell to rely on the conduct which took place between these dates.

206. Mrs Russell will, in due course, be entitled to injury to feelings damages arising out of the distress caused to her by the harassment we have found to have taken place. The level of damage will be assessed following submissions from the parties (and having regard to the guidance set out in the case of **Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871** and the subsequent up-rating of the "**Vento** bands"). In making that assessment, the Tribunal panel will have to be careful to distinguish between the distress caused to Mrs Russell by comments which were not part of the successful harassment claim (for example, the comments concerning her) and those which were.

Failure to make reasonable adjustments – Legal Principles

207. The duty to make reasonable adjustments is set out in ss.20-21 EqA:

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

[Further sub-sections omitted]

21 Failure to comply with duty

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

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

[Further sub-sections omitted]

208. Schedule 8 of the Equality Act 2010 deals with reasonable adjustments in the workplace and provides, materially, as follows:

> **20 Lack of knowledge of disability, etc**
>
> **(1) 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) […]**
>
> **(b) … 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 requirement.**

Issue 8: Reasonable Adjustment claim related to fibromyalgia

8.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

209. In accordance with our findings of fact set out above, we are satisfied that the respondent knew of the claimant's disability from an unknown date in January 2021 when we found that Mrs Russell informed Mr Stockwell that she suffered from fibromyalgia. We are satisfied that, even if this condition does not necessarily amount to a disability in every case, that information was sufficient to put the respondent on notice that Mrs Russell may well satisfy the definition contained in s.6 EqA. If further enquiries were necessary, it would have been up to the respondent to pursue this.

8.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPS:
8.2.1 That employees on the claimant's team were required to attend the office on a rota basis from July 2020?

210. Yes. Mr Mensah has acknowledged in his submissions that the respondent did have a PCP as described.

8.3 Did the PCPS put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was suffering from extreme tiredness at that point in time and would find travel to and from the office difficult?

211. We are not satisfied that the PCP put Mrs Russell at a substantial disadvantage due to her disability of fibromyalgia. Prior to Covid, she had been able to attend the office for her whole working time without difficulty. We accept that this was a fluctuating condition and are prepared to accept, broadly, that she was experiencing more difficulty with it in late 2020 and into 2021 than she had been at an earlier point. However, there was no medical evidence, and very limited evidence from Mrs Russell, which would support a finding that the very minimal travel requirements arising from the rota caused her difficulty.

212. We find that the difficulty related much more to the prospect of having to return to in-person working alongside colleagues she had now formed a very dim view of. That was not a problem with the rota as such, but caused Mrs Russell to fear the prospect of increased in-office working, which would involve meeting her colleagues in person. There is no evidence to suggest that Mrs

Russell was any more disadvantaged than someone else, without fibromyalgia, who had taken a similar view to her as to the conduct of her colleagues.

8.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage? (The claimant will say the respondent knew from the 16 December 2020 when she emailed her line manager to request permanent home working)

213. As we have found there was no substantial disadvantage this question does not strictly arise. however, we are satisfied that, even if we are wrong, and there was a substantial disadvantage to Mrs Russell related to her disability, that the respondent had no actual or constructive knowledge of this.

214. Although we have found that the respondent had knowledge of the disability itself from some point in January 2021, we are satisfied that the respondent reasonably understood Mrs Russell's queries about homeworking to relate to the future prospect of employees being required to return to the office on a more substantive basis. Merely knowing that Mrs Russell had fibromyalgia and that she had a concern about the prospect of a substantive return to office-based work did not, in our view, put the respondent on notice that attending the office once every four weeks on average would present any real difficulty to Mrs Russell, given that she had previously spent all of her working hours in the office and that she failed to expressly state that coming in on the rota basis was causing her a problem.

215. Mrs Russell provided more information when she made her initial disclosure on 29 March 2021. In that letter she said that the WhatsApp messages were "*causing my illness to flare up*" and that "*I contacted you previously to request working from home on a permanent basis, this was mainly to do with my health but also because I dread the day I have to work back in the office because it has highlighted what some people are like that I have to work* with*."* Whilst we consider it would have been much better if the respondent had engaged with the reference to future homeworking in this letter, the content of the letter does not suggest that attending work on a rota basis is problematic, whether for health reasons or otherwise.

216. Mrs Russell finally made an express request not to have to attend the office in accordance with the rota in an email to Mrs Farrer and Miss Jones on 21 May 2021 (see para 163 above). Mrs Farrer replied on the same day confirming that she would arrange for someone else to cover the next occasion Mrs Russell was due in the office. Further management of this was overtaken by events in the form of Mrs Russell's sickness absence and resignation. This illustrates that the respondent was willing and able to act promptly to remove Mrs Russell from the rota when it was understood that this was a problem for her. That fact reinforces the conclusion we have reached that, prior to this date, the rota either presented no problem or, if it did, the respondent was (reasonably) unaware of the problem.

8.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:
8.5.1 allowing her to work from home on a permanent basis and not attend the office.

8.6 by what date should the respondent reasonably have taken those steps?

217. As we have found that the respondent was not under a duty to make reasonable adjustments, the issues identified above do not arise for determination.

Public interest disclosure

Protected disclosures – legal principles

218. Section 43B ERA provides as follows:

> **43B Disclosures qualifying for protection.**
>
> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**
> **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
> **(e) that the environment has been, is being or is likely to be damaged, or**
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.**
>
> **(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.**
>
> **(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.**
>
> **(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.**
>
> **(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).**

219. The effect of ss. 43A and s43C is that a qualifying disclosure made to an individual's employer will be a protected disclosure.

Issue 3.1 Did the claimant make one or more qualifying disclosures as defined in section 43 B of the employment rights act 1996?

220. Mrs Russell relied on thirteen alleged protected disclosures, taking place on ranging from 29 March 2021 to 2 June 2021. Those are set out in full in the complete list of issues (annexed) and are not repeated here for brevity. We have also identified the individual conversations/emails which were said to constitute protected disclosures in our Findings of Fact.

221. The list of issues also identifies, at paragraphs 3.1.1 to 3.1.5 the various elements of the test, drawn from the statutory provisions set out above. In view of certain concessions made by the respondent, we have not set out the elements of the statutory test and made separate findings in relation to each

disclosure under each element. We have had regard to all relevant elements of the test in determining the disputed disclosures.

222. There is little dispute of fact about the existence and content of the disclosures. The majority were contained in emails which are reproduced in the bundle. Those that took the form of conversations are also broadly agreed.

223. The respondent's initial position was that it disputed that each of the disclosures met the definition of a qualifying disclosure as set out in s.43B. By closing submissions, the respondent had modified its position. Mr Mensah accepted that PDs 1-3, 5 and 11 were qualifying disclosures. (It has always been accepted that any qualifying disclosures were made to the employer and were therefore protected).

224. The respondent's concession was based on acknowledgement that Mrs Russell had a reasonable belief that a person had failed, was failing, or was likely to fail to comply with any legal obligation. Broadly, that relates to legal obligations in respect of data protection (relevant to service users and third parties), obligations owed by the respondent to its service users under the Care Act 2014 (for example to treat them with dignity) and obligations not to discriminate. The respondent accepts (in respect of most of the disclosures) that if the relevant belief is made out, then there would also be a reasonable belief that disclosure was in the public interest.

225. Mrs Russell's case had also relied on an asserted reasonable belief that a criminal offence had been committed was being committed or was likely to be committed. The respondent denied that the content of the messages could give rise to such a belief being reasonably held. In particular, there was considerable debate about one message dating from 30 September 2020 in which Claire Greaves, referring to a service user, stated "*I've stalked the shit out of him on Facebook, there is nothing poor about him! I've no sympathy he's a piss-taker*." Mrs Russell was adamant that the reference to stalking meant that a criminal offence had taken place. We do not agree that it is reasonable to jump from this casual use of language to an assumption that Miss Greaves was, in effect, admitting an offence under the Protection from Harassment Act 1997 or any other 'stalking' legislation. Given her position, we accept it is possible that there was some wrongdoing involved in her accessing a service user's (publicly available) Facebook information. Whether this was likely to amount to a criminal offence is more dubious. In any event, we find it unnecessary to make a final determination on the point. There is ample material to support a belief that the respondent and its employees were in breach of legal obligations of various types set out above. In our view the respondent was correct to make the concession that it made, and it is a concession that could have been made earlier in the litigation. It makes no difference to the case whether or not Mrs Russell had an additional reasonable belief relating to the commission of one or more criminal offences.

Summary of conclusions about alleged protected disclosures

226. PD1 was Mrs Russell's initial conversation with Mr Stockwell on 29 March 2021 which disclosed the existence of inappropriate messages on the Dream Team WhatsApp group. PD2 was the follow up email requested by Mr Stockwell in which Mrs Russell committed the disclosure to writing and provided

her initial examples. These were the primary disclosures from which the subsequent conversations and actions (and indeed failures to act) which followed in April and May 2021 all flowed from. Given the respondent's concession that these primary disclosures are protected disclosures, the dispute which remains in respect of some of the other disclosures is of little practical significance. We therefore record our decision in respect of the disputed disclosures in the following summary way (omitting 3, 5 and 11 which were also conceded):

PD4. The respondent submits that this related to Mrs Russell's personal complaint that she had been excluded from the second WhatsApp group and that reasonable belief in the public interest of her disclosure was absent. We disagree. The claimant's email to Miss Jones reiterates (at least by implication) her earlier disclosures and is set in the context of those disclosures. It also criticises the approach of the council in dealing with the original disclosure and suggests that this is likely to be ineffective. We find it is a protected disclosure.

PD6. This is the claimant's email to Linda Dutton dated 31 May 2021. The respondent again submits that it arises out of Mrs Russell's personal complaint of exclusion and that the public interest element is absent. We disagree. As expressed in the email, Mrs Russell is contacting Mrs Dutton as a senior officer named in the Whistleblowing Policy because she believes that policy is engaged and it has not been followed. The primary purpose of the email is to forward the 29 March email (PD2) to Mrs Dutton in this capacity, in the hope that she will deal with the disclosure more effectively than Mr Stockwell, or the managers he escalated it to, had done. If PD2 was a protected disclosure when sent to Mr Stockwell (as the respondent has conceded) then we find PD6 must also be a protected disclosure.

PD7 is a further email to Linda Dutton, in response to Mrs Dutton's reply. The respondent raises the same arguments as it did in respect of PD6. Again, we reject those arguments.

PD8 relates to a meeting between Mrs Russell and Mrs Jones. The respondent does not dispute the content of the meeting as paraphrased in the list of issues. Its position is that no new information was provided beyond what Miss Jones had already been told. A disclosure need not be of new information. However, in this case we are satisfied that the focus of the meeting was on discussing process and Mrs Russell's queries. Whilst the content of the messages provided the context, Mrs Russell was not, in our view, repeating the disclosure in a manner which makes it appropriate to view it as a separate disclosure. (In contrast to, for example, PD6 above). This was not a protected disclosure.

PD9 this relates to the disclosure of the "LD face" screenshot and voice recording to Miss Jones. The respondent's position is that this was "making fun of" Miss Greaves' son. We had already recorded that we prefer the claimant's interpretation that (whether or not the 'joke' started as being about Miss Greaves' son) this is offensive to people with learning disabilities more generally. However, as the respondent notes no specific service user is referred to or identified. We accept the respondent's submission that, of itself, PD9 is not a protected disclosure.

PD10 was the claimant's grievance letter. The claimant conceded that that was personal and "probably not" a disclosure in the public interest. In view of that concession the reasonable belief test is not met.

PD12 is a further email to Louise Jones. We accept the respondent's submission that this is, in effect, a discussion about the case and the steps being taken. It is not a protected disclosure.

PD13 this was an email to Louise Jones on 2 June 2021 where Mrs Russell forwarded screenshots showing all of the messages which she was, at that time, concerned about. The respondent denies this was a disclosure in the public interest. We disagree. On the same rationale that Mrs Russell had a reasonable belief that the initial disclosure was in the public interest, her disclosure of the full set of screenshots was made in the same belief. This is a protected disclosure.

Issue 4: Detriments

Legal Principles

227. Section 47B ERA 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure. s.47(1A) to (1E) ERA provides that an employer can be vicariously liable for the detrimental acts of its workers unless the employer has taken all reasonable steps to prevent the detriment. It is immaterial whether the act of detriment or deliberate failure to act was done with the knowledge or approval of the employer. (There is no "reasonable steps" defence relied on in this case).

228. The principles around establishing detriment in whistleblowing cases correspond in many respects which the principles around establishing detriment in direct discrimination cases.

229. Whether there has been a detriment is to be assessed from the perspective of the employee. It is sufficient that a reasonable worker might take the view that the action of the employer was in all the circumstances to her detriment. There is no need for any physical or economic consequences for the employee, nor any threshold of severity, provided that this test is met. (**Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**).

230. The claimant is entitled to succeed if the protected disclosure "materially influenced" the employer's action. (**Fecitt v NHS Manchester, CA, [2012] IRLR 64**). (This is a lower test than the test applied to determine whether a protected disclosure was the "sole or principal" cause for a dismissal under s.103A)

231. It is not unusual for a failure to investigate, uphold or "deal properly" with a grievance, complaint or other disclosure, to be alleged to constitute a detriment, whether in the context of a protected disclosure claim or a victimisation claim. Here, if the Tribunal is satisfied that there was a detrimental failure, it will have to examine closely the causal connection between the disclosure made and that failure. It does not naturally follow that a failure to investigate properly is something done "on the ground" that a disclosure has been made. The Court of Appeal decision in **Iwuchukwu v City Hospitals Sunderland NHS**

Foundation Trust [2019] EWCA Civ 498 is an example of a case where the failure to investigate was found to have been caused by the particular content of the grievance (i.e. that it asserted discrimination) and so a victimisation claim succeeded.

Protected disclosure detriment – discussion and conclusions

232. In respect of each of the alleged detriments set out in the List of issues, we have considered the questions below.

4.1 what are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?
4.2 said the claimant reasonably see that act or deliberate failure to act as subjecting her to a detriment?
4.3 if so was it done on the ground that she had made a protected disclosure?

D1 On or around 15 April 2021, Claire Coggan setting up a replacement WhatsApp group and failing to invite the claimant to join it.

233. We refer to the findings of fact at paragraph 144 above. The respondent's submissions focus entirely on causation and do not argue that this did not amount to a detriment. We have considered whether it can properly be considered as a detriment in view of the distress caused to Mrs Russell by her presence in the Dream Team WhatsApp group and her (failed) request to leave the group in October 2020. We remind ourselves, however, that the bar is a low one. We accept the claimant's evidence that she felt excluded from the team by not being *asked* whether she wanted to be part of the new group, even although the likelihood is that she would not have accepted an invitation. We take account of the context of this exclusion – that Mrs Russell knew that Miss Coggan suspected she had drawn the employer's attention to the inappropriate messages and that she was apprehensive about what treatment she might receive from her colleagues going forward. Taking everything into account we conclude that this was a detriment, albeit a relatively minor one.

234. The respondent's argument is that this detriment cannot have been caused by Mrs Russell's disclosures, because Miss Coggan did not "know" that Mrs Russell was responsible for making the disclosures until a much later date during the formal investigation.

235. From the meeting she had with Mrs Farrer and Miss Jones on 12 April 2021, Miss Coggan knew that someone in the group had informed managers about inappropriate messages. Out of a small number of possible suspects, she correctly guessed it was Mrs Russell. Given the dynamics in the team and the relative levels of participation in the messaging, it did not require Holmesian genius to make this deduction. Miss Coggan candidly admitted in evidence that it was her "suspicions" that Mrs Russell was responsible for the disclosure which led to her failure to invite her to the new group – albeit that she asserts this was because she believed Mrs Russell would not want to be in it, rather than because she wished to retaliate for the disclosures or ostracise Mrs Russell. In light of those findings, we must conclude that the decision to not to invite Mrs Russell to join the new group was made on the grounds of PDs 1 and 2, which preceded, and led to, the 12 April meeting. Those disclosures

were causative of the detriment and materially influenced (in the **Fecitt** sense) Miss Coggan's decision not to invite Mrs Russell to the new group, and this detriment claim is made out.

D2 The respondent failing to investigate the WhatsApp group posts in an appropriate and/or timely way.

236. It will be apparent from our narrative findings of fact that the Tribunal panel was unimpressed with the response of the council to Mrs Russell's important disclosure. This was not simply a case of an employer dragging its feet. Following the communication between Sue Simister and Tracy Greenhalgh there was a positive decision not to investigate the group posts, which was only overturned due to the persistence of Mrs Russell and the eventual involvement of Mrs Dutton. We are satisfied that that failure was a detriment to Mrs Russell.

237. We find that there was a separate, but related, detriment arising from the delay between Mrs Dutton confirming that a formal investigation would take place on 27 April 2021 and the failure of anyone to contact Mrs Russell between then and early June to explain or progress the investigation process. Both matters could reasonably cause Mrs Russell to feel that she had been placed at a disadvantage, and received treatment which was worse than she reasonably expected to receive.

238. In relation to questions about delay in the later stages, we are quite satisfied that this was not materially caused by, or related to, any of the protected disclosures. Mrs Dutton gave candid evidence about the funding pressure the respondent is under and the knock-on effect of that in terms of availability of investigating officers and other resources necessary for investigations. We accept her evidence that the council is routinely unable to meet the time limits set out in its various employee relations policies and is in the process of engaging with the relevant Unions to attempt to reframe these.

239. The question about the initial failure to investigate is more subtle. A different sort of complaint or disclosure may well have proceeded more smoothly to formal investigation. On the balance of probabilities, however, we consider this is more likely to be a question of mismanagement than a cover up. We accept Mrs Dutton's evidence that "matters weren't helped" by the number of managers whom the disclosure was escalated though. In fairness to Ms Greenhalgh, it was Miss Jones' email of 1 April 2021 suggested that the group could be investigated by someone in risk services may be able to access the group and see who the posts are from. From a technological point of view, we accept that that would be a non-starter, and Ms Greenhalgh's response that an investigation will be difficult or impossible must be seen in that context. Although the respondent had a whistleblowing policy, we accept that it was very little used (at least in the experience of these managers) and that no one involved in the case had experience of investigations involving WhatsApp messages. We would hope that the respondent's response to any similar future disclosure would be much more robust. Finally, in this respect, we pay heed to the fact that the matter *was* formally investigated when Mrs Russell pushed for this and that disciplinary action followed. All of the managers who have given evidence before us have appeared to have genuine strong feelings about the contents of the messages, and there is nothing to suggest that anyone involved

would not want action to be taken to discipline those involved and prevent any similar conduct in future.

240. In those circumstances, we find that the failure to initially investigate was due to miscommunication, managers poorly equipped to deal with the situation they found themselves in, and the nature of the subject matter i.e. WhatsApp messages. The failure was related to the protected disclosures, but was not materially caused by the fact that protected disclosures had been made and the requisite causal connection is not made out. This allegation of detriment on the grounds of protected disclosure fails for that reason.

D3 The respondent failing to communicate clearly with the claimant over its response to her disclosures, what action was being taken, and what assurances it could provide to her regarding her concerns about retaliation.

241. In view of our findings of fact, and in line with the reasoning set out above, we find that Mrs Russell was subject to detriment in relation to the matters set out above. However, that detriment was not on the grounds of the fact that she had made protected disclosures.

D4 The respondent failing to permit the claimant to work from home on a permanent basis in view of her having raised these concerns and her fears about retaliation.

242. As will be apparent from our findings above, Mrs Russell did not make a clear request to be removed from the rota until 21 May 2021, whereupon it was granted in respect of the next occasion. The question of what would happen about any future requirement to attend the office was overtaken by Mrs Russell's sickness absence, and then by her resignation. In the circumstances, and given that (apart from the rota requirements) all the team were working from home on an on-going basis with no proposed end date, we find there was no failure amounting to a detriment. Further, even if we are wrong about that, we find that Mrs Russell's disclosures played to material part in her being subjected to such a detriment. The reason the respondent did not tell Mrs Russell that she was permitted to work from home was that she was already doing so, and she made no clear request to be removed from the rota until 21 May, which was then actioned promptly.

D5 The respondent failing to expedite its investigation as proposed by occupational health

243. The OH report was produced on 12 May 2021, although there was a delay in Mrs Farrer accessing it. Under the heading "Reasonable Adjustments" the report stated:

> *"I would advise that the formal investigation procedure that has recently been instigated, due to Mrs Russell's concerns is brought to a resolution as soon as possible. This will hopefully assist in a speedy return to an enjoyable and more comfortable work environment for Mrs Russell."*

We find that this report made no impact on the respondent's attempts to progress the formal investigation. However, the reason for the delay from this point was entirely due to the respondent's resources. The period between the occupational health report being produced and Mrs Russell

resigning was relatively short, and it is unrealistic to suggest that the investigation could have been expedited within that period. We find that there is therefore no detriment. (To the extent that there was a detriment, if we are wrong, it was entirely unrelated to any of the protected disclosures made by Mrs Russell.)

Unfair dismissal

244. Having reached our conclusions about the various other claims, we then considered the question of dismissal in light of those conclusions.

Legal Principles

245. In order to establish a constructive dismissal, the employee must show that:

(a) there was a fundamental breach of contract on the part of the employer;

(b) the employer's breach caused the employee to resign;

(c) the employee did not affirm the contract (either expressly or impliedly) and thereby lose the right to claim constructive dismissal.

Western Excavating (ECC) Ltd v Sharp 1978 ICR 221

246. All contracts of employment contain an implied term of trust and confidence, requiring that the employer will not, without reasonable cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee (***Malik v BCCI SA 1997 ICR 606, HL***). Any breach of the implied term is repudiatory in nature. In assessing whether there has been a breach of the implied term, Tribunals must take care not to apply the test of 'reasonableness', familiar from cases involving express dismissals.

247. Although the breach must 'cause' the resignation, it need not be the sole or main cause, provided it played an effective part. (***Wright v North Ayrshire Council 2014 ICR 77, EAT***).

248. The Judgment of HHJ Burke in **The Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT** summarised the development of the implied term and what is required in identifying a breach of it. Specifically, the EAT rejected a suggested that, following the Court of Appeal decision in **Tullett Prebon PLC v BGC Brokers [2011] IRLR 420** Tribunals were required to make an express finding as to whether the employer, by its conduct, had *intended* to repudiate the contract of employment. This case (and others) confirmed that the question of whether there has been a breach of the implied term is a question of fact for the tribunal, to be answered objectively. That emphasis on objectivity is apparent from the exert from paragraph 25 of the judgment:

> *The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…*

249. Failure to implement a grievance process may be a breach of the implied term, but is not necessarily one. (**W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516** and **Sawar v SKF (UK) Ltd [2010] UKEAT 0355_09_2101**). This will depend on the facts of the individual case and the Tribunal must always come back to the fundamental question of whether the employer acted without reasonable cause in a mater calculated or likely to destroy or seriously damage the relationship of trust and confidence.

250. Where an employer is found to have breached the implied term of trust and confidence, it is not open to the employer to remedy the breach by subsequent conduct, **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908, CA**. (Subsequent 'remedial' conduct may well be relevant in determining whether the employee has affirmed the contract and whether they resigned in response to the breach or for some other reason).

251. The correct approach to questions of affirmation was very recently addressed by the EAT in **Leaney v Loughborough University [2023] EAT 155**. In particular, paragraph 20 of the Judgment notes that:

> *"Mere delay in communicating a decision to accept the breach as bringing the contract to an end will not, in the absence of something amounting to express or implied affirmation, amount in itself to affirmation. But the ongoing and dynamic nature of the employment relationship means that a prolonged or significant delay may give rise to an implied affirmation, because of what occurs during that period."*

We also paid careful attention to the further commentary in paragraphs 21-23, citing passages from **Buckland** and **Chindove**. That is not reproduced here to avoid extending an already lengthy Judgment. The guidance may be conveniently summarised in the principle that the issue is one of conduct and not of time.

252. Where an employee relies on a continuing cumulative breach of the implied duty of confidence, they may resign in response to a particular incident which is often characterised as being "the last straw". This doctrine is relevant where an employee may have affirmed the contract following earlier breaches, but the right to resign and claim constructive unfair dismissal is revived by the last straw event.

253. The Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** set out a series of questions for the Tribunal to ask itself in such cases:

1. What was the most recent act that the employee said had caused their resignation?
2. Had the employee since affirmed the contract?
3. If not, was the act by itself a repudiatory breach of contract?
4. If not, was it nevertheless part of a course of conduct which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?
5. Did the employee resign in response to that breach?

Unfair dismissal – discussion and conclusion

254. We have not approached the matter exactly as set out in the List of issues, as we consider an approach which reflects the **Kaur** questions to be appropriate in this case.

255. We replicate here, for ease of reference, the nine matters relied on in the List of issues as constituting (whether individually or cumulatively) the breach of contract relied on by Mrs Russell. Save for point 1, in each case Mrs Russell relies on the implied term of trust and confidence.

> 1. ***Breach the express terms of part 8 of the claimant's contract of employment, by not taking all reasonable steps to prevent discrimination and failing to deal with the claimant's allegations of harassment therefore failing to provide a healthy and safe harassment free environment.***
> 2. ***Subjecting the claimant to inappropriate and offensive WhatsApp messages between 23/3/20 and 14/4/21.***
> 3. ***Giving the claimant's home address to a colleague without her consent in or around December 2020.***
> 4. ***Refusing to permit the claimant to work from home permanently (following her request on 16 December 2020).***
> 5. ***Jill Farrer failing to deal appropriately with the with the claimant's initial complaint about the WhatsApp group by failing to conduct an investigation and deal with the matter formally as agreed in a Teams call, on around the 30th of March 2021 leading to potential disciplinary action against team members.***
> 6. ***Louise Jones in her email dated this 22nd April 2021, failing to investigate possible underlying issues between Claire Coggan (Supervisor) and the claimant when she knew that Claire Coggan suspected that the claimant had reported the WhatsApp posts.***
> 7. ***Claire Coggan setting up a replacement WhatsApp chat group on around 15 April 2021 and not inviting the claimant to join it.***
> 8. ***Louise Jones's decision (communicated by email dated 22nd April 2021) not to formally investigate the contents of messages posted on the WhatsApp group.***
> 9. ***The respondent failing to expedite the formal investigation (once it had started to) as recommended by occupational health.***

256. The most recent act relied on, at point 9, is the alleged failure of the respondent to expediate the investigation in response to the occupational health report. Realistically, we have found that there was no failure to act in the short timescale between the respondent receiving the report and the claimant's resignation. More fundamentally, we have found that Mrs Russell made her decision to resign on the 27 April 2021, and that that decision pre-dated the production of the occupational health report by several weeks. For those reasons, we have excluded that matter from our consideration in respect of the constructive dismissal claim.

257. Our attention then turns to the 'next most recent' act, being Louise Jones's decision not to formally investigate the content of the messages. As will be apparent from our findings, this was not so much Louise Jones's decision, as Tracy Greenhalgh's decision communicated via Louise Jones on 22 April 2021. (We note that, on our findings, it was Mrs Dutton's subsequent (apparent) endorsement of the decision that there would be no investigation on the 27 April which was, factually, the final straw prompting Mrs Russell's decision to resign. That is not listed as one of the matters relied on in the List of issues, but in our judgement the omission does not have any material bearing on the outcome of the case.)

258. We find that Mrs Russell did not affirm the contract between receiving the email on 22 April and resigning on 2 June. The following matters are relevant:

258.1 Mrs Russell initially looked for other avenues to press for a formal investigation. This led her, on 27 April 2021, to correspond with Mrs Dutton. Although Mrs Dutton's initial response ("what more did you expect to happen") exacerbated the problem in Mrs Russell's eyes, she confirmed later on the same day that a formal investigation would take place.

258.2 We find that Mrs Russell remained in employment, despite her resolve to leave, in order to ensure that the investigation did take place and in order to contribute to it. For the next month, until 24 May, she continued to correspond with managers, she raised a grievance and she cooperated with the occupational health referral. Taking these matters together, we find that there is no conduct through from affirmation can be inferred in this relatively short period.

258.3 On 24 May Mrs Russell had indicated that she was working under protest. Whilst an employe cannot work under protest indefinitely, this act underlines the findings we have made above that Mrs Russell did not intend to affirm the contract, and had not, in fact, done so. There was then only a very short subsequent period before she was signed off sick on 31 May, and then resigned on 2 June.

259. Turning back to the **Kaur** questions, we have to ask whether the decision communicated on 22 April, that there would be no formal investigation, amounted, by itself, to a breach of the implied term of trust and confidence. We are satisfied that it did.

260. When an employee makes a disclosure about serious misconduct by her colleagues, which has a public interest dimension and a bearing (even in part) on obligations owed by the council to the vulnerable clients of the Client Finance team, in respect of whom the council holds significant power and responsibility, she would expect, as Mrs Russell expected, the matter to be investigated. This is all the more the case when the council has a Whistleblowing Policy which lays out in detail the approach that the employee can expect the council to take and the protections that will be afforded to them. To fail to do so is, in our judgement, a matter likely to destroy or seriously damage the relationship of trust and confidence between the parties.

261. We have found that this failure was not on the grounds that Mrs Russell had made a protected disclosure, but for other reasons, as outlined above. We must consider whether the respondent had "reasonable cause" for its failure for the purpose of assessing whether there was a breach of the implied term. Although we have a degree of sympathy with the individuals involved and the confusion that has arisen, ultimately we find that the respondent had no "reasonable cause" for failing to invoke the Whistleblowing Policy and deciding (initially) that no formal investigation would be carried out as a result of Mrs Russell's disclosures. That decision was a breach of the implied term of trust and confidence. We are satisfied, in view of the findings of fact that we have made, that Mrs Russell resigned in response to that breach (**Issue 2.1.3**), and we have already addressed the question of affirmation (**Issue 2.1.4**).

Reason for dismissal and fairness

262. It is possible (though rare) that a Tribunal can find that a constructive dismissal was nonetheless a fair dismissal. This is not one of those cases. Although the List of issues envisages that the Tribunal will consider whether there was a fair reason for dismissal under s.98 ERA (**Issue 2.3**) Mr Mensah has conceded in his submissions that there is no potentially fair reason. The dismissal is therefore unfair and Mrs Russell's claim of unfair dismissal under s.94 ERA must succeed.

263. If the only claim arising out of the dismissal was a straight-forward constructive unfair dismissal claim, then we could end our discussion there. However, it is part of Mrs Russell's claim that the dismissal was unfair because the reason or principal reason for the dismissal was that she had made a protected disclosure (**Issue 2.2**). There is also the question of whether the dismissal is, itself, an act of unlawful harassment, expressed at **Issue 2.1.5** as follows:

> **Did the claimant resign in response or partly in response to repudiatory conduct which included unlawful harassment? If so, is her constructive dismissal itself 'unwanted conduct' and hence an act of harassment contrary to sections 26 and 40 of the EqA, or, alternatively, discrimination contrary to section 39 of the EqA?"**

264. Dealing first with Issue 2.2, we have found that the respondent's initial failure to investigate the claimant's disclosure was not causally linked to the claimant having made protected disclosures. The breach of the implied term which gives rise to our finding of constructive dismissal is not, therefore, linked to the protected disclosures in a way which would give rise to a successful 'automatic' unfair dismissal claim under s.103A ERA.

265. In the list of matters relied on by Mrs Russell as causing or contributing to her the breach of the implied term, number 7 is Claire Coggan's actions in setting up the replacement WhatsApp group and not inviting Mrs Russell to join it. We have found that to be a detriment on the grounds that Mrs Russell had made protected disclosures.

266. We have therefore gone on to consider what, if anything, this matter contributed to the respondent's repudiatory breach, in order to determine whether the "sole or principal reason" for the dismissal can be regarded as the fact that the claimant had made protected disclosures. In our view, although we have found this to be an unlawful detriment, it contributed little or nothing to the repudiatory breach, and was not, in reality, part of Mrs Russell's reason for resigning. We accept that the second group was intended to be social and find that Mrs Russell would not have accepted an invitation to join. Whilst she was unhappy had not being invited, this was not conduct likely to destroy or seriously damage the employment relationship. Mrs Russell is astute enough to distinguish between the actions of Miss Coggan as a supervisor and the actions of the more senior managers. The actions of Miss Coggan (and other team members on the WhatsApp group) caused Mrs Russell concern and distress, but they did not cause her to question her underlying employment relationship with the council. This is illustrated by the fact that she was prepared to continue in employment for a year whilst her concern about the messages built up, by the fact that she wished to distance herself from the activities in the group and the people involved, first by requesting to come off the group, and

then by requesting (albeit opaquely) to work from home in order to avoid contact with the team. We find that she was hesitant to report the messages, in part because of concern over repercussions, but that she had every expectation that senior managers would be supportive and address her concerns fully and properly. The question of resignation only arose when the response to her disclosure was inadequate, compared to the expectations she had formed having regard to the Whistleblowing Policy.

267. In those circumstances, we are satisfied that the test in s.103A is not made out, and that the claimant's claim of 'automatic' unfair dismissal on the ground that she made protected disclosures cannot succeed.

268. Turning to the harassment claim, we consider that the acts of harassment we found to have taken place would amount to repudiatory conduct. For the reasons set out above, however, we find that Mrs Russell did not resign in response to that repudiatory conduct. She resigned in response to the failures of management to respond appropriately to her disclosures. In those circumstances, we find that the constructive dismissal which took place cannot be properly characterised as either an act of harassment or an act of direct discrimination.

269. Although not strictly necessary, for the sake of completeness we include the following findings about the earlier matters set out in the List of issues as causing or contributing to the respondent's alleged breach of contract:

247.1 Issue 1: We find no breach of any express term of Mrs Russell's contract. The purpose of Part 8 is to set out a contractual requirement for employees to adhere to the council's policies and procedures. The council's own "duty of care to its employees to provide both a safe work place and a safe system of work" is referred to in this context. Part 8 places no contractual obligation on the council.

247.2 Issue 2: This arises out of the WhatsApp messages and has already been considered.

247.3 Issue 3: This is the complaint that Mrs Russell's home address was given out. We find this cannot be criticised in the circumstances and adds nothing to the allegation of repudiatory conduct.

247.4 Issue 4: This is the alleged failure to permit the claimant to work permanently from home. For reasons already discussed we do not criticise the respondent in respect of this issue, and find it adds nothing to the allegation of repudiatory conduct.

247.5 Issue 5: this is an allegation that Jill Farrar failed to deal properly with Mrs Russell's request that her disclosure be dealt with formally. There is substance in this complaint and it contributes to the repudiatory conduct which we have found. There is no requirement to determine whether, taken on its own, it would amount to a breach of the implied term.

247.6 Issue 6: is an allegation which picks up on a comment made by Louise Jones in her email of 22 April 2021 that there may have been "underlying issues" between Mrs Russell and Miss Coggan (leading to Miss Coggan expressing suspicions that Mrs Russell had reported the comments). If the Whistleblowing Policy had been followed and the whole episode had been dealt

with in the way envisaged by that policy then it is unlikely that this comment would have come about. However, we see it as a somewhat "throwaway" comment and do not attach the significance to it that Mrs Russell clearly does. There was nothing to investigate and we make no criticism of the respondent (including Miss Jones) for not launching a separate investigation. This does not contribute to repudiatory conduct.

247.7 Issue 7: this is the issue around Miss Coggan excluding Mrs Russell from the second WhatsApp group, which has already been considered.

Conclusion

270. There will be a Remedy Hearing on a date already notified to the parties to consider the appropriate compensation for those claims which have been upheld.

Employment Judge Dunlop
Date: 30 January 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
1 February 2024

FOR EMPLOYMENT TRIBUNALS

Annex
Complaints and Issues

1. **Time limits**

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 25 February 2021 may not have been brought in time.

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

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

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

1.2.4.1 Why were the complaints not made to the Tribunal in time?

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

2. **Unfair dismissal**

<u>Dismissal</u>

2.1 Can the claimant prove that there was a dismissal?

2.1.1 Did the respondent do the following things:

2.1.1.1 Breach the express terms of part 8 of the claimant's contract of employment, by not taking all reasonable steps to prevent discrimination and failing to deal with the claimants allegations of harassment therefore failing to provide a healthy and safe harassment free environment.

2.1.1.2 Subjecting the claimant to inappropriate and offensive WhatsApp messages between 23/3/20 and 14/4/21.

2.1.1.3 Giving the claimant's home address to a colleague without her consent in or around December 2020.

2.1.1.4 Refusing to permit the claimant to work from home permanently (following her request on 16 December 2020).

2.1.1.5 Jill Farrer failing to deal appropriately with the claimant's initial complaint about the WhatsApp group by failing to conduct an investigation and deal with the matter formally as agreed in a Teams call, on or around the 30th March 2021 leading to potential disciplinary action against team members.

2.1.1.6 Louise Jones in her email dated the 22nd April 2021, failing to investigate possible underlying issues between Claire Coggan (supervisor) and the claimant when she knew that Claire Coggan suspected that the claimant had reported the WhatsApp posts.

2.1.1.7 Claire Coggan setting up a replacement WhatsApp chat group on or around 15 April 2021 and not inviting the claimant to join it.

2.1.1.8 Louise Jones's decision (communicated by email dated 22 April 2021) not to formally investigate the content of messages posted on the WhatsApp group.

2.1.1.9 The respondent failing to expedite the formal investigation (once it had started) as recommended by occupational health.

2.1.2 Did that breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:

2.1.2.1 whether the respondent had reasonable and proper cause for those actions or omissions, and if not

2.1.2.2 whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

2.1.3 Was the fundamental breach of contract a reason for the claimant's resignation?

2.1.4 Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.1.5 Did the claimant resign in response or partly in response to repudiatory conduct which included unlawful harassment? If so, is her constructive dismissal itself 'unwanted conduct' and, hence, an act of harassment, contrary to sections 26 and 40 of the EqA or alternatively discrimination contrary to section 39 of the EqA.

Reason

2.2 Has the respondent shown the reason or principal reason for the fundamental breach of contract?

2.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

2.4 Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

2.5 If the respondent has shown a potentially fair reason for the fundamental breach, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

3. **Protected disclosures**

3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The disclosures relied on are:

PD1: 29-03-2021 - Teams call to Dean Stockwell on the 29 March 2021 advising him of content of WhatsApp posts and saying that colleagues are making fun of our clients and colleagues based on their protected characteristics (disability etc). Sharing data sensitive information. Discussing job vacancies and who has applied. Posting sexual content. I gave an example of a colleague is stalking the shit out of a client with Learning Disabilities on Facebook. That there are 100s of posts about our clients, colleagues and staff from DWP that help us. Dean asked me to put it in an email and I asked if he wanted me to provide some examples and he said yes.

PD2: Email to Dean Stockwell dated 29 March 2021 expressing a wish to leave the team WhatsApp group and raising concerns about the content of the messages.

PD3: On or around the 30-03-2021 – Teams call with Jill Farrer discussing the content of the WhatsApp posts. Jill said how shocked she was, especially with it being in the Client Finance

Team and we were there to protect vulnerable clients. I told her they were only a few examples and there were 100's more. She said 'I take it you want this to be dealt with formally" and I agreed. She said 'This will stop!' She apologised to me.

PD4: Email to Louise Jones dated 19 April 2021 concerning action being taken as a result of PD1 and PD2 and raising concerns about exclusion from the new WhatsApp group.

PD5: 23-04-2021 - Telephone call to Linda Dutton (Head of HR) - Advised about the posts and reporting them and the actions (or lack of actions) taken following the disclosure. She said I do not know why you are contacting me and I told her that she is recorded as a contact in the Whistleblowing policy and also because it was HR that had told Louise Jones to deal with it informally rather than formerly as agreed. She did not sound happy that I had contacted her but asked me to email my concerns to her. She asked if I had sent screenshots to Dean and I said I had sent examples and that I thought that the screenshots would be requested at the formal investigation.

PD6: Email to Linda Dutton dated 25 April 2021 concerning action being taken as a result of these issues.

PD7: Email to Linda Dutton dated 27 April 2021 concerning action being taken as a result of these issues.

PD8: Meeting with Louise Jones 30th April 2021. Discussed the content of the posts and how it had been dealt with and the effect it was having on me. We discussed how shocked Jill was about the content of the posts and how shocked I was that it had been dealt with informally after Jill had said ‘I take it you want this to be dealt with formally’. Louise said that HR had said to deal with it informally and that normally there would be a pre-disciplinary where she would be asked her opinions and if it had been her decision, then she would have dealt with it under the Whistleblowing and Disciplinary Procedures.

PD9: 13th May 2021. Email to Louise Jones. Enclosing screenshot of photo and conversation between Claire Greaves and Claire Coggan making reference to pulling her LD face and saying there is a recording of Claire Greaves doing her LD voice which I can send to her phone.

PD10: Formal grievance letter dated 17 May 2021.

PD11: 23rd May 2021. Email to Louise Jones and cc Jill Farrer enclosing copy of all the WhatsApp posts relevant to the disclosure.

PD12: Email to Louise Jones dated 25 May 2021 concerning action being taken as a result of these issues.

PD13: 2nd June 2021. Email to Louise Jones enclosing list of WhatsApp posts believed to be in the public interest and copies of screenshots.

3.1.1 Did she disclose information?

3.1.2 Did she believe the disclosure of information was made in the public interest?

3.1.3 Was that belief reasonable?

3.1.4 Did she believe it tended to show that:

3.1.4.1 a criminal offence had been, was being or was likely to be committed;

3.1.4.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

3.1.4.3 a miscarriage of justice had occurred, was occurring or was likely to occur;

3.1.4.4 the health or safety of any individual had been, was being or was likely to be endangered;

3.1.4.5 the environment had been, was being or was likely to be damaged;

3.1.4.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

The claimant will rely on 3.1.4.1 and 3.1.4.2

3.1.5 Was that belief reasonable?

3.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

4. **Detriment (Employment Rights Act 1996 section 48)**

4.1 What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?

D1: On or around 15 April 2021, Claire Coggan setting up a replacement WhatsApp group and failing to invite the claimant to join it.

D2: The respondent failing to investigate the WhatsApp group posts in an appropriate and/or timely way.

D3: The respondent failing to communicate clearly with the claimant over its response to her disclosures, what action was being taken, and what assurances it could provide to her regarding her concerns about retaliation.

D4: The respondent failing to permit the claimant to work from home on a permanent basis in view of her having raised these concerns and her fears about retaliation.

D5: The respondent failing to expedite its investigation as proposed by Occupational Health.

4.2 Did the claimant reasonably see that act or deliberate failure to act as subjecting him/her to a detriment?

4.3 If so, was it done on the ground that she made a protected disclosure / other prohibited reason?

5. **Disability**

5.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

5.1.1 Did she have a physical or mental impairment: the impairments relied upon are (1) facial scarring (2) fibromyalgia and (3) depression/anxiety?

5.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities? (Having regard to s.3, Part 1, Schedule 1 EqA 2010 as regards cases of severe disfigurement);

5.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

5.1.4 If so, would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?

5.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

5.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

5.1.5.2 if not, were they likely to recur?

6. **Harassment related to disability (Equality Act 2010 section 26)**

6.1 Did the respondent do the following alleged things:

6.1.1 Comments made by Mark Watson in the WhatsApp group about the claimant being “quiet”.

6.1.2 On or around October 2020 Mark Watson putting the claimant’s face on the full screen of a team video call in response to her comment that she did not like her face appearing on screen.

6.2 If so, was that unwanted conduct?

6.3 Was allegation 6.1.1 related to her disability of fibromyalgia?

6.4 Was allegation 6.1.2 relation to her disability of facial scarring?

6.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. **Harassment related to various characteristics (Equality Act 2010 section 26)**

7.1 Did the respondent do the following alleged things:

7.1.1 Various team members making inappropriate and/or offensive comments about service users via the WhatsApp group chat between 6 May 2020 and 17 March 2021.

7.2 If so, was that unwanted conduct?

7.3 Was it related to one or more protected characteristic?

7.4 Alternatively, was it conduct of a sexual nature?

7.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

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

<u>Claims related to fibromyalgia</u>

8.1 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?

8.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

8.2.1 That employees on the claimant's team were required to attend the office on a rota basis from July 2020.

8.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was suffering from extreme tiredness at that point in time and would find travel to and from the office difficult?

8.4 Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage? (The claimant will say the respondent knew from 16 December 2020

when she emailed her line manager to request permanent home working and the conversation with Dean Stockwell following her request).

8.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

8.5.1 Allowing her to work from home on a permanent basis and not attend the office.

8.6 By what date should the respondent reasonably have taken those steps?

9. **Remedy**

Specific issues as to remedy will be identified at a later date, but may include:

9.1 What financial losses have been sustained by the claimant in respect of the claims in which she has succeeded?

9.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.3 If not, for what period of loss should the claimant be compensated?

9.4 What losses has the claimant suffered as a result of leaving the respondent's pension scheme?

9.5 What injury to feelings has the respondent's unlawful conduct caused the claimant and how much compensation should be awarded for that?

9.6 (If the claimant has succeeded in a claim which gives rise to personal injury damages) Has the respondent's unlawful conduct caused the claimant personal injury and how much compensation should be awarded for that?

9.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

9.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.9 Did the respondent or the claimant unreasonably fail to comply with it?

9.10 If so, is it just and equitable to increase or decrease any award payable to the claimant?

9.11 By what proportion, up to 25%?

9.12 (If the claimant has succeeded in a discrimination claim) should interest be awarded? How much?

9.13 Is the claimant entitled to aggravated damages?