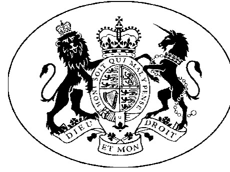
Case No: 2300816/2021



EMPLOYMENT TRIBUNALS

Claimant: Ms M Osei-Antwi

Respondent: The London Borough of Lewisham

Heard at: **London South**
On: 12, 13, 14 and 15 February 2024 and in chambers 16 February and 15 March 2024

Before:
Employment Judge Heath
Dr S Chacko
Ms C Edwards

Representation
Claimant: In person
Respondent: Mr B Jones

RESERVED JUDGMENT

1. The claimant was not at the relevant times a disabled person under section 6 Equality Act 2010.

2. None of the claimant's claims are well-founded and they are all dismissed.

REASONS

Introduction

1. This is a case about the claimant's resignation before the likely non-confirmation of her employment following her probation period within the respondent's local authority's Unaccompanied Asylum Seeking Children and Leaving Care Service. The claimant says that the reason why her employment was not likely to be confirmed, and why she was treated unfavourably in a number of ways during her employment, was because of

2. or related to her disability or because of protected disclosures she made about aspects of the service or because she had complained of discrimination. She says she was constructively dismissed. The respondent does not accept that the claimant was a disabled person, or in any event it had no knowledge of this, does not accept she made protected disclosures or did protected acts, says the claimant resigned and was not constructively dismissed, and says the reason why it proposed not confirming her employment was her poor performance during her probation period.

The issues

3. The List of Issues in this case was agreed at a Case Management preliminary hearing on 6 October 2022 before Employment Judge Matthews. The parties agreed at the hearing before us that these were the issues the tribunal had to determine. They are annexed to this decision.

Procedure

4. In the run up to the final hearing the claimant made an application to postpone the hearing on the basis that she had made a Data Subject Access Request "SAR" back in 2020 and that information had not been supplied to her. Her application was not granted, and on 9 February 2024 Acting Regional Judge Khalil directed that the matter should not be postponed, but that the application should be renewed on the first day of the hearing.

5. The claimant renewed the application, supplying a further chronology setting out information she relied on to support it, and made further oral submissions. In short, she set out that the respondent had not supplied information that she had applied for in a SAR back in 2020. She said that at the Case Management Preliminary Hearing on 6 October 2022 the respondent agreed to supply the information. She set out the attempts that the respondent had taken to supply the documents, which involved sending it by a system called Egress. She was unable to access the information and made requests for it to be sent in an alternative format. She was sent the documents in a format she could access on 12 January 2024 (it had been sent on 20 December 2023), she accessed it on 17 January 2024, but later found that it had not saved correctly on her laptop, and she could not access it again. She said that there was a large amount of information that she had not fully read, and she believed there was information that supported her case.

6. The claimant confirmed that she had not exchanged her witness statement, and had not even completed it. She confirmed that she could rely on her extensive pleadings (including further particulars and disability impact statement) as her evidence, but that she would try to complete her

7. statement and provide it to the respondent later that day if the matter was not postponed.

8. The respondent argued that the claimant was conflating the SAR procedure with the duty to disclose, which is separate. The respondent had complied with the duty to disclose and had disclosed documents in December 2022 pursuant to case management orders. The material requested in the SAR was provided last year and the claimant accessed some of the cloud links provided on 4 October 2023. Those links had a download function and she could have downloaded the documents then. When the claimant had indicated to the respondent's solicitors that she was in difficulty, the respondent suggested alternate ways of providing it, including hard copy to be collected from the respondent's offices. The claimant delayed in responding to this offer and later declined it. This matter concerns a resignation in 2020 and is already stale. By the time this is relisted, if the application were granted, it would be more stale.

9. We refused the application for a number of reasons given orally, but in short:

    a. The claimant was effectively saying that there might be information in the SAR which might support her case. She was not clear on what the information was, or what issues it might go to;

    b. The respondent has supplied the SAR documents on a number of occasions, and made further offers to supply it in other ways. It is not responsible for the claimant's failure to access the documents;

    c. There is no information to suggest that the respondent has not complied with its disclosure obligations. At its highest, there is a possibility that there might be other relevant documents supplied in the SAR;

    d. The case is already stale and would not be relisted before the second half of 2025 if postponed. To have the case hanging over all parties would be highly unsatisfactory. The interests of justice apply to all parties, including not only the claimant, but the respondent and its witnesses who have serious allegations levelled against them, but also the tribunal as it administers justice.

10. The claimant then indicated that she had several witness statements from other witnesses she had not exchanged. The tribunal ordered her to exchange those by 12 noon, and would decide the following day how to proceed.

11. The claimant emailed 8 witness statements by noon, but did not provide her own witness statement until 1.03am. In the morning of the second day, Mr Jones told us that he had not finished reading the statement, but had already identified one assertion in paragraph 62of the statement, made for

12. the first time, that prejudiced the respondent, in that it set out an alleged disclosure of the disability to a manager that was not a witness, and who he would seek to call if that evidence stood. He said that it could well be the case that further difficulties might exist in the remainder of the statement. He submitted that the statement should not be admitted, and

13. that the pleadings should stand as the claimant's evidence. If the statement were admitted in full this would in all probability mean the case could not proceed in the current trial window. After some discussion, we gave Mr Jones a further half an hour to finish reading the statement to identify any other potential difficulties. After this time Mr Jones confirmed that there were none. We decided to admit the statement, but that in the interests of justice paragraph 62 would be struck out. This avoided the need for an adjournment to call a further witness to deal with the evidence contained in it. This approach avoided delay and additional cost, and (balancing the relative prejudice to the parties) placed them on an equal footing.

14. At 7.02 pm in the evening of the second day of the case the claimant emailed the tribunal to apply to disclose further evidence. She said she had been advised that that she had been under an obligation to disclose all her evidence at once and that she could not disclose anything further after this. She had not disclosed anything as she was waiting for the SAR documents, and made reference to 560 pages of documents. She reiterated matters she had raised in her application to postpone.

15. On the morning of the third day, the claimant applied to disclose documents and have them added to the bundle. She confirmed that it was around 100 pages, that they were in electronic form, unpaginated and as yet undisclosed to the respondent, albeit that they were documents the respondent possessed. She said they included sick certificates (these appeared to be already in the bundle), emails between her and the Multi-Agency Safeguarding Hub ("MASH"), and between her and her line manager.

16. Mr Jones indicated that normally he would be relaxed about continuing disclosure and adding to the bundle, but in this instance he objected. There was no way that this amount of evidence, at this stage of proceedings could be dealt with fairly. He also indicated that from the respondent's side, they had been investigating one issue which had arisen the previous day when it had become clear that Ms Aira's witness statement referred to an incorrect document. Investigation revealed that the correct evidence would be found in Ms Aira's notebook, which also contained other evidence relating to the claimant. Mr Jones said this was a disclosable document, and while he was not seeking to rely on it, he nonetheless flagged up its disclosability. The practical difficulty was that the respondent would have to select parts from the notebook, type it up, and redact sensitive material. It was unlikely this could be done within the hearing window.

17. The claimant objected to the admission of the notebook, and suggested (seemingly as a pragmatic compromise) that if she is not allowed to rely on her documents, the respondent should not be allowed to rely on theirs.

18. We did not consider that it was in the interests of justice (focussing on issues of the parties being on an equal footing, delay and additional costs) to admit any of the further documents either side sought to adduce. By now, the case was on an extremely tight timescale whereby it would only be possible to hear evidence and submissions on liability within the 4 day window and the tribunal would have to produce a reserved decision. Further extensive disclosure would throw this out entirely and lead to delay and extra cost.

19. We were provided with a 665 page bundle. An additional document (the Flexible Working Policy) was added on the second day.

20. The claimant gave evidence on her own behalf and called Ms Janelle Murray, Keyworker with Young Futures. She tendered statements from the following who did not attend to give evidence;

    a. Caroline Fergusson;

    b. Denise Sellars (Senior Personal Adviser);

    c. Maurice Sinclair (Personal Adviser)

    d. Leon Berry (Personal Adviser);

    e. Ransbrilla Sessay;

    f. Stella Wells.

21. The respondent called the following who provided witness statements:

    a. Ms Sharon Chambers (Group Manager);

    b. Ms Conchita Aira (Team Leader);

    c. Ms Bernadette Sumner (former Senior HR Adviser).

22. The parties provided oral closing submissions. The tribunal reserved its decision and deliberated for a further two days in chambers.

The facts

The parties

23. The respondent is a local authority which provides a number of statutory services. This claim concerns the claimant's employment in the Unaccompanied Asylum Seeking Children and Leaving Care Service ("the Service") which is within the Children and Young People's Directorate. At

24. the time of the events to which this claim relates, the Service had recently been reinstated following an Ofsted inspection which deemed it as requiring improvement. This led to a reconfiguration of the Service which was taking place around the time and after the claimant's appointment.

Application for employment

25. The claimant applied for the role of Senior Personal Adviser ("SPA") within the Service. Within her application form was a section asking whether she considered herself a disabled person. She ticked the "Prefer not to say"

26. box. She completed a declaration of Health form on 22 July 2019 in which she indicated that she did not anticipate needing any adjustments to carry out her role, that she anticipated that the duties would not affect her health and that she was not receiving or waiting for any treatment (including counselling). She was successful in her application and was appointed to the SPA role commencing employment on 1 October 2019.

Policies

27. The respondent has numerous policies governing the employment of staff, including a Probation Policy. This policy sets out the respondent's policy, principles and process for managing probation. The probation period is six months and has reviews at two months, four months and five months at which the probationer is reviewed under the following headings: quality of work, quantity of work, flexibility, customer care, reliability/timekeeping, conduct, attendance and any other relevant professional standard or key areas relating to the job requirements. Assessing managers are to fill out probation assessment forms at each review meeting:

    a. At the two-month review the employee should be given feedback on strengths and areas for further development, and any areas of concern should be raised, with any support or training required identified.

    b. At the four month review, if the probation period was going well, the employee should be advised that a further and final meeting will take place at five months. If there are concerns, the employee should be made aware of them and advised that if they do not meet the required standard dismissal could be possible outcome. If the employee has not met the required standards, but a manager considers that they could do with a further period of review, the probation period can be extended for three months beyond the initial six months.

    c. At the five month review the employer can confirm employment if all has gone well.

    d. Where a manager determines either at the five month review, or following an extended probation period, that the employee does not meet the required standards, they should advise the employee that

e. they will be recommending termination of employment. An employee will be invited to attend a meeting with a Service Manager or other senior manager at which the line manager will explain the reasons for the recommendation and the employee can put forward any information they would like to be taken into account in reaching a decision. The employee can be accompanied by a trade union representative or colleague. The service manager will make a decision on the available information which will be communicated to the employee in writing, giving them a right of appeal.

28. The respondent also has a Flexible Working Policy, which contains Appendix A on Flexi-time “the flexi-time policy”. This policy sets out that operation of flexitime is at the discretion of management, and that working hours must be agreed with the line manager to ensure service provision is maintained. The policy sets out a standard band for flexible working hours between 8:30 AM to 6:30 PM, with core working hours, which must be maintained by the employee, between 10 AM and 12 noon and 2:30 PM and 4 PM. If an employee wishes to take advantage of flexible time on a particular day (for example to leave early or work late,) they should get the agreement from their line manager and not assume it is a right to leave early. There is a four-week accounting period during which the employee must work their contractual hours, plus or minus a certain number of hours which must not exceed 14. During the accounting period, excess hours worked may be taken off in lieu or carried over into the next accounting period. The employee should keep a record of their starting, finishing and break times on a daily basis using a flexitime record sheet which must be approved by the manager at the end of the accounting period.

29. The claimant’s contract of employment referred to the flexible working policy and set out normal hours of work as being 35 per week, which would usually be Monday to Friday 9 AM to 5 PM. Additional hours worked should be compensated by giving time off in lieu rather than payment of overtime. All overtime should be planned and approved by the service manager or budget holder in advance.

30. However, the claimant was in a client facing role which would regularly require out of hours visits to service users. Flexi time would not be accruable outside of the hours mentioned in the previous paragraph, but rather time off in lieu would accrue for hours worked in addition to contractual hours. Ms Sumner said that the claimant’s role within the Service would not have been one where flexi time would apply. Ms Sumner was the senior HR advisor who had been supporting Childrens’ Social care including the Service, and we accept her evidence in that regard.

Commencement of employment

31. The claimant commenced employment as a SPA on 1 October 2019. In this role she provided support, guidance and advocacy for young care leavers between the ages of 16 to 25 years old, assisting them during their transition into adulthood and independent living on leaving the care system. It almost goes without saying that, due its very nature, the Service dealt with many children and young people with very complex needs and significant vulnerabilities. Sadly, serious mental health problems, suicidal thoughts and attempts, and challenging behaviour among service users was not uncommon due to the cohort of young people the Service worked with.

32. The claimant's employment was subject to 6 months probation under the relevant probation policy.

33. The Service was in the process of being reconfigured as the claimant began working for it. She was initially supervised by an Interim Service Manager, Ms Reynolds, and a Team Manager, Ms Hines, due to lack of management capacity. These were managers who would only be supervising the claimant on an interim basis as the Service continued to recruit. In November 2019, Ms Chambers, Group Manager (and another senior manager) took over the line management of the claimant on a temporary basis. Team Managers were recruited at the management level above the claimant.

34. We find that the state of the Service at the time of the claimant's commencement of employment and shortly after was such that the line management of the claimant during this initial period was probably not what it could have been. One deficiency was that the explanation of flexitime may well not have been explained to her satisfactorily. Another was that managers may not have gained as detailed an impression of her work as they were later to gain.

35. The claimant presented as a confident and vocal member of staff. She disclosed no health difficulties and gave no impression to management that she was struggling in any way. Indeed, her GP records do not indicate she was experiencing any health difficulties that required medical attention.

36. While the management arrangements of the claimant were not ideal, they were entirely due to the state of flux the Service was in. There is no evidence to suggest that she had any issues with her health or was at a disadvantage because of any health condition arising from the management arrangement.

The first few months of employment

37. The claimant had a background in housing, and was the lead SPA on housing matters. The two other SPAs led on health and education respectively. We do not find, as the claimant appeared to suggest during questioning of witnesses, that this meant that she dealt with all housing

38. matters relating to all care leavers. Her expertise would be drawn on when complex housing issues arose, but we do not find that this created a significant extra tranche of work for her in comparison with her peers (who themselves would lead on complexities arising in health and education related matters). We make this finding based on the fact that there is no contemporaneous documentation to support the claimant's narrative and it was never a claim that she made at the time.

39. The other SPA's were not new to the service and carried an existing caseload. The claimant was allocated a smaller number of cases to begin with. Being more senior than the Personal Advisors ("PAs"), the SPAs would be expected to have some cases with a degree of complexity.

40. On 6 December 2019 Ms Chambers wrote to the SPAs to tell them that she was looking to reduce their caseloads down to 15 cases (the majority of which would be complex) in addition to other tasks related to their roles. She indicated that all outstanding Pathway Plans ("PWPs") (written plans for care leavers which the respondent was obliged by statute to produce) would need to be completed. The SPAs would be given protected time to complete this. At this point in time, the claimant held a caseload of seven, while her colleagues held around 25 cases each. Any reduction to 15 cases obviously did not apply to the claimant who only had seven cases. There was no suggestion that this would mean the claimant's case load would increase to 15.

Two month probation meeting

41. On 9 December 2019 Ms Chambers had a two month probation meeting with the claimant. As we have found, oversight of the claimant's work had not been what it might have been at this stage. Ms Chambers' observations under the relevant headings within the Probation Assessment Form included the following:

    a. In terms of quality of work, it was noted she had completed three of five targets that had been set by Ms Reynolds.

    b. In terms of quantity of work, the absence of sufficient management cover in the service was noted, but it was observed that samples of the claimant's work indicated it had been completed to a good standard.

    c. She had shown a professional work ethic and been flexible in her approach and maintained acceptable professional standards.

    d. She appeared to be reliable in her timekeeping and there were no concerns about her attendance.

    e. She displayed integrity and made efforts to form relationships with colleagues, but was still establishing relationships across the service.

f. It was noted under "What specific points (if any) were brought to the employees attention?" that, although the claimant was keen to perform well, and was animated and outspoken "*It was mentioned that she may wish to reflect on how she displays her enthusiasm to others, as each member of the service is at a different stage of their development and may therefore not always appreciate her approach*".

42. Ms Chambers presented as a thoughtful, professional and overall impressive witness. She told us that by this time she herself had observed, and others had brought to her attention, that there were concerns about the way the claimant communicated with others. She told us that her own management style was to focus on the positives, and to present the negatives in a nice way that would not demotivate the individual. Ms Chambers had observed, and staff had told her about, "tricky situations" and difficulties in the claimant's communication style within an open plan setting. She was very abrupt in the way she spoke to people, would not listen to colleagues and appeared not to accept the "gentle hints" that Ms Chambers was giving her. We accept Ms Chambers' evidence, and accept that she chose to present her concerns to the claimant in a way that she hoped would not demotivate her.

First protected disclosure

43. On 12 December 2019 the claimant emailed Ms Chambers about a statutory visit the previous day to a young person whose case file she held. She explained that this young person, who had a history of mental health difficulties and suicidal ideation and threats, had flown into a rage in which he threw chairs, made threats and racially abused the claimant. She asked for the case to be reallocated to someone else as she was not prepared to accept this behaviour, and believed it was in the young person's best interests to have another worker allocated to him. She pasted an extract of the notes from the young person's file, which referred to the outburst and suicidal history. This is the first disclosure of information that the claimant relies on (we will call it "PD1" and adopt similar terminology for the two subsequent disclosures).

44. Ms Chambers responded to the claimant on the same day expressing the opinion, based on the young person's presentation and the risks concerning his undiagnosed mental health, that it might not be appropriate to re-allocate the case without discussing expectations and boundaries with the young person. Otherwise, there was a risk of simply passing issues on to someone else. Ms Chambers said she would discuss the matter further with the management team and come back with any decisions, but that in the meantime the claimant was not to contact the young person for her own safety. At this point the claimant had not mentioned anything about any health condition or disability.

January 2020 Ms Aira as line manager

45. Ms Aira came into post just before Christmas but went on leave more or less straight away over the holiday period. On 10 January 2020 Ms Aira emailed the claimant having spoken to her earlier that week. She set out a list of 9 young people whose PWPs required updating or needed a home visit. She invited any questions the claimant might have and indicated that the information was a guide for the claimant to complete her own planner to complete tasks and share with her. Ms Aira followed this up with a further email on 14 January 2020 with a breakdown of cases and overdue outstanding tasks for the week. We find that the claimant may well have been taken aback that her new manager was focused on the work she had to do. We further find that such focus was not inappropriate.

15 January supervision meeting

46. On 15 January 2020 Ms Aira had a supervision meeting with the claimant. This also served as a formal handover meeting, and so Ms Chambers attended. The meeting was minuted and covered a number of points including:

    a. A history of previous meetings, including the first probation meeting on 9 December 2019.

    b. A discussion of the supervision process and expectations.

    c. A discussion of the claimant's caseload (she had 14 cases allocated at this point).

    d. A discussion about the claimant's timekeeping. Ms Aira said she needed to get a better sense of the claimant's whereabouts. The claimant said that Ms Aira was trying to micro-manage her. Ms Aira said she wanted to clarify flexitime and TOIL but the claimant said she could not plan ahead and put it in her diary. Ms Aira said she wanted to know when she could expect the claimant in the office, and it was agreed that the claimant would communicate with her and let her know her plans, perhaps by saying hello when she got into the office. Ms Aira requested to claimant sent her a text if she is going to work late so that Ms Aira knew when she finished. This would also assist in approving TOIL for additional hours. The claimant was informed that TOIL was only when a late visit or additional visit was agreed with the manager and approved. Similarly working from home needed to be pre-agreed by the manager. Ms Aira explained that the respondent had a duty of care towards the claimant as a lone worker. The claimant shared that she felt this indicated a lack of trust in her and micromanagement by Ms Aira. The claimant said she had been recording her leave on her Flexi sheet rather than her leave card.

    e. A discussion about the incident in November where a young person had tried to assault her, and the accommodation provider did

f. nothing about it. Ms Aira asked that the claimant complete an incident report. The claimant said she did not feel safe, and refused to work with the young person. Ms Aira said she would explore the issue with management and come back to the claimant.

47. We find that Ms Aira was not seeking to micromanage the claimant. The claimant carried out lone home visits to vulnerable people, at times out of office hours. This created at least the potential for danger, and it is entirely unsurprising that the respondent wanted to ensure it knew of the claimant's movement. It is to be noted that the claimant herself had already raised an issue about her own safety with a service user at this point. In addition, it is not unreasonable for the claimant to provide some evidence of the times she has been working in order to claim TOIL. We formed the impression that while interim management arrangements were in place, and the service was in flux, the claimant had probably been coming and going as she pleased. In addition to her timekeeping, there had probably been less of a scrutiny of her work performance. The degree of additional scrutiny the respondent imposed on her timekeeping and work was entirely reasonable, but almost certainly resented by the claimant.

48. Also of note, is that there appears to be no complaint from the claimant that her level of work was too high. There was also no reference whatsoever to any ill health or disability.

49. On 16 January 2020, Ms Burrell, a Team Manager (the same level as Ms Chambers, that is two management levels above the claimant) emailed the claimant about an incident the previous day. In a fairly lengthy email copied to Ms Chambers and Ms Aira, Ms Burrell set out that she had sought to speak to the claimant about an issue with the duty rota which the claimant had produced. The claimant started shouting at Ms Burrell asking to get senior management involved. Ms Burrell attempted to arrange a meeting with the claimant, and waited while she made a phone call. After the phone call, the claimant appeared to refuse to acknowledge that Ms Burrell was waiting for her and appeared to be texting on her phone. Ms Burrell asked if the claimant was ready to meet with her, and the claimant began shouting at her again. Ms Burrell set out that she found the claimant's behaviour unprofessional and disrespectful and indicated that the claimant had not listened to an instruction.

50. In her disability impact statement, the claimant states that this was the point she began to notice the effects of her alleged disability. At this stage she had not visited her GP concerning any symptoms, and there was nothing within her employment to suggest any impairments that affected her work or that she brought any to the respondent's attention.

Second protected disclosure

51. In the claimant's claim form she alleges that she made a protected disclosure ("PD2") to the effect that a property occupied by a service user

52. was not adequately heated. There was no documentary or witness evidence to this effect, but we have no reason to doubt that the claimant raised this issue with management in some way. We further find that raising difficulties encountered by young persons, for example those experienced with their housing, was very much part and parcel of the claimant's role, and would not have been seen by the respondent as anything out of the ordinary.

53. On 23 January 2020 the claimant copied Ms Aira and Ms Chambers into an email in which she indicated that a young person had presented at a third party organisation threatening to harm herself and her daughter. The claimant said that she was with another young person at this point and she could not attend, and advised contact with MASH. Within four minutes Ms Chambers replied to say that due to the complexities involved, the claimant needed to action this is a matter of urgency, that this was not an issue for the duty worker, but for the claimant herself given the fact the claimant was working that day and was already aware of the young person's vulnerability. She urged the claimant to make this a priority. Ms Aira emailed the following day asked the claimant whether the young person had been seen the day before and whether she had been referred to the community mental health team and whether her child had been referred to MASH.

27 January 2020 – "mentally drained"

54. On 27 January 2020 the claimant emailed Ms Aira to request four days leave. She said "*After a very turbulent week I am mentally drained and need to reflect please*." The claimant relies on this as disclosing her disability to the respondent. We find that there is nothing in this email to put the respondent on notice that the claimant had a disability. Staff in the service carry out difficult and taxing work, and this would probably have appeared to be nothing out of the ordinary, and nothing beyond an indication that somebody was feeling the strain after a difficult week. The claimant's pleaded case is that she was unfavourably treated because of something arising from disability by not having her caseload reduced, and that this was disability related harassment. There is no reference in the email to her requesting a reduction of her caseload, and no evidence of a refusal at any point thereafter.

10 February 2020 supervision

55. On 10 February 2020 the claimant had a supervision meeting with Ms Aira, which was recorded on a pro-forma supervision record template. The claimant was four months into her probation at this point. The meeting covered a number of areas, including the following:

    a. Flexitime and TOIL was discussed, and it was agreed that additional late working needed to be agreed in advance, and that the manager should be contacted at the end of any late working. The claimant indicated she preferred to email, whereas Ms Aira felt

b. text was more appropriate. Ms Aira agreed to meet with HR for clarity around issues of lone working and flexi policies.

c. The claimant currently had 15 cases allocated.

d. The claimant was encouraged to be mindful of how she may be perceived by others, particularly when having difficult conversations. Ms Aira requested the claimant to be mindful of comments made in front of other staff that could be demoralising and discouraging. This related to the claimant telling a colleague that she "*should not be working late, and that this was not can be valued or given back to her on TOIL*".

e. The incident with Ms Burrell was discussed, and the claimant continued to express that her responses had been justified.

56. On 17 February 2020 a Team Manager in the Children Looked After Service approached Ms Aira to express her concern about the way the claimant had been talking to a young person over the phone. The following day, a Group Manager from the same service also approached Ms Aira expressing the same concerns, and wondering if the claimant should be working with that young person. This information was passed on to the claimant, who disagreed that she had been inappropriate in any way. On 21 February 2020 the young person themselves approached Ms Aira raising a number of concerns about the claimant.

24 February 2020 four month probation meeting

57. On 24 February 2020 the claimant's four-month probation meeting took place with Ms Aira and Ms Chambers. Ms Chambers was in attendance the claimant's probation, and because a number of issues had arisen which required the attendance of someone of her seniority. The meeting was recorded in a pro-forma Probation Interview Record (4 months).

58. A box was ticked in the pro-forma form indicating that the claimant had been advised that there were currently concerns about her probation and that her probation period should be extended. The form dealt with a number of matters including:

a. Under Quality Of Work: that the claimant a current allocation of 15 cases. She had difficulties with recording home visits, but had been provided training.

b. Under Quantity of Work: that her caseload had increased from 7 to 15, and the claimant found it difficult to manage competing demands. There was no evidence that the claimant had asked for her allocation of cases to be reduced.

c. Under Customer Care: that the claimant had been made aware that communication training was on offer for members of staff.

d. Under Reliability/Timekeeping: it was noted that this was an area Ms Aira and the claimant had been working on to ensure better timekeeping and communication.

e. Under Attendance: it was noted that Ms Aira had been working with the claimant to ensure her whereabouts were known at all times and to support effective lone working arrangements.

59. Ms Aira took the view that the claimant wanted to progress, and that her probation should be extended because of the issues.

4 March 2020 complaint to Ms Jannetta (protected act)

60. On 4 March 2020 the claimant emailed Ms Jannetta, the interim Service Manager (essentially the head of the Service) to say "*I have no other option but to bring your attention that I would like to raise a grievance against [Ms Aira]*". She went on to say that she had raised her concerns, but that things were not improving and that it was "*now having a severe and detrimental effect on my work and current state of mind*". Ms Jannetta replied later that day to express that she was sorry to hear this and agreed to schedule some time in the diary later in the week. We find the claimant did have a discussion with Ms Jannetta on 6 March 2020, but at no stage raised a formal grievance. On 6 March 2020 the claimant sent an email to Ms Jannetta thanking her for her time and objectivity and attaching copies of a link to the flexi policy, flexi recording sheets and supervision notes and probation report. There does not appear to be any evidence of any express or implied complaint or anything done by reference to the Equality Act.

<u>12 March 2020 supervision meeting</u>

61. On 12 March 2020 there was a supervision meeting between the claimant and Ms Aira which was recorded on a pro-forma form. The meeting covered a number of issues including:

a. The claimant reported feeling *"cool, all right*" and felt she was "*managing work and stress*".

b. She felt that "*trust not at all built*", and Ms Aira reassured the claimant that supervision was meant to be a safe space and that she wanted to work with her build trust. The claimant said she would get back to her on the issue. The claimant said she was not comfortable sharing, and Ms Aira suggested they could use a specific tool related to supervision called the Supervision Anxiety Questionnaire to assist on reflection and communication.

c. Communication was discussed, and the claimant indicated that she in the past did not want to talk to Ms Aira directly, say hello to her or tell her plans as those were attempts to micromanage her. The claimant and Ms Aira were not in agreement as to the line between

d. appropriate management and micromanagement. The claimant was not ready to stipulate what her preferred way of communicating with Ms Aira was.

e. There was a discussion about the claimant's inappropriate behaviour towards Ms Aira in a Service Meeting. Ms Aira said she had double-checked with HR about advice on managing TOIL and flexitime and was not looking to single the claimant out. Ms Aira wondered if this was the cause of how the claimant generally spoke to her. She reminded the claimant that the claimant cannot talk to her or other staff in the way that she did, and reminded her of the need to behave professionally and with respect.

62. We consider that Ms Aira was clearly communicating the respondent's position on TOIL and flexitime, but that the claimant was resisting Ms Aira applying the procedures, complaining that doing such was subjecting her to micromanagement. We consider that what Ms Aira was attempting to do, was in fact simply managing the claimant. We also do not find that the claimant made any disclosures which would lead to the conclusion that the respondent knew or ought to have known of any mental health issue.

24 April 2020 supervision

63. On 24 April 2020 there was a further supervision between the claimant and Ms Aira. This meeting covered a range of issues including:

a. The claimant reporting that she felt "*Okay and fine*".

b. The claimant had 22 cases allocated, and it was noted that her case management was getting better, but that this need to be sustained.

c. On the question of communication, Ms Aira indicated that she wanted to encourage the claimant to view others' feedback as an opportunity to learn. The claimant felt that her communication with colleagues and senior management was improving, and Ms Aira herself noted an improvement in the way the claimant spoke to her when she came back from leave. Ms Aira stressed that she was not out to "get her" but wants to address issues and improve. The claimant said she felt more comfortable.

64. We note, that among the concerns raised with the claimant, there are instances of support and praise being offered by Ms Aira. For example, in an email of 28 April 2020 Ms Aira provides the claimant with a weekly report which she hopes the claimant can use to help plan her work. She also observed that everything seemed to be going "*really well in terms of our catching up plan*".

65. On 14 May 2020 a manager in the service received a complaint from a young person about the way the claimant treated her. The young person

66. did not want to raise a formal complaint, but said that the claimant made her feel uncomfortable, and kept demanding the young person respected her. The young person said that they had never experienced anything like this in the 10 years they had been in care.

67. On 21 May 2020 Ms Aira attended a Complex Strategy Meeting with the Local Authority Designated Officer ("LADO") and other members of the service. The LADO is the local authority officer who takes the lead role in safeguarding issues relating to children. The LADO had received a referral of a young person for whom the claimant was responsible. The LADO was concerned that she had great difficulty in communicating with the claimant, and once she contacted her, the claimant did not want to disclose relevant information. The LADO was concerned that the claimant appeared not to be fully aware of the LADO process. Ms Aira viewed this as a serious mistake on the claimant's part. The claimant's previous experience and training should have meant she would know what she needed to do, but in these circumstances, if she was in doubt about what to do she should have escalated it to senior managers.

3 June 2020 five month probation meeting

68. On 3 June 2020 a Five Month Probation Meeting was held with the claimant. Both Ms Aira and Ms Chambers were present. Again, given the fact that Ms Chambers had started the probation process with the claimant, and that there were concerns to be raised with her, it was appropriate for Ms Chambers to be in attendance. The meeting was minuted in a pro-forma form, which itself indicated why Ms Chambers attended.

69. The minutes set out the timescale of the probation process. It made clear that originally the meeting was set for 31 March 2020, but due to 2 periods of annual leave taken by the claimant, and the Covid lockdown restrictions, the meeting had to be delayed and postponed to 1 and then 3 June 2020. This meeting covered a number of issues including:

    a. The claimant had 24 files allocated to her (colleagues had 28, 29 and 30 cases respectively).

    b. There had been some improvement on overdue PWPs and the recording of home visits.

    c. The claimant's understanding of safeguarding was raised. She did not accept the concerns raised by Ms Chambers that the claimant had failed to make a referral to MASH. She also did not accept the validity of concerns raised by LADO about failing to share information.

    d. In terms of Customer Care, the managers shared an example of praise from one of the claimant's clients. They also raised examples of concerns raised by both young people and colleagues about the

e. way the claimant communicated with young people. The claimant did not accept there were grounds for criticism. She said she had been "*micromanaged and attacked*".

f. On the question of timekeeping, it was noted that this has been a main issue of miscommunication. Ms Aira said there had, however, been an improvement. The claimant again raised that she felt she was being micromanaged on this issue.

g. On the issue of Conduct, including relationship with other employees and team members, Ms Chambers raised the lack of communication with LADO and relationship difficulties with another manager, young people and staff. Ms Aira raised the progress that the claimant made, but indicated that the claimant required further support in taking management instructions, communication style, ability to de-escalate challenging situations and professional integrity. Examples were given of inappropriately challenging her manager, raising her tone of voice, interrupting her in conversation, heavily gesticulating in her communication, rolling her eyes and undermining her position as chair of meetings. She pointed out that other team members had approached her to say that the claimant's behaviour was unacceptable.

h. The meeting addressed specific points which had been brought to the claimant's attention during probation, which included timekeeping and the use of flexi and TOIL, conduct with managers and other professionals, safeguarding and information sharing, communication with young people and inability to resolve conflict appropriately resulting in complaints, lack of professional conduct in professional meetings and failure to take management instructions.

i. In short, the claimant disagreed with all of the concerns management raised in this meeting.

70. The claimant was advised that her probation should be extended by one month to 6 July 2020.

71. We find as a fact that the respondent, and in particular Ms Aira and Ms Chambers, had ample cause to raise the concerns they did this meeting. We would observe that the fact that the claimant appeared to accept practically no accountability in respect of these concerns would have given the respondent all the more cause for concern.

<u>Claimant off sick from 4 June 2020</u>

72. On 4 June 2020, the day after her probation was extended for a month, the claimant went off sick. She produced a fit note citing "*work-related stress leading to low mood and anxiety*". This fit note was issued following a telephone call with her GP on 8 June 2020. This had been the first time

73. she had contacted her GP since 31 October 2018 when she had also complained of stress at work.

74. On 18 June 2020 the claimant's trade union representative Mr Cummins emailed Ms Sumner, Senior HR Adviser about the claimant's recent five month probationary meeting. Mr Cummins pointed out that the probation review meetings did not take place when they should have done. He also pointed out that the claimant did not receive notes from the four-month review meeting until just before the five month review meeting. He complained that the minutes did not reflect the content of the meeting and contained an insertion about a probationary extension. He complained about the "*number of levels about this process and the abuse of the process*". He proposed that the claimant be confirmed in post and the probation process stopped.

75. Ms Sumner replied to Mr Cummins on 25 June 2020 having discussed the situation with management. She set out a history, pointing out the interim management arrangements in place at the beginning of the claimant's employment. She pointed out that the four-month review was held just over three weeks after the target date because numerous attempts were made to schedule a meeting, but the claimant was unavailable because of leave. It was pointed out that she also declined supervision sessions. Ms Sumner also pointed out that the five month review was delayed once again because the claimant used TOIL followed by annual leave and was not available for meetings. This period also coincided with the Covid lockdown at the end of March 2020. In summary, Ms Sumner pointed out that the delays to the process were at the claimant's request and because of extenuating circumstances.

<u>Return to work 10 July 2020</u>

76. On 10 July 2020 the claimant returned to work. Initially she worked from home following a phased return to work pattern. She had a return to work meeting on 14 July 2020. She emailed some corrections to the minutes of the meeting in which she pointed out that her absence was certificated, that she had not any previous sick days prior to this, and noted the doctor's recommendation for a phased return to work.

77. On 15 July 2020 the claimant was referred by Ms Aira to occupational health ("OH"). Ms Aira set out that the claimant reported that she had work-related stress leading to low mood. The claimant had said her doctor wanted to prescribe a longer period of sickness, but she had not wanted this. Ms Aira asked OH to assess the claimant's fitness to carry out her role (supplying details of it), asking whether there were any underlying medical conditions which caused the sickness absence, and whether anything could be done to support it.

78. On 16 July 2020 the claimant was provided with the report from the probation meeting of 3 June 2020. The following day the claimant emailed to say her trade union representative had advised her not to sign it.

22 July 2020 supervision meeting

79. On 22 July 2020 the claimant had a supervision meeting with Ms Aira. This covered a number of things, including:

    a. An instance when the claimant had failed to fill out a report, claiming that it was not her responsibility.

    b. The claimant reported to be happy with her caseload (which, again, was lower than her colleagues).

    c. Ms Aira outlined the support that was available for the claimant.

    d. The claimant was encouraged to listen to feedback and think about what can be done differently. The claimant said she felt complaints about her were automatically believed.

80. On 28 July 2020 the claimant emailed Ms Sumner, cc Mr Cummins, but addressed to Mr Cummins ("Dear Gary") saying that she very much needed to raise what she described as "a 2nd grievance" against Ms Aira and Ms Chambers alleging race discrimination. She said they had abused their position of power over her by making false representations about her and falsely attempting to call her capabilities into question in order to facilitate the extension of her probation thus justifying a reason to facilitate her dismissal. Ms Sumner replied on 30 July 2020, noting that the email had been addressed to Mr Cummins, and leaving it for him to respond.

4 August 2020 supervision meeting

81. On 4 August 2020 the claimant had a further supervision with Ms Aira. Various matters were covered, including:

    a. The claimant reporting she was "*well and blessed*".

    b. Various cases were discussed, and in respect of one of them the claimant pointed out she felt she had not received the right support when she wanted the case reallocated. Ms Aira invited the claimant to reflect on matters, and suggested that the claimant was stuck in defensive mode.

    c. An informal complaint from a colleague about the claimant was discussed.

    d. The claimant had not been assigned any new cases for a number of months, and her caseload was the lowest possible.

e. The claimant's recent absence was discussed and she reported work related stress leading to low mood. The phased return arrangements were set out.

<u>Formal grievance 4 August</u>

82. On 4 August 2020 the claimant submitted a formal grievance by email. She set out a grievance against both Ms Aira and Ms Chambers for "*bullying, harassment, victimisation & racial profiling and discrimination on the basis of my ethnicity*". She said she had raised matters informally "*prior to making a formal written complaint on 4 March 2020*". As set out above, we have found that no such written grievance on 4 March 2020 was submitted by the claimant. The claimant sought the redress of having her probation stopped until her grievance has been fully heard. The claimant attached to this letter setting out a formal grievance for "*Disability Discrimination, Bullying and Harassment*" against Ms Aira and Ms Chambers. This was the first time the claimant had mentioned a disability. She asked this to be treated as a stage 2 formal grievance which she wanted investigated under the grievance procedure. Over the course of six pages her grievance included:

    a. Her history of events. She referred to management arrangements at the beginning of her employment, flagging up that her two month probation review did not raise any fundamental issues. She said the change in management led to various failings resulting in an extension of the probation which "*has impacted upon my disability*".

    b. She said she had been subjected to physical assaults and threats of violence and verbal abuse from clients as well as dealing with three incidents of attempted suicide. She said she had not received appropriate management support or counselling.

    c. She referred, in very legalistic terms, to the respondent being in breach of the implied duty of mutual trust and confidence.

    d. She referred to disability discrimination based on her anxiety and depression, which had been caused or exacerbated by the respondent's actions.

    e. She referred to excessive supervision, excessive monitoring of her whereabouts, failing to notify her of anonymous complaints within a reasonable timeframe, not supplying her with details of alleged complaints, and using the extension of the probation procedure to intimidate her.

    f. She alleged unfavourable treatment for reasons relating to her disability, again in legalistic language.

    g. She alleged disability related harassment.

h. She complained that the respondent had failed to investigate the grievance she submitted on 4 March 2020.

i. As a reasonable adjustment she asked for the suspension of the extended probation review meeting scheduled to take place on 12 August 2020.

83. The probation review meeting did not take place on 12 August 2020 as the claimant did not have a trade union representative.

84. On 17 August 2020 the extended probation meeting took place attended by the claimant, Ms Aira and Ms Chambers. The meeting covered a number of matters including:

a. The claimant specifically asked it to be noted that she found it "*quite perturbing*" that to line managers attended the meeting, and that she felt "*blindsided*". Ms Chambers explained the rationale behind her presence.

b. Various management concerns were raised with the claimant including

   i. Communication with colleagues both within and outside the service and young people.

   ii. Ability to take management instruction.

   iii. Not focusing on priorities.

   iv. Professional integrity, including concerns around the claimant continually disputing supervision and other notes relating to her performance and in case files where discrepancies had been noted.

   v. The claimant's lack of understanding with safeguarding, which included matters dealt with in previous probation report and a fresh serious incident concerning another young person.

c. The claimant was told that management would not be recommending that she be confirmed in post. The process going forward was highlighted, in which the recommendation would be relayed to HR and discussed with the Head of Service who would make a decision about whether her employment be terminated.

d. The claimant was of the view that she should be given notice that day or placed on "*garden leave*". She was told that this was not the process.

e. The claimant was told that the recommendation was not personal, but based on performance and other related matters. It was acknowledged how difficult this must be for the claimant and that every effort would be made to support her. It was proposed that the next stage of the process takes place in early September after which she would receive an outcome in writing.

85. On 17 August 2020 Ms Chambers wrote to the claimant confirming the outcome of the probation review. She explained that the claimant had not met the required standard, and that she was therefore recommending the termination of her employment. She said the claimant would be invited to attend a meeting with a senior manager (likely to be the Head of Service or equivalent) where she could be accompanied by a trade union representative or colleague. The purpose of the meeting would be for Ms Chambers to explain the reasons for the recommendation, to allow the claimant the opportunity of providing any information she would like the manager to take into account, and for the manager to reach a decision. It was explained to the claimant that her employment would continue until the recommendation had been considered.

86. On 4 September 2020 the claimant emailed Ms Sumner asking about the current status of her grievance. Ms Sumner replied on 7 September 2020 to inform the claimant that, as her grievance related to her probation, she would be able to raise this as part of her probation meeting. On 8 September the claimant responded to Ms Sumner requesting to have her grievance formally investigated. On 10 September Ms Sumner reiterated that the issues in the grievance related to the probation process and would be dealt with at the probation meeting.

87. On 10 September the claimant commenced ACAS early conciliation.

88. On 14 September 2020 the claimant had a telephone consultation with OH who reported that same day by email. The report included:

a. The claimant was currently in work undertaking her duties, but work-related issues were ongoing and causing her stress, anxiety and depression "*which all appear to be management related*". The claimant reported poor sleep, concentration and appetite. She was on medication awaiting counselling. The claimant also formed the OH that she "*suffers from clinical depression*".

b. The claimant became tearful during the consultation, and the OH was of the view that she had moderate to severe symptoms for anxiety and depression.

c. The OH advised that the claimant was fit to remain in work undertaking all her duties. "*Her case seems to be more related to employee workplace concerns rather than a primary medical problem*". He was of the view that "*further OH intervention is*

d. *unlikely to be helpful until any real or perceived employee workplace stressors are addressed. Currently Michelle's symptoms are not impacting on her ability to undertake duties, however this could change if her work-related stressors are not resolved*". OH was of the view that there was a chance symptoms could re-occur in the future, but this could been minimised with careful management of her situation and good support personally and professionally. OH was of the opinion that the claimant "*is likely to be considered to have a disability*" for the purposes of the legislation.

89. On 21 September 2020, the claimant was invited to a final probation hearing on 30 September 2020 before Ms Hare, Head of Service for Family Support and Safeguarding, to consider the recommendation to terminate her employment.

90. The 30 September 2020 meeting was postponed because of a bereavement experienced by the claimant. On 5 October 2020 the claimant went off sick and produced a fit note citing "*depression aggravated by stress*".

91. On 10 October 2020 ACAS early conciliation concluded and the claimant was issued with a certificate.

92. On 14 October 2020 solicitors acting for the claimant sent the respondent a further grievance, expressed in rather florid terms.

93. On 26 October 2020 Ms Sumner responded directly to the claimant in respect of the grievance put in by solicitors. She referred to paragraph 44 of the ACAS Code of Practice indicating that where an employee raises a grievance during a disciplinary process, that process may be temporarily suspended to deal with the grievance. However where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently. It was reiterated the claimant that she could raise arguments set out in her grievance during the probation process.

94. On 1 December 2020 the claimant was invited to a probation meeting on 11 December 2020. This letter stated among other things "*It is acknowledged that you have raised a Grievance during this process, which is inherently linked to your probation, you have been advised that you will have the opportunity to present your Grievance during the Probation meeting. To date you have not provided any documentary evidence to support your Grievance presentation*".

95. The respondent made a further referral to OH on 9 December 2020.

96. On 9 December 2020 the claimant emailed a resignation letter to Ms Sumner. In it she set out that she did not accept that the nature of her grievances were such that they could be considered within the probation

97. process. She considered that a separate process and a separate investigator would be needed. She considered that the attitude of management in respect of the probation review was a cumulative act of victimisation arising from her complaints about bullying and harassment. She considered she should have been afforded protection under whistleblowing law. She was concerned that she had not been supplied a copy of the OH report, and believe this was a further act of victimisation. She considered that Ms Hare was unsuitable to conduct the probation review meeting, and considered that complaints about this point had not been considered by the respondent. She believed that management did not have any intention of carrying out a probation review that was in partial or in good faith. She had lost all trust and confidence in the process and felt she had no choice but to resign and consider herself constructively dismissed.

98. We accepted Ms Sumner's unchallenged evidence at paragraph 22 of her witness statement that she wrote to the claimant on 14 December 2020 with advice on how to make the claimant a leaver. Payroll had already processed the December pay which would have been made up of two weeks arrears of pay in two weeks advance pay. The claimant was overpaid a full month of her entitlement to sick pay for December and was only entitled to 10 days half pay. No payments were owing by the respondent at the end of her employment.

Findings related to disability

99. in addition to the OH evidence which we refer to at paragraph 78 above, we were also taken to the claimant's disability impact statement ("DIS") dated 24 November 2022, and to GP records and a letter from her GP dated 30 September 2020.

100. The DIS set out that the claimant had been diagnosed and suffered clinical depression since 2008. She set out symptoms of low mood, anxiety, depression, sleeplessness, loss of appetite and an inability to concentrate. She related how her depression was exacerbated by experiences in employment with the respondent.

101. The DIS mentioned episodes of panic attacks, being forgetful and difficulty retaining information. She referred to menopausal symptoms which were exacerbated by stress leading to swelling of her limbs which made it extremely difficult for her to write, type and walk.

102. She said she started to notice the effects of her impairment "*sometime in the middle of January 2020*" and that the effects deteriorated after problems with the management escalated. She said her symptoms persisted until around May 2021. She said that she had made a significant improvement since leaving the respondent's employment.

103. The claimant set out that she had received medical treatment which included various types of antidepressant and hypnotic medication, in

addition to undergoing CBT counselling. She set out strategies she undertook to help her recovery.

104. The GP records referred to

a. An episode of low mood in January 2008 which coincided with certain difficulties in her life.

b. Stress related problems in January 2013 and a reference to CBT a year previously.

c. Memory disturbance in July 2016.

d. Stress at work on 26 September 2018 and 8 October 2018. She refused the offer of medication.

e. The next entry in her GP notes was 8 June 2020 relating to a stress related problem, when the claimant complained of stress, poor sleep, and painful joints. Further entries corresponded with fit notes being issued in 17 June 2020 and 9 July 2020.

f. On 6 August 2020 was an entry relating to difficulty sleeping, feeling stressed at work with poor concentration and making mistakes at work, mood up and down with reduced appetite.

105. The GP letter of 30 September 2020 referred to the claimant's long history of low mood. It said the claimant had been diagnosed with anxiety and depression since August 2017, and had been prescribed antidepressant medication and had CBT in 2012. It said symptoms of depression got worse in June 2020 when she complained of low mood and poor sleep. The latter made reference to symptoms being exacerbated by work, with issues of poor concentration and mistakes at work. The letter set out the history of telephone consultations corresponding with the GP records.

The law

Disability

106. Section 6 Equality Act 2010 ("EqA) provides: -

(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

107. Schedule 1 Part 1 Paragraph 2 of the EqA provides: -

1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

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

(c) it is likely to last for the rest of the life of the person affected.

(2) 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 to be treated as continuing to have that effect if that effect is likely to recur.

108. Part 2 of the same schedule obliges tribunals to take account of such guidance as it thinks is relevant. The "*Equality Act 2010 Guidance: Guidance on matters to bet taken into account in determining questions relating to the definition of disability*" (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to s. 6(5) of the EqA 2010.

109. Unlike Disability Discrimination Act 1995, the EqA does not set out what day-to-day activities might be. Section D of the Guidance is some assistance and gives some examples. The Appendix of the Guidance also gives an illustrative and non-exhaustive list of factors which would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, and a list of factors it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

110. The relevant point in time in assessing whether the claimant is disabled under section 6 EqA is the time of the alleged discriminatory acts (*Cruikshank v Vaw Motorcast Ltd [2002] ICR 729*).

111. In *J v DLA Piper UK LLP UKEAT/0263/09/RN* the EAT observed at paragraph 42: -

> *The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events".[We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for*

the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived

Direct discrimination

112. In respect of direct discrimination, Section 13(1) of the EqA provides as follows:

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

113. Section 23(1) of the EqA deals with comparisons, and provides:-

On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

114. The EAT in Chief Constable of West Yorkshire v Vento *[2001] IRLR 124* made clear that using examples of individuals who were not true comparators was a proper way of constructing a hypothetical comparator.

115. The burden of proof provisions (which apply equally to other claims under the EqA) are set out in section 136 EqA 2010:-

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

116. When considering direct discrimination, the tribunal must examine the "reason why" the alleged discriminator acted as they did. This will involve a consideration of the mental processes, whether conscious or unconscious, of the individual concerned (*Amnesty International v Ahmed [2009] IRLR 884*). The protected characteristic need not be the only reason why the individual acted as they did, the question is whether it was an "effective cause" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor [1996] IRLR 372*).

117. Guidance on the application of the burden of proof provisions of the Sex Discrimination Act 1975 (which is applicable to the EqA) were given by the Court of Appeal in *Igen v Wong [2005] IRLR 258*:

> *"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".*
>
> *(2) If the claimant does not prove such facts he or she will fail.*
>
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".*
>
> *(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*
>
> *(5) It is important to note the word "could" in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*
>
> *(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

118. Tribunals are cautioned against taking too mechanistic an approach to the burden of proof provisions, and that the tribunal's focus should be on whether it can properly and fairly infer discrimination (*Laing v Manchester City Council [2006] ICR 1519*). The Supreme Court has observed that provisions "*will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other*" (*Hewage v Grampion Health Board [2012] UKSC 37*).

119. The Court of Appeal has emphasised that "*The bare facts of a difference in treatment, without more, sufficient material from which the tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*" (Madarassy v Nomura International plc *[2007] IRLR 246*). "Something more" is needed for the burden to shift. Unreasonable behaviour without more is insufficient, though if it is unexplained then that might suffice (Bahl v Law Society *[2003] IRLR 640*).

Indirect discrimination

120. Section 19 of the Equality Act 2010 ("EA") provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Harassment

121. Section 26(1) EqA provides: -

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.

122. Section 26(4) EqA sets out factors which tribunals must take into account: -

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

123. Section 212(1) EqA provides that conduct amounting to harassment cannot also be direct discrimination.

124. The Court of Appeal in Richmond Pharmacology v Dhaliwal *[2009] IRLR 336* stated:-

"an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so….We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

125. The Court of Appeal again emphasised that tribunals must not cheapen the significance of the words of section 26 EqA as "*they are an important control to prevent trivial acts causing minor upsets being caught up by the concept of harassment*' (Land Registry v Grant *[2011] ICR 1390*).

Victimisation

126. Section 27 EqA deals with victimisation and provides: -

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

127. A person suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.* An unjustified sense of grievance is not sufficient (*Barclays Bank plc v Kapur (No. 2) [1995] IRLR 87* and *EHRC Employment Code*, paragraphs 9.8 and 9.9).

Discrimination arising from disability

128. Section 15 EqA provides:

(1) A person (A) discriminates against a disabled person (B) if—

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

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

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

129. Guidance was given by the EAT on the correct approach to section 15 claims in *Pnaisner v NHS England* [2016] IRLR 170. In short

a. Was there unfavourable treatment and by whom?

b. What caused the alleged treatment, or what was the reason for it?

c. Motive is irrelevant.

d. Was the cause/reason "something" arising in consequence of the claimant's disability?

e. The more links in the chain of causation, the harder it will be to establish the necessary connection.

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

g. The knowledge requirement is as to the disability itself, not extending to the "something" that led to the unfavourable treatment.

h. It does not matter in which order these matters are considered by the tribunal.

Reasonable adjustments

130. Section 20 EqA sets out the duty to make reasonable adjustments, which comprises three requirements, the first of which is: -

"*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*".

131. "Substantial" is defined in section 212(1) as meaning "more than minor or trivial".

132. Section 21 EqA provides that a failure to comply with any of the requirements in section 20 is a failure to comply with the duty to make reasonable adjustments. A person or body subject to the EqA discriminates against a disabled person if they or it fails to comply with that duty in relation to that person.

133. The term PCP carries the connotation of a state of affairs indicating how similar cases are generally treated, or how a similar case would be treated if it occurred again. A "practice" does not need to have been applied to anyone else, but should carry with it an indication that it will or would be done again in future if a hypothetical similar case arises (*Ishola v Transport for London* [2020] EWCA Civ 112).

134. EqA Schedule 8, Part 3 paragraph 20(1)(b) provides: -

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

135. What is required for knowledge is the for the employer to know of the facts of the disability (the impairment, the long-term substantial adverse effect on the ability to carry out day to day activities). There is no need for

136. the employer to know of a cause or diagnosis (*Gallop v Newport City Council [2014] IRLR 211, Urso v Department for Work and Pensions [2017] IRLR 304, Jennings v Barts and the London NHS Trust [2011] All ER (D).*)

Limitation

137. Section 123 EqA governs time limits and provides: -

(1)… proceedings on a complaint within section 120 may not be brought after the end of—

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

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

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Whistleblowing

Protected disclosure

138. The Employment Rights Act 1996 ("ERA") provides as follows in relation to protected disclosures:

Section 43A

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H

Section 43B

(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—

…

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

…

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

139. The authorities stress the importance of the tribunal taking a structured approach to determinations relating to protected disclosures. As set out in *Williams v Michelle Brown AM* UKEAT/0024/19

> *"First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."*

140. There must be a disclosure of information, that is to say the conveying of facts, and it is not sufficient for the claimant simply to have made allegations *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38. However, a disclosure may contain sufficient information to qualify for protection even if it includes allegations. The question of whether there is sufficient information will be a matter of fact for us taking into account context and background (*Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436). *Kilraine* further makes clear that in order for a statement or disclosure to be a qualifying disclosure it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters in section 43B(1) ERA.

141. In terms of the public interest element, in *Chesterton v Nurmohamed* [2017] IRL 837 the Court of Appeal set out factors to be considered by a tribunal in deciding whether there was a reasonable belief a disclosure was made in the public interest. They are the numbers whose interests the disclosure serve; the nature of the interests affects; the nature of wrongdoing disclosed; the identity of the alleged wrongdoer. Where a disclosure raises questions of a personal character, the question of whether it is reasonable to regard it as being in the public interest is to be answered by considering all of the relevant circumstances of the case. *Dobbie v Felton* [2021] IRLR 679 held that a disclosure relevant to one person could nonetheless be in the public interest.

142. The tribunal is to determine whether, i) the claimant had a genuine belief that the disclosure was in the public interest, and ii) whether he had

reasonable grounds for so believing. The claimant's motivation, as such, is not part of the test (*Ibrahim v HCA International* [2019] EWCA Civ 20).

Whistleblowing Detriments

143. Section 48 Employment Rights Act 1996 ("ERA") provides *inter alia*:

> *(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.]*
>
> *(2) On a complaint under subsection …(1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

144. In order to bring a claim under section 47B ERA the worker must have suffered a detriment. This must be judged from the point of view of the worker. "*There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases*" (*Jesudason v Alder Hay Children's NHS Foundation Trust* [2020] EWCA Civ 73). However, an unjustified sense of grievance cannot amount to a detriment (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337).

145. The tribunal is to determine the reason why the claimant was treated as he was, which requires an analysis of the mental processes, conscious or unconscious, which case the employer to act as they did. It is for the employer to prove that the act complained of did not materially influenced the employer's treatment of the whistleblower (*Fecitt v NHS Manchester* [2011] EWCA Civ 1190).

Automatic unfair dismissal

146. Section 103A ERA provides that "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure*".

147. The "reason" for the dismissal "connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision." *Beatt v Croydon Health Services NHS Trust* [2017] ICR 1240.

148. The focus of the Tribunal is on the mind of the individual responsible for making the decision to dismiss. *Royal Mail Ltd v Jhuti*

[2019] UKSC 55 provides an exception to this general principle where a person in the hierarchy of responsibility above the decision maker decides to dismiss and hides the true reason behind an invented reason which the decision maker adopts.

149. Where there is an overall plan to dismiss an employee, to which a number of managers are party, then a Tribunal can draw inferences from the overall circumstantial evidence to conclude that the dismissing manager was acting in accordance with that plan *University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall,* UKEAT/0150/20 [36].

150. The burden of proof is on the claimant, when they do not have 2 years' service to establish the reason for dismissal (*Smith v Hayle* [1978] IRLR 413.)

Constructive dismissal

151. In order for there to have been a constructive dismissal there must have been:-

a. a repudiatory or fundamental breach of the contract of employment by the employer;

b. a termination of the contract by the employee because of that breach; and

c. the employee must not have affirmed the contract after the breach, for example by delaying their resignation.

152. In *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, CA, it was said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*".

153. An employee can rely on breach of an express or implied term of the contract of employment. In cases of alleged breach of the implied term of trust and confidence the test is set out in the case of *Malik v Bank of Credit and Commerce International Ltd* [1998] AC 20; namely, has the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee? The test of whether there has been such a breach is an objective one (see *Leeds Dental Team Ltd v Rose* [2014] IRLR 8).

154. The EAT in *Frenkel Topping v King* UKEAT/0106/15/LA set out that simply acting in an unreasonable way is not sufficient to satisfy the test. The employer "*must demonstrate objectively by its behaviour that it is*

155. *abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term*". (See also *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168.)

156. It is open to an employee to rely on a series of events which individually do not amount to a repudiation of contract, but when taken cumulatively are considered repudiatory. In these sorts of cases the "last straw" in this sequence of events must add something, however minor, to the sequence (*London Borough of Waltham Forest v Omilaju* [2005] ICR 481).

157. The employer's breach must be an effective cause of the resignation (*Wright v North Ayrshire Council [2014] ICR 77*).

158. On the question of waiving the breach, the *Western Excavating* case makes clear that the employee "*must make up his mind soon after the conduct of which he complains; if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will regarded as having elected to affirm the contract*".

Conclusions

159. We will make our conclusions on the issues in the case as set out in the agreed List of Issues. We will follow the numbering in this document and set this out in the headings below, but will not always follow the same order of the issues. For certain of the issues we can take multiple issues at once when, effectively, the same determination applies to more than one issue.

Protected Disclosure paragraph 2

160. The protected disclosures relied on by the claimant are set out at paragraph 2.1.1. She provided further particulars of these on 27 April 2023.

<u>2.1.1.1 emails on 9 and 12 December 2019</u>

161. We were not taken to an email of 9 December 2019, but the one of 12 December 2019 was in the bundle (page 155-6) and we refer to it at paragraph 36 above. The claimant did not give evidence of oral disclosures and did not put any to Ms Chambers in cross examination.

162. The claimant refers in this email to receiving "*vile threats and abuse*" from the young person, and says that she believed "*it best for him to be allocated to another PA or offer a service from a distance*". She set out in excerpt from the notes which referred to previous aggressive outbursts and a disclosure that the young person was suicidal. She referred to him getting abusive and threatening and saying he would kill someone. The young person went on to smash things up in a rage. She

163. said that she remained seated but "*was very scared for my safety despite Tom being sat across the other side of the room*".

164. It is not easy to see from this email that the claimant was disclosing information which, in her reasonable belief tended to show a breach, or likely breach, of a legal obligation in respect of health and safety. The reference to being scared for her safety potentially is information that her health and safety had been endangered.

165. We turn to the public interest aspect, and note the claimant's further particulars which set out at she "*reasonably believed that these concerns were in the public interest as they did not only relate to my own private rights at work but also concerned a risk of serious injury to other colleagues*".

166. However, any concerns for the protection of colleagues is not apparent from her email of 12 December 2019. What the claimant was seeking was for the young person's case file to be transferred to a colleague. The apparent safety of that hypothetical colleague does not appear to be a concern for her. Having regard to the guidance in *Chesterton* and looking at the way the claimant has put her case on public interest we do not find that the claimant reasonably believed that disclosure of this information was in the public interest.

167. We do not find that this disclosure was protected. However, with this as with all the alleged protected disclosures, we will go on to consider the claimant's detriments and automatic unfair dismissal cases as if the disclosures did qualify for protection.

<u>2.1.1.2 unheated accommodation</u>

168. The difficulty with this alleged protected disclosure is that the claimant did not give evidence about it and did not cross-examine Ms Chambers about it. The claimant refers to a conversation with Ms Chambers on 22 January 2020 in her further particulars in which she sought advice on next steps regarding a young person who had been served a notice to quit from his accommodation because she had taken a portable heater to keep herself warm when the central heating was not working. She went on to mention the cold temperatures in the winter months and how no action had been taken on the issue.

169. Without evidence, and with only the rather unfocused pleadings to consider, it was impossible for us to conclude that the claimant had disclosed sufficiently specific information which tended to show that, in her reasonable belief, a legal obligation had been breached or that health and safety of an individual had been endangered always likely to be endangered.

170. In the circumstances, we do not find that this was a protected disclosure.

<u>2.1.1.3 suicidal client</u>

171. In her further particulars the claimant refers to a young person "BOD" with a history of repeated suicidal attempts, whose accommodation had a detrimental effect on his mental health. The claimant refers to disclosures having been made to Ms Reynolds, Ms Aira and Ms Chambers during "*supervision, case review and probation meetings*" on 30 October 2019, during a December 2019 supervision meeting with Ms Chambers, during a case review on 15 January 2020, "*and all other supervision/case reviews and probation meetings"* and *"email communications between the claimant and placement providers*".

172. Nothing in the claimant's witness statement narrows things down or helps with specifics. Nonetheless, we have looked at the notes or minutes of the meetings mentioned by the claimant and can find no reference in any of them to anything resembling the disclosures the claimant seeks to rely on. Furthermore, a chart attached to the meeting of 15 January 2020 appears to suggest that all accommodation for all of the claimant's clients was marked as appropriate. There is no suitably specific information that we can see has been disclosed to support the claimant's alleged protected disclosure.

173. In the circumstances we do not find that this was a protected disclosure.

Protected act

174. We will consider whether the claimant made a protected act which would be foundational to any claim of victimisation (Issue 11). The claimant relies on her having raised a grievance on 4 March 2020.

175. Our findings above at paragraph 52 make clear that we do not find that the claimant made a formal grievance and we do not find that her communications with Ms Jannetta raised anything to do with a breach of the EqA. Accordingly, we do not find that the claimant did a protected act. Again, we will go on to consider the claimant's victimisation claim as though she had done the protected act she alleges.

Disability

176. The claimant did not disclose any disability in her pre-employment documentation. She did not disclose any disability to her employers during the course of her employment until a very late stage. Going by her DIS the claimant only began to notice symptoms from mid-January 2020. There is absolutely no basis whatsoever to conclude that she was a disabled person before mid-January 2020.

177. The claimant's claim to be a disabled person is very heavily reliant upon her own self reporting. Mr Jones took the claimant to parts of her DIS in which she spoke of panic attacks, and her references to finding it "*extremely difficult for me to write, type and walk*". The claimant's self reporting appeared to suggest a very significant impact on her functioning which was entirely unsupported by the medical records. This severely impaired functioning was also never apparent or made apparent to the respondent. We raise this here not in relation to the legal issue of the employer's knowledge, but to observe that the claimant not appearing to show the symptoms she later claims to have experienced undermines her claim that she was disabled at this stage. We accept the respondent's evidence that the claimant at all times presented as a confident and vocal member of staff with no apparent health difficulties. This sharp disparity between her medical records and how she appeared to others and how she seeks to present her condition to the tribunal does call into question the claimant's reliability.

178. The GP records (with their brief reference to problems with stress in 2013 and 2018) do not support a finding that the claimant had an underlying illness which recurs from time to time. We find, therefore, that the telephone attendance at the GP on 8 June 2020 marks the starting point from which the claimant might have a mental impairment. There are question marks, however, as to the extent to which it impacted her day-to-day activities. There was also nothing at this point to indicate that it was long-term. It had not lasted for 12 months and there was nothing to suggest that it could well last for 12 months (i.e. 2 June 2021).

179. The OH report of 14 September 2020 makes clear that the OH professionals saw the claimant's problems as primarily workplace concerns rather than a primary medical problem. Any condition did not appear to impact on the claimant's ability to carry out her duties. Thus far, it seems to be that the OH professionals was seeing what Underhill J in *DLA Piper* characterised as a reaction to adverse circumstances rather than a medical condition (although the President recognised the blurred distinction between the two). Thus far, there appears to be no reliable evidence of a substantial impact on the claimant's ability to carry out day-to-day activities. Equally, there is no evidence that the condition was likely to persist long-term. The OH practitioner recognises there was a "*chance that her symptoms could re-occur in the future but the potential for re-occurrence might be minimised with careful management of the situation and good support both personally and professionally*". Although the OH practitioner ventures an opinion that the claimant satisfied the definition of disability, it is difficult to see on what basis she reached this conclusion. She observes a reaction to adverse events rather than an impairment, she assesses the condition as not impacting on the ability to carry out work duties, she sets out no impact the condition has on day-to-day activities and expresses the view that there is a <u>chance</u> that symptoms <u>could</u> re-occur but sets no timescale for this.

180. The further GP evidence in September and October 2020 gives no further support for the likelihood of any condition experienced by the claimant persisting to the point of being long-term.

181. In all the circumstances we find that the claimant was not a disabled person during the currency of her employment.

182. As with the whistleblowing claims, we will, nonetheless, consider the claimant's disability discrimination claims as though she were in fact disabled, at least from mid-January 2020.

Working towards dismissal and termination (Issues 3, 4, 6, 7.1.1 and 11)

183. Various of the claimant's claims relate to allegations that the respondent worked towards, or took steps to terminate her employment for failing the probationary process. She says this was:

a. A fundamental breach of contract entitling her to resign and claim constructive dismissal in respect of her automatic unfair dismissal claim (Issue 3).

b. A detriment for having made a protected disclosure (Issue 4).

c. An act of direct disability discrimination (Issue 6).

d. An act of unfavourable treatment because of something arising from disability (Issue 7.1.1), and

e. An act of victimisation (Issue 11).

184. It appears that no real issues were raised with the claimant's performance while Ms Hines and Ms Reynolds were the claimant's interim line managers, although it seems she was falling behind with her PWPs. We have commented that the state of flux of the Service may well have been a reason why there was not particular scrutiny of the claimant's work.

185. From November 2019 onwards Ms Chambers noted problems with the way the claimant communicated with people, which she raised in a non-challenging and supportive way (paragraphs 34 to 35 above).

186. Under the management of Ms Aira, the claimant's work almost certainly came under more scrutiny. The communication difficulties observed by Ms Chambers persisted (paragraphs 47c, 53c and d) in one instance leading to a written complaint by a senior manager Ms Burrell (paragraph 42). Timekeeping and resistance to letting her manager know her whereabouts were perennial issues (paragraphs 39d and 40). Concerns were raised by colleagues about her practice (paragraph 48 and 58) and by young service users themselves (paragraph 57). The evidence is clear that these concerns were raised with the claimant during

supervisions and formal probation meetings, but the claimant's reaction was inevitably one of defensiveness and denial.

187. The claimant's case, in a nutshell, is that she had been the victim of "*contrived complaints and allegations*" (un-numbered paragraph on the final page of her witness statement). The motivation for making these contrived complaints appears to be that she had made protected disclosures and done a protected act that were uncomfortable for the respondent.

188. We have found that PD1 was not protected because it did not satisfy the public interest element, and with PD2 and PD3 we were unable to determine sufficient specificity in the information disclosed. However, taking the allegations broadly the claimant was saying that 1) a young person with mental health difficulties had flown into a violent rage from a visit, 2) a young person was not provided with adequate heating, and was evicted for commandeering a heater, and 3) a young person with a history of suicide attempts have been placed in inadequate accommodation.

189. Assuming that we are wrong about these disclosures not attracting protection, we turn to the causative impact of such disclosures. We accept the evidence of Ms Chambers, an experienced social work professional, that what the claimant was raising was really nothing out of the ordinary. Sadly, the Service was responsible for a number of young people with significant challenges in their complex lives and with substantial vulnerabilities. We accept Ms Chambers's evidence that it was often the case that various needs of young people would be raised which the Service was unable to meet. In short, there is nothing to make the three alleged protected disclosures stand out, and there was nothing about them that might conceivably warrant any form of retribution. The claimant was simply doing her job.

190. In terms of the alleged protected act, we have found that there was none.

191. The explanation which best fits the facts is that the respondent progressed the claimant's probation in the way that it did (flagging up numerous issues, extending the process because of these issues, and then recommending the non-confirmation of the claimant's employment) because Ms Aira and Ms Chambers had numerous well-evidenced concerns about her ability adequately to perform in the role. These concerns were the reason why the respondent was working towards the non-confirmation of the claimant's employment.

192. There is no evidence from which we could conclude that these managers approached the probation process in the way that they did had anything whatsoever to do with:

a. Any disclosures of information the claimant made;

b. Any medical condition the claimant suffered from;

c. Anything arising from such medical condition (we will say more of this later);

d. Any protected act.

193. In terms of the contractual picture, we conclude that in implementing the probation process in the way that it did the respondent did not act without reasonable cause in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence. It had every reasonable cause to take these steps in circumstances when numerous concerns about the claimant's ability to fulfil the demanding and responsible role. The claimant resigned and was not constructively dismissed.

194. It follows that the claimant's claims for automatic unfair dismissal (Issue 3), detriment for making protected disclosures (Issue 4), direct disability discrimination (Issue 6), discrimination arising from disability in respect of taking steps to dismiss (Issue 7.1.1) and victimisation (Issue 11) are not well-founded and are dismissed.

Arising from disability.

195. Issue 7.3 is framed as follows: "*Did the following things arise in consequence of the claimant's disability? The claimant's case is that her disability was exacerbated by the unfavourable treatment and it made it more difficult to do what was asked of her*". This is after setting out eight ways in which the claimant alleged she was treated unfavourably.

196. It was extremely difficult to understand the way the claimant put her case on the section 15 claim. To succeed in such a claim the unfavourable treatment must be because of something arising from disability. It is hard to understand how a claim can be framed in a way where the unfavourable treatment itself is causative of the something arising. Frankly, it does not make sense.

197. It might be that a better way to understand the claim is by treating simply the difficulty in doing what was asked of her as being the "something" arising from her disability. The claimant faces to difficulties in running such a case. First, it is not the way she ran her case. Her case is that she did nothing wrong and she had no difficulty in doing what was asked of her. Her case was that the respondent "*contrived complaints and allegations*" against her. The second problem is that even if the claimant's case was that she had difficulty doing what was asked of her, there is no evidence to suggest that this arose from any medical condition (again, in the alternative, assuming we are wrong in our conclusion that she was not a disabled person). She gave no evidence herself to this effect and there was no medical evidence supporting this.

198. Nonetheless, we will go on to consider whether the claimant was unfavourably treated as alleged, and, if appropriate, consider the reason why she was treated unfavourably.

a. 7.1.1 - taking steps to terminate the claimant's employment for failing her probationary period was unfavourable treatment. We have determined that the reason why the respondent took the steps was because of valid evidence based concerns about her performance. There is no evidence that poor performance arose from any medical condition experienced by the claimant. We do not find that the respondent had knowledge of any medical condition until early June 2020, which was after it had alerted the claimant to numerous performance concerns and decided to extend her probation because of them.

b. 7.1.2 – at paragraph 33 above we found that Ms Chambers was not increasing the claimant's caseload to 15. The claimant was not unfavourably treated as she asserts. The decision to limit cases to 15 at this point in time was an operational decision that had nothing to do with any medical condition of the claimant's. In fact , there was no suggestion by the claimant that she had any mental health difficulties at this stage.

c. 7.1.3 - our findings are at paragraph 31 above. We do not find that the claimant was placed in a position of having "*an inexhaustible overload of cases funnelled through her full side support in addition to her own cases*" and she alleges. We do not find that the claimant was unfavourably treated as asserted. The decision to give her the lead on housing responsibilities was taken at the start of her employment and had absolutely nothing to do with any medical condition she was later to raise.

d. 7.1.4 - we have looked carefully at documentary evidence relating to all instances where the claimant appears to suggest that the respondent was asked to allocate fewer cases. There simply is no reference to her asking for fewer cases. There was no refusal to allocate fewer cases. The claimant was not treated unfavourably as she asserts. There is no evidence to suggest that decisions on allocation of cases were made for anything other than valid operational reasons.

e. 7.1.5 - we find the claimant <u>was</u> treated unfavourably by not having sufficient or consistent management cover in the first three months of her employment. However, this was down to the state of the Service at the time. This state of affairs predated considerably any suggestion by the claimant that she may have had any medical condition. The respondent had no knowledge of any condition, and the state of affairs had absolutely nothing to do with the state of the claimant's health.

f. 7.1.6 - as we have set out in our findings at paragraph 40 above, we do not find that Ms Aira micromanaged the claimant. Her wish to have some degree of knowledge of the claimant's movements was entirely reasonable in all the circumstances. The claimant was not treated unfavourably by Ms Aira, who had no knowledge of any health condition experienced by the claimant. Her reasons for requiring some oversight of the claimant's movements were entirely operational and had nothing to do with any health condition.

g. 7.1.7 - there was a gradual increase in the claimant's caseload, but this was always substantially lower than her colleagues. The claimant never complained about it. We do not find Ms Aira treated the claimant unfavourably by implementing this gradual increase. When implementing this increase Ms Aira had no knowledge of any health condition of the claimant's, and, again, this was an operational decision completely unrelated to anything to do with the claimant's health.

h. 7.1.8 - our findings relating to the claimant's request to have a case transferred, and Ms Chambers's response are at paragraph 37 above. We do not find Ms Chambers's decision not to transfer the case file before exploring certain issues with the young person was unfavourable treatment. This was in December 2019, well before the claimant raised any issue about her mental health. The decision had nothing whatsoever to do with anything to do with the claimant's health.

199. It follows that, even if we had found the claimant to be a disabled person, her claims of discrimination arising from disability is not well-founded for a number of reasons. These claims are dismissed.

Indirect discrimination

200. We find that the respondent did have a PCP of allocating in excess of 10 cases to PAs and SPAs. It applied that PCP to the claimant and to others who were not disabled. Again, we approached the indirect discrimination claim in the alternative assuming that she was a disabled person.

201. However, the claimant did not produce any evidence whatsoever to establish that disabled people were put to a group disadvantage by the application of this PCP.

202. Further, in circumstances where the claimant never once made complaint about her caseload, she has not established that this requirement put her at a disadvantage.

203. We did not hear detailed evidence on justification, but we need not make any findings on it.

Failure to make reasonable adjustments

204. **PCP 1** (Issue 9.2.1) is the allocation of the caseload in excess of 10.

205. For very similar reasons as set out in the previous section on indirect discrimination, we do not find that this put the claimant at a substantial disadvantage compared to non-disabled persons. No evidence was advanced that disabled people found it more difficult to cope. Given that no complaints were made about the allocation of cases, the respondent did not know, and could not reasonably expected to know, that such an allocation would put the claimant to a substantial disadvantage.

206. **PCP 2** (Issue 9.2.2) was the provision of in sufficient or inconsistent management supervision in the first three months of employment. The difficulty with this claim is that on any view of the evidence the claimant had not told anyone she was experiencing mental health problems, or that the management arrangements were putting her to a substantial disadvantage. It might be argued, on the evidence, that in actual fact that her whereabouts and timekeeping were subjected to lesser scrutiny and her work was not monitored as closely during this period, which may have worked to her advantage.

207. **PCP 3** (Issue 9.2.3) is a requirement to continue to engage with service users after they had been abusive and committed an assault. The young person had clearly been abusive to the claimant, but there was no evidence of an assault. Nonetheless, this was clearly an unpleasant experience for the claimant. As is clear from our findings at paragraph 7 above, the extent of further "engagement" required of the claimant was solely a discussion about expectations and boundaries. She was specifically told <u>not</u> to have further contact with him for her own safety. This "requirement" was a one-off arising from the single event. We do not find it to amount to a PCP. The respondent had no knowledge of any disability or any substantial disadvantage the claimant would be put to in being required to have the minimal engagement suggested.

208. For all these reasons we do not find the respondent to have been in breach of the duty to make reasonable adjustments.

Harassment

209. The claimant relies on three acts of disability-related harassment, all of which are featured in other claims and we deal with them swiftly.

    a. 10.1.1 - we have found as a fact that Ms Aira did not micromanage the claimant and was acting reasonably when she sought to have a greater sense of the claimant's whereabouts than the claimant felt appropriate. Ms Aira's actions were not at all related to any health condition of the claimant's (which Ms Aira was entirely unaware of in January 2020). Ms Aira's actions did not have either the purpose

or effect of violating the claimant's dignity or creating the requisite harassing environment for the claimant.

b. 10.1.2 - the decision not to reallocate a case on 10 December 2019 was reasonable in the circumstances. It had absolutely nothing to do with the claimant's health, and Ms Chambers decision had neither the purpose or effect of violating the claimant's dignity or creating the requisite harassing environment.

c. 10.1.3 - the claimant never made any issues about the number of cases she had, there was no refusal to allocate fewer cases, and any decision on allocation had absolutely nothing to do with any health condition the claimant had and did not have the purpose or effect of violating the claimant's dignity or creating the requisite harassing environment for the claimant.

210. For all these reasons the claimant's harassment claims are not well-founded and are dismissed.

Victimisation

211. We have already concluded that the claimant did not do a protected act. However, for good measure we have already set out the reasons why the respondent took steps to terminate the claimant's employment (valid evidence based concerns about her performance) which had nothing to do with anything she may have said to Ms Jannetta in early March 2020.

212. The claimant's victimisation claim is not upheld and is dismissed.

Overall conclusion

213. It follows from our findings and conclusions that none of the claimant's claims are upheld, and they are all dismissed.

Employment Judge Heath
Dated: 21 March 2024

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Annexe – List of Issues

1. Time limits

1.1 The claim form was presented on 25 February 2021. The Claimant commenced the Early Conciliation process with ACAS on 10 September 2020 (Day A). The Early Conciliation Certificate was issued on 10 October 2020 (Day B).

1.2 Were the discrimination 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 (plus early conciliation extension) of the act or omission 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 (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that 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?

1.3 Were the unfair dismissal and detriment complaints made within the time limit in sections 48 and 111 of the ERA? (There does not appear to be a time limit point in relation to the claim for other payments, dealt with below.) The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination/ the act complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Protected disclosure ('whistle blowing')

2.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the Claimant say or write? When? To whom? The Claimant says she made disclosures on these occasions:

2.1.1.1 On or around 9 and 12 December 2019 the Claimant reported by e-mail that she had suffered racial abuse and physical assault from a service user;

2.1.1.2 On another occasion, the Claimant told the Respondent that a property occupied by a service user was not adequately heated (the Claimant is to provide further information on this as provided above);

2.1.1.3 On another occasion, the Claimant was allocated a service client who had a history of suicide attempts. (Note: It is not clear what disclosure is alleged here and this is dealt with in the orders to provide further information above.)

2.1.2 Were the disclosures of 'information'?

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

2.1.4 Was that belief reasonable?

2.1.5 Did she believe it tended to show that (Note: This is the subject of the above order to provide further information):
- 2.1.5.1 a criminal offence had been, was being or was likely to be committed;
- 2.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;
- 2.1.5.3 a miscarriage of justice had occurred, was occurring or was likely to occur;
- 2.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;
- 2.1.5.5 the environment had been, was being or was likely to be endangered;
- 2.1.5.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

2.1.6 Was that belief reasonable?

2.2 If the Claimant made a qualifying disclosure, was it a protected disclosure because it was made to the Claimant's employer?

3. Dismissal (Employment Rights Act s. 103A)

3.1 Was the making of any proven protected disclosure the principal reason for the Respondent working towards dismissing the Claimant for failing her probationary period? If so, was that a fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence? Did the Claimant resign because of any such breach? Did the Claimant delay in resigning and affirm the contract?

3.2 The Claimant did not have at least two years' continuous employment and the burden is therefore on her to show jurisdiction and to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosure(s).

4. Detriment (Employment Rights Act 1996 section 47B)

4.1 Did the Respondent conduct a process working towards the dismissal of the Claimant for failing her probationary period?

4.2 By doing so, did it subject the Claimant to detriment?

4.3 If so, was it done on the ground that she had made the protected disclosure set out above?

5. Disability

5.1 (Note: If the Respondent does not concede disability and the Claimant maintains that she was a disabled person, an Employment Judge may set the matter down for a preliminary hearing. This is so because it is unlikely that the four day time allocation for the hearing is sufficient to include this issue as a preliminary matter.) 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 Whether the Claimant had a mental impairment. She asserts the mental impairment of depression.
- 5.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

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 Would the impairment have had a substantial adverse effect on 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. Direct disability discrimination (Equality Act 2010 section 13)

6.1 Did the Respondent take steps to terminate the Claimant's employment on the grounds that she had failed her probationary period?

6.2 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who she says was treated better than she was and therefore relies upon a hypothetical comparator being a person in her circumstances but without her disability.

6.3 If so, was it because of disability?

6.4 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability?

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

7.1 Did the Respondent treat the Claimant unfavourably in all or any of the following ways:

7.1.1 As set out in 6.1 above;

7.1.2 In an e-mail after a meeting on 6 December 2019, Ms Chambers sought to increase the Claimant's workload to 15 cases when most of the other Personal Advisors were of the view that they were struggling to cope with 5;

7.1.3 The Claimant's role of being the Housing Lead involving the provision of support to other Personal Advisors placed her in a position of having an inexhaustible overload of cases funnelled through her for side support in addition to her own cases;

7.1.4 In a conversation with Ms Chambers on 15 January 2020, an email dated 24 January 2020, a report to her manager on 27 January 2020, a grievance dated 4 February (or March?) 2020, an occupational health report following a referral on 4 June 2020 and an email from Mr Cummings dated 18 June 2020 the Respondent was asked to allocate a lesser number of cases to the Claimant but the Respondent refused;

7.1.5 In the first 3 months of the Claimant's employment the Respondent was unable to provide sufficient or consistent management cover for the Claimant;

7.1.6 On 15 January 2020 Ms Aira asked the Claimant where she was that morning, when that information was already in the shared diary. Ms Aira subsequently demanded that the Claimant make sure that she called Ms Aira daily to notify her of the Claimant's location or any absences from the office. This was later modified to a requirement that the Claimant find Ms Aira in the office to report to her with the Claimant's proposed daily activities. Ms Aira also required that the Claimant attend fortnightly supervision meetings;

7.1.7 After the appointment of Ms Aira as the Claimant's manager, the Claimant was required to increase her case load to 20 cases;

7.1.8 On 10 December 2019 the Claimant was subjected to racial abuse and assaulted by a service user. The Claimant reported this and requested that the service user should be reallocated to another Personal Advisor. The Respondent refused the request.

7.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that her disability was exacerbated by the unfavourable treatment and it made it more difficult for her to do what was asked of her.

7.3 Was the unfavourable treatment because of any of those things? In particular, did the Respondent move to dismiss the Claimant for failing her probationary period because her disability made it more difficult for her to do what was asked of her?

7.4 Was the treatment a proportionate means of achieving a legitimate aim? (Note: The Respondent is to provide further information on this as provided above.)

7.5 The Tribunal will decide in particular:

7.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

7.5.2 Could something less discriminatory have been done instead;

7.5.3 How should the needs of the Claimant and the Respondent be balanced?

7.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

8. Indirect discrimination (Equality Act 2010 s. 19)

8.1 A "PCP" is a provision, criterion or practice. Did the Respondent have or apply the PCP of allocating cases in excess of 10 to Personal Advisors?

8.2 Did the Respondent apply the PCP to the Claimant?

8.3 Did the Respondent apply the PCP to persons with whom the Claimant did not share the same protected characteristic (without her disability) or would it have done so?

8.4 Did the PCP put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom she did not share the characteristic?

8.5 Did the PCP put the Claimant at that disadvantage in that it was more difficult for her to cope with a caseload in excess of 10 because of her disability?

8.6 Was the PCP a proportionate means of achieving a legitimate aim?

8.7 The Tribunal will decide in particular:

8.7.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;

8.7.2 Could something less discriminatory have been done instead;

8.7.3 How should the needs of the Claimant and the Respondent be balanced?

9. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

9.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

9.2 A “PCP” is a provision, criterion or practice. Did the Respondent have the following PCPs:

9.2.1 The allocation of a caseload in excess of 10;

9.2.2 The provision of insufficient or inconsistent management supervision in the first 3 months of employment;

9.2.3 A requirement to continue to engage with service users after they had been abusive and committed an assault.

9.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant’s disability, in that it was more difficult for her to cope with any or all of them because of her disability?

9.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

9.5 What steps (the ‘adjustments’) could have been taken to avoid the disadvantage? The Claimant suggests:

9.5.1 A reduced caseload allocation;

9.5.2 The provision of adequate and consistent management supervision in the first 3 months of employment;

9.5.3 Reallocating cases where service users had been abusive and committed an assault.

9.6 Was it reasonable for the Respondent to have to take those steps and when?

9.7 Did the Respondent fail to take those steps?

10. Harassment related to disability (Equality Act 2010 s. 26)

10.1 Did the Respondent do the following things:

10.1.1 On 15 January 2020 Ms Aira asked the Claimant where she was that morning, when that information was already in the shared diary. Ms Aira subsequently demanded that the Claimant make sure that she called Ms Aira daily to notify her of the Claimant’s location or any absences from the office. This was later modified to a requirement that the Claimant find Ms Aira in the office to report to her with the Claimant’s proposed daily activities. Ms Aira also required that the Claimant attend fortnightly supervision meetings;

10.1.2 On 10 December 2019 the Claimant was subjected to racial abuse and assaulted by a service user. The Claimant reported this and requested that the service user should be reallocated to another Personal Advisor. The Respondent refused the request;

10.1.3 In a conversation with Ms Chambers on 15 January 2020, an email dated 24 January 2020, a report to her manager on 27 January 2020, a grievance dated 4 February (or March?) 2020, an occupational health report following a referral on 4 June 2020 and an email from Mr Cummings dated 18 June 2020 the Respondent was asked to allocate a lesser number of cases to the Claimant but the Respondent refused.

10.2 If so, was that unwanted conduct?

10.3 Did it relate to the Claimant’s protected characteristic, namely her disability?

10.4 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?

10.5 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.

11. Victimisation (Equality Act 2010 s. 27)

11.1 Did the Claimant do a protected act as follows:
- 11.1.1 Raising a grievance on 4 March 2020;
- 11.1.2 Anything else? (See the order to provide further information above.)

11.2 Did the Respondent take steps to terminate the Claimant's employment on the grounds that she had failed her probationary period?

11.3 By doing so, did the Respondent subject the Claimant to detriment?

11.4 If so, was it because the Claimant had done the protected act or acts?

12. Unauthorised deductions (Part II of the Employment Rights Act 1996)

12.1 Were the wages paid to the Claimant in the week before Christmas 2020 underpaid by £687.40?

12.2 Was any deduction required or authorised by statute?

12.3 Was any deduction required or authorised by a written term of the contract?

12.4 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

12.5 Did the Claimant agree in writing to the deduction before it was made?

12.6 How much is the Claimant owed?

13. Remedy

Unfair dismissal

13.1 The Claimant does not wish to be reinstated or re-engaged.

13.2 What basic award is payable to the Claimant, if any?

13.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

13.4 If there is a compensatory award, how much should it be? The Tribunal will decide:
- 13.4.1 What financial losses has the dismissal caused the Claimant?
- 13.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 13.4.3 If not, for what period of loss should the Claimant be compensated?
- 13.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 13.4.5 If so, should the Claimant's compensation be reduced? By how much?
- 13.4.6 If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce her compensatory award? By what proportion?

Detriment (s. 47B)

13.5 What financial losses has the detrimental treatment caused the Claimant?

13.6 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

13.7 If not, for what period of loss should the Claimant be compensated?

13.8 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

13.9 Is it just and equitable to award the Claimant other compensation?

13.10 Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and equitable to reduce the claimant's compensation? By what proportion?

13.11 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

Discrimination or victimisation

13.12 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

13.13 What financial losses has the discrimination caused the Claimant?

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

13.15 If not, for what period of loss should the Claimant be compensated for?

13.16 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

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

13.18 Should interest be awarded? How much?