THE EMPLOYMENT TRIBUNALS

Claimant: Miss L Hodgson

Respondent: Whistl Fulfilment (Gateshead) Limited

Heard at: Newcastle Hearing Centre

On: 20 and 21 January and 1 and 2 February 2024
with deliberations on 28 March 2024

Before: Employment Judge Morris
Members: Mrs S Don
Mr K Smith

Representation:
Claimant: In person
Respondent: Mr M Mensah of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that the respondent directly discriminated against her contrary to section 39(2)(d) of the Equality Act 2010 by treating her less favourably than others because of disability, with reference to section 13 of that Act, is not well-founded and is dismissed.

2. The claimant's complaint that, contrary to section 21 of the Equality Act 2010, the respondent failed to comply with its duty under section 20 of that Act to make adjustments is not well-founded and is dismissed.

3. The claimant's complaint that the respondent subjected her to harassment related to disability contrary to section 40 of the Equality Act 2010, with reference to section 26 of that Act, is not well-founded and is dismissed.

4. The claimant's complaints that her dismissal by the respondent was discriminatory contrary to section 39(2)(c) of the Equality Act 2010 and unfair, being contrary to section 94 of the Employment Rights Act 1996 with reference to Section 98 of that Act, are not well-founded and are dismissed.

REASONS

The hearing, representation and evidence

1. The claimant appeared in person and gave evidence. She was accompanied throughout the hearing by her father. The respondent was represented by Mr M Mensah, of Counsel, who called the following employees or former employees of the respondent to give evidence on its behalf: namely, Mrs DL Ferris-Lawson Contact Centre Operations Manager; Mr S Ormston, HR and Training Manager; Mr D Saveraux, Team Leader; Miss A Maguire, formerly Partner Services Manager.

2. This hearing was attended by the claimant, the majority of the respondent's witnesses and their representative. By consent, Mrs Ferris-Lawson and Miss Maguire gave evidence by way of the Cloud Video Platform as it was not practicable for them to attend the hearing in person and all their evidence could be dealt with by video conference.

3. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. The Tribunal also had before it a bundle of agreed documents comprising some 424 pages. The numbers shown in parenthesis below refer to the page numbers or the first page number of a large document in that bundle.

The claimant's complaints

4. As have been identified at Preliminary Hearings conducted on 25 July (52) and 16 October 2023 (97) The claimant's complaints were as follows:

    4.1 The respondent had directly discriminated against her because of disability contrary to sections 13 and 39(2)(d) of the Equality Act 2010 "the 2010 Act").

    4.2 The respondent had failed, contrary to section 21 of the 2010 Act, to comply with the duty to make adjustments imposed upon it by section 20 of that Act.

    4.3 The respondent had subjected her to harassment contrary to sections 26 and 40 of the 2010 Act.

    4.4 Her dismissal by the respondent was both,

        4.4.1 discriminatory contrary to section 39(2)(c) of the 2010 Act; and
        4.4.2 unfair contrary to sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act").

The issues

5. The respondent had produced a list of issues, which is attached as the Appendix to these Reasons. Although not agreed by the claimant in advance of the

hearing, she did not object to anything that was included in or omitted from the list and the hearing proceeded on the basis that it was agreed.

6. In relation to issue of whether the claimant was a disabled person as defined in section 6 of the 2010 Act, the respondent conceded as follows,

> "*the claimant now satisfies s.6 Equality Act 2010 by reason of her anxiety and depression.*
> *This concession relates to 24th April 2023 onwards only and not at the material time relied upon for all of the allegations advanced*."

Consideration and findings of fact

7. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the Hearing and the relevant statutory and case law, including that referred to by Mr Mensah, (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

7.1 The respondent is part of the Whistl corporate group, which provides business parcel and postal services. The respondent focuses on third-party logistics. It is based in Gateshead and provides services to clients in the North East Region.

7.2 Broadly, its employees work in one of three departments: Contact Centre, Warehouse and Partner Services (being the department managing the interface between the Contact Centre and the Warehouse).

7.3 The claimant's employment with the respondent commenced on 8 July 2019 (127) although she had previously worked for the respondent and its predecessor company on an agency basis. The claimant terminated her employment with immediate effect by email of 4 May 2023 (293).

7.4 For the majority of her employment the claimant worked in the Contact Centre, her line manager being Mr Saveraux. Prior to the commencement of the claimant's engagement by the respondent's predecessor through the agency she completed an Employee Health Questionnaire on 15 April 2019 (176), which came into the hands of the respondent's managers albeit they were then employed by the predecessor company. Mr Saveraux confirmed that he would receive all such questionnaires that were relevant to his Department but, having considered so many, he could not specifically remember having seen that completed by the claimant. Answers given by the claimant to questions in that questionnaire, which have relevance in this case were as follows:

7.4.1 She was fit and well and free from disabilities.
7.4.2 She was not currently taking any medication.

7.4.3 She had not stayed away from work because of sickness or injury in the past two years.

7.4.4 She was not registered disabled.

7.5 Of particular significance is that in answer to the question, "Have you ever suffered with depression, anxiety or other problems with your nerves?", the claimant had replied, "Yes was treated with medication and years of therapy" (178). The evidence of Mr Saveraux and Mr Ormston was that that answer was written in the past tense rather than referring to the claimant's then current situation and, especially in the context of her previous answers (as summarised above), the Tribunal is satisfied that that was a reasonable interpretation for them to make of the claimant's answer. Indeed, in answer to a question from the Tribunal the claimant confirmed that she had ceased taking medication because it was not working albeit she had continued to have sessions of cognitive behavioural therapy thereafter. This evidence of the claimant is borne out by what was recorded in her GP medical records (349) and in a Universal Credit Medical Report Form (335) the latter of which states that the claimant had stopped taking antidepressants completely in February 2022 and that her most recent course of therapy ended in December 2022.

7.6 The claimant was a good employee both in terms of the quality and quantity of the work she undertook and her interpersonal relationships with colleagues.

7.7 The claimant had to deal with considerable difficulties in her personal life. Her nephew, who lived with her, attempted suicide on 18 December 2020 and her son contracted Covid in August 2021 necessitating hospitalisation. These matters impacted hugely on the claimant's mental health.

7.8 On 29 July 2021 the claimant wrote to Mr Saveraux. Although she was actually working from home at that time due to her son's condition she asked if there was a possibility of moving to the Warehouse on her return to work, on a temporary basis. She explained, "I am massively struggling talking to people on the phones while my mental health seems to be deteriorating and Im finding I have no empathy and I am really struggling and I don't want to not have a job if that makes sense" (181).

7.9 Mr Saveraux and the Contact Centre Manager (TF) acceded to the claimant's request and she returned to work at the Warehouse on 4 August 2021, it being intended that that would continue for the remainder of August (187). She was then absent due to sickness, however, from 22 August to 26 September 2021.

7.10 The claimant returned to work in her Contact Centre role on 27 September 2021 and, on that day, had a return to work meeting with Mr Saveraux. In light of what the claimant said at that meeting Mr Saveraux arranged a second, informal, meeting on 28 September 2021 involving him and the

claimant and Mr Ormston because, as he said in evidence, he thought Mr Ormston could help because he did not feel “equipped”.

7.11 There is a dispute between the claimant and Mr Saveraux and Mr Ormston as to what occurred at these meetings. Having carefully considered the evidence before the Tribunal in the witness statements, the answers given in cross examination and relevant contemporaneous documents the Tribunal is satisfied as follows.

7.11.1 The claimant’s evidence is only that at their meeting on 27 September she told Mr Saveraux the reason she had been off work and that she needed to be open and honest with her mental health to which Mr Saveraux had responded that he would like Mr Ormston to attend. Mr Saveraux’s evidence, both in his witness statement and during cross examination, was that at their meeting on 27 September the claimant had informed him that she had recently driven somewhere with thoughts of suicide.

7.11.2 At 09:52 on the morning of 28 September, however, Mr Saveraux wrote to the Contact Centre Deputy Operations Manager (GR) informing him, “I have a welfare meeting with Leyanne and HR today, yesterday Leyanne told me that she tried to take her own life whilst she was off” (192). In evidence Mr Saveraux said that on 27 September the claimant did not tell him that she had tried to take her own life and that his language in that email “was perhaps a little loose”. Given the clear wording in that fairly contemporaneous email, however, the Tribunal is satisfied that the claimant did tell him, on 27 September, that she had tried to take her own life.

7.11.3 There is no dispute that at the meeting on 27 September the claimant was very upset and, as Mr Saveraux put it, was very emotional, shaking and crying and had poured her heart out. The Tribunal accepts Mr Saveraux’s evidence that it was at this meeting that he made reference to the actor Robin Williams. As he explained during cross examination, he had used a public figure to say that it was not always obvious to the public that someone might be suffering with their mental health. His evidence was that he said words to the effect, “If you look at Robin Williams, he appeared to be a very jovial and very happy guy to the public, but he had mental health issues that weren’t clear on the surface”. The Tribunal accepts that evidence.

7.11.4 The claimant’s evidence was that Mr Saveraux made reference to Robin Williams at the meeting on 28 September rather than at the meeting on 27 September but the Tribunal does not accept that evidence, which is contrary to the evidence of both Mr Saveraux and Mr Ormston who said that there had been no mention of Robin Williams whatsoever during the meeting on 28 September. This is of note as if he and Mr Saveraux had concocted their evidence it would have been easy for Mr Ormston to support Mr Saveraux’s account of the words he says he used about Robin Williams on 27 September. Neither does the Tribunal accept the

claimant's evidence that Mr Saveraux said of the claimant words to the effect, "He did not understand that I was feeling the way I was as I reminded him of the actor Robin Williams, the actor which had taken his own life" or that he said that the claimant reminded him of Robin Williams or had compared her to him.

7.11.5 Mr Ormston's evidence was that at the meeting on 28 September the claimant had stated that she had driven somewhere and sat and thought about taking her own life. The Tribunal is satisfied that the claimant did say that at the meeting on 28 September rather than, as Mr Saveraux recalls, at the meeting on 27 September.

7.12 This lack of clarity as to what occurred at the meeting on 27 September might have been avoided if Mr Saveraux had continued to take notes of that meeting, which he had begun to do at the commencement of the meeting, but the Tribunal considers it understandable that given the claimant's distress, which Mr Saveraux described during cross examination as being emotional for her and for him, he had put his pen and paper away as it did not seem right to continue to take notes. Importantly, he did not make a note following the end of the meeting either, which he accepted he ought to have done but in the circumstances Tribunal is not minded to criticise him for that.

7.13 Also at the meeting on 28 September 2021, an adjustment to the claimant's working arrangements was made in that it was agreed that, if she needed to, she could work from home. On occasions, the claimant would not inform Mr Saveraux that she would be working from home until an hour or so before her shift started, which was inconvenient given that staff rotas had been prepared, but was accommodated.

7.14 That day, 28 September 2021, the claimant wrote to Mr Ormston and Mr Saveraux stating, "Thanks so much for listening and trying to understand it does mean a lot" (195). It is notable that the claimant made no mention in her email of Mr Saveraux making a comment about Robin Williams or being hurt or upset by what he had said; neither did the claimant raise a complaint about this matter at that time.

7.15 Further indications of the claimant being content with the above response of the respondent's managers at this time can be found in her writing to Mr Ormston on 8 October 2021 in which she stated, "I know your there to listen to me if needed thank you" (196) and having nominated him for a Reward and Recognition Award in which she stated as follows, "Stu has always demonstrated huge amounts of empathy and sympathy to my situation, which has made me feel comfortable to be open with work colleagues to enhance my performance and ease my angst" (227).

7.16 In October 2021 ML, a new Team Leader, joined Mr Saveraux's team to support Mr Saveraux in his role as Team Leader. They decided that the team of some 20 employees would be split in half for the purposes of managing the day-to-day tasks that were undertaken. Thus, ML assisted team members with questions regarding their tasks, and dealt with holiday

requests and more basic elements of management. Mr Saveraux remained in charge of the team as a whole, however, and retained responsibility for all serious matters. The claimant was assigned to the part of the team overseen by ML. The claimant was made aware of this division of responsibility, which Mr Saveraux believed was communicated orally to those who were in the office at the time and by email to those who were not.

7.17 In order to maintain confidentiality and the trust that had developed between Mr Saveraux and the claimant he did not disclose her mental health struggles to ML. The Tribunal was initially surprised at this but, having heard Mr Saveraux's explanation during cross examination regarding ML only being involved in day-to-day matters and given that Mr Saveraux retained overall responsibility for the team, the Tribunal considers that this was a reasonable decision for him to take.

7.18 At this time, adjustments had been put in place to accommodate the claimant. At her discretion she could undertake work relating to email correspondence only rather than by telephone, could come into the Contact Centre or could work from home. Mr Saveraux considered that he had the necessary authority to agree each of these adjustments but when it came to the claimant seeking to notify the respondent on five minutes notice that she would work from home he felt that he should elevate this aspect to his manager. Also at about this time, due to ML not having a full understanding of the claimant's situation, he did not approve one of her requests to work from home; his reasons being that as the claimant would not be in the office, she would not be able to accept card payments. The claimant considered that this was contrary to the reasonable adjustments that had been agreed regarding her working from home and requested a meeting to consider it (232).

7.19 Following a conversation with Mr Ormston and the Contact Centre Operations Manager (MG) it was confirmed that the claimant could work from home whenever she wanted despite the difficulties that that presented with taking card payments and that she could call to inform the respondent even on short notice that she would be working from home that day. That is recorded in an email of 6 April 2022 thus, "it has been agreed that Leyanne can call the black phone at any time and tell us she is working that days shift from home" (235).

7.20 The claimant raised these concerns on 6 April 2022. She first wrote to Mr Saveraux in an email timed at 14:33, he replied at 14:34, the claimant wrote to him again at 14:39, he replied at 14:45 and following the conversation referred to in the preceding paragraph the resolution of the matter in a manner satisfactory to the claimant is recorded in an email timed at 16:33. The claimant relied upon her concerns in respect of working from home as being an example of the respondent not responding appropriately to her circumstances and her need to work from home. The Tribunal considers, however, that these events are better regarded as the respondent reacting swiftly and appropriately to an issue raised by the

claimant such that it was resolved to her satisfaction in the space of two hours.

7.21 In August 2022, the claimant successfully applied for a secondment to a role of Partner Services Manager in the Partner Services Department, which she commenced on 12 September 2022. A particular reason for a secondee being sought to work in that Department was the fluctuating nature of its workload, including the need to address the 'spike' in workflow as a result of the so-called 'Black Friday' and 'Cyber Monday' retail events held in November each year.

7.22 The letter confirming the claimant's secondment, dated 1 September 2022, records, "Your secondment may potentially take you up to the end of the year, but we will endeavour to give you as much notice before it comes to an end as possible" (241). Her secondment is also recorded in a document headed, "Change to Employee Terms" (142) in which the reason for the change is given as, "Secondment to assist Partner Services in the increase in Partner Support tasks particularly Zendesk customer service queries and stock transfers between external storage and Gateshead".

7.23 Although she is no longer employed by the respondent, Miss Maguire was the manager of the Partner Services Department at that time. She was not made aware that the claimant had any issues in relation to her mental health either prior to or at the commencement of her secondment. She confirmed in oral evidence that it might possibly have helped to know about such matters.

7.24 Miss Maguire's intention was to have the secondee start off working on Zendesk (a customer management ticketing service) to help manage the number of queries that were coming through from clients. Her evidence was that as the claimant had such experience it seemed like a good fit and she considered that it would free up the rest of the team to concentrate on more difficult matters. In the first week of her secondment the claimant was very much focused on Zendesk for a particular client where there could be up to 100 customer emails in a queue that needed answering. The claimant was familiar with the way the Warehouse system worked and she appeared to find it relatively straightforward to handle queries about orders and returns, which was similar to the work that she would have been doing in the Contact Centre. Miss Maguire's plan was that as the claimant made progress clearing the email queues she would be trained onto different tasks that she could get to grips with relatively quickly; for example, helping to prepare daily and weekly activity reports for clients and prepare transport invoices.

7.25 The claimant's evidence was that she agreed that she had been trained in dealing with emails for the client but maintained that she had completed that task within 30 minutes each day and, as she did not have her email set up to be able to do any other kind of work, she spent the majority of the first week asking IT to set this up, which could take 48 hours. As such,

for her first week she was sat staring at a computer screen and her boredom continued throughout the second week also.

7.26 The Tribunal is not satisfied that the claimant's account of not having sufficient work to do is borne out by the evidence before it taken as a whole. In common with other employees of the respondent, the claimant was required to input onto the respondent's system details of work or other activities undertaken during a working day: in particular, the activity, the time taken in minutes and the name of the client (395). The claimant's oral evidence was that she input the data as directed by a colleague and that the figures she had entered regarding the amount of time taken on each activity were inaccurate and served only to validate bills to be sent to clients. The Tribunal does not accept that evidence. It might be one thing if the inputting of this data was simply an internal monitoring document for the respondent's managers but the evidence was that these figures formed the basis of client bills and, importantly, that the figures input by the employees were sent to the clients themselves for scrutiny. The Tribunal does not accept that commercial clients would have been taken in by false records of time allegedly spent on their work.

7.27 Thus the Tribunal is satisfied that these records, which the claimant completed, accurately reflect the work she had undertaken and also the time that she had spent on training; the documents before the Tribunal showing that she had undertaken a total of 17.25 hours training from 13 to 29 September. The Tribunal rejects the claimant's contention that she entered false figures as she was told to do by a colleague. That, of course, is a difficult position for the claimant to take because if she was being dishonest in completing these records it might call into question her honesty and credibility in these proceedings.

7.28 In short, the Tribunal is satisfied that it is clear from these records that the claimant completed showing the work that she was doing during her secondment that she was fully engaged undertaking primarily either work for named clients (such as emails or reports) or training.

7.29 Additionally in this connection, the Tribunal has had regard to some holiday notes prepared by an employee in the Partner Services Department, dated 29 September 2022, in which she has made several references to the claimant undertaking a variety of work and for a number of clients (255).

7.30 Neither is the Tribunal satisfied that the claimant's evidence in respect of the delays in responding to her IT requests is borne out by the evidence before the Tribunal; both the evidence of Miss Maguire and the contemporaneous emails, relevant points from which are as follows:

7.30.1 In preparation for the claimant's arrival on her secondment Miss Maguire wrote to the respondent's IT services requesting that a login be set up for the claimant "to WCMS", which the Tribunal

understands to stand for web content management system (242). This request was dealt with that day (243).

7.30.2 On Thursday, 22 September 2022 at 15:41 the claimant sent an email to the respondent's IT provider stating that she was not able to send emails from certain mailboxes and asked, "would you be able to give me full access please" (244). The following Monday, 26 September, the claimant was informed that all her issues had been resolved (245).

7.30.3 On 28 September 2010 the claimant sent an email to an IT administrator timed at 15:48 stating, "I need access to DMS so need a login please" (248). A reply three minutes later confirmed that this had been resolved for which the claimant expressed her thanks (247).

7.30.4 Also on 28 September the claimant sent an email timed at 11:28 to a colleague enquiring if he would be able to give her access to Dimensions so that she could raise invoices (254). At 12:39 that day he replied that she would need to ask someone at the respondent's IT service provider to help. The following day, at 10:27, the claimant confirmed to the original colleague that she had done so and it was sorted (253).

7.31 In the experience of this Tribunal, these are timely and helpful responses on behalf the respondent both to the requests of the claimant and her needs in relation to the work she was expected to undertake, and are far from the claimant's position of her being denied the tools with which to do her work. These email exchanges are also inconsistent with the claimant's contention that she was bored at work and did not have sufficient work to do.

7.32 In summary of the above, Miss Maguire explained in answering questions in cross examination that the claimant's first and priority task was working on Zendesk (which is borne out by the quotation from the Change to Employment Terms document set out above (142)) for which she had been provided with necessary access. She had then moved on to sit with members of the team to enter data for clients in relation to weekly and monthly reports, and that was then used for month-end invoicing. The claimant had had access to the necessary systems in connection with that information. Only when the claimant moved on were emails sent to IT to set her up for that system. An issue she had raised on 27 September was resolved on 28 September and the claimant's need for access to accounting was resolved within a day. Importantly, in the meantime the claimant had other work that she could do. The Tribunal accepts this evidence.

7.33 The claimant also asserted that she had been denied the training that was necessary to enable her to undertake the work for which she had been seconded; further, that no training manuals were available and she had to sit behind another member of the team to train on invoicing clients. The Tribunal preferred the evidence of Miss Maguire who explained that the respondent does have sets of instructions available on its network to

which employees can make reference and about which the claimant would have been informed but she further explained that in practice the most practical and effective way of training someone had been found to be to pair them up with a more experienced member of staff so that they can see how to complete a certain task in practice and ask questions on a 1:1 basis. The Tribunal accepts that evidence. As Miss Maguire answered in cross examination, she had left the claimant's training with the other members of the team to bring her up to speed in relation to invoicing. She continued that there was not a specific timetable because she wanted to see how the claimant dealt with specific tasks before moving to the next one. This evidence is, to an extent, borne out by the following:

7.33.1 the claimant's own evidence in her witness statement that Miss Maguire, "sat me with a lady [*RN*] to train on invoicing the clients";

7.33.2 a contemporaneous email from the claimant to a colleague dated 29 September 2022, "Marie was class at showing me stuff …." (250); and

7.33.3 the holiday notes referred to above that had been produced by another colleague on that date, 29 September, "Leyanne has been shown how to complete transport invoices …. but does not have access to dimensions this is currently with pulsant" (255). The Tribunal understands that Pulsant is an IT provider used by the respondent.

7.34 Miss Maguire was on holiday during the second week of the claimant's secondment. She met the claimant on her return. The date of this meeting is unclear but on the basis of other relevant evidence, the Tribunal considers it reasonable to infer that it was on 29 September 2022. The claimant states that at this meeting she told Miss Maguire that she was bored at work as she had so little do. To the contrary, Miss Maguire's evidence was that the claimant was shocked at how busy work in Partner Services was and that she was struggling with the work situation. As she explained in an answer to a question from the Tribunal, Partner Services was a different environment with areas covering services different to the Contact Centre. She explained that all areas apart from Zendesk represented new tasks, "something totally different", and it would be tough, as in any job to which someone was moving. The Tribunal accepts Miss Maguire's evidence as that is supported by the fact that she and the claimant agreed at this time that she would pare back the work the claimant was doing following which Miss Maguire had spoken to managers to come up with a plan. They had agreed to limit the number of client accounts the claimant was working on to two or three and to reduce the number of different tasks she was allocated until she felt more comfortable with the work. The Tribunal is satisfied that Miss Maguire taking those steps is inconsistent with how she would have reacted to an employee complaining about having insufficient work to do. In this connection the Tribunal also notes that on 29 September the claimant wrote to a colleague informing her that she had told Miss Maguire, "I will give it a couple more weeks and see how I feel" (249).

7.35 At this meeting on Miss Maguire's return from holiday the claimant had also referred to a terrible atmosphere within the Department with everyone being nasty behind the backs of others, and that she had not been included in the sharing of birthday cake. In oral evidence the claimant referred to the atmosphere in the Department as being "toxic" but that is not borne out by her emails to colleagues. On 28 September 2020, for example, having been asked how she was enjoying her secondment the claimant replied only, "I miss talking to everyone no gossip here everyone seems sane hahaha" (246). Likewise, the claimant wrote to another colleague by email of 29 September stating, "I really like Alison [Maguire] shes lovely …. I think shes nice" (249)

7.36 The above notwithstanding, Miss Maguire accepted in evidence that during their meeting the claimant was clearly upset and unhappy but she considered that related to her feeling out of her depth. In an attempt to reassure the claimant Miss Maguire told her that individual members of the team had said that she was doing well. This assessment of the claimant by her colleagues is borne out by an email from Miss Maguire dated 3 October 2022, "we are all over the moon with the support Leyanne has been able to give …. She has made a great impact on handling the zen desk" (257).

7.37 The claimant took Miss Maguire's statement about remarks from team members to be a reference to comments they had made in a Whatsapp group that had been set up for the Department but to which she had not been added at the commencement of her secondment. Her own evidence, as set out in paragraph 42 of her witness statement, was that she instantly thought that she was not included in the chat and wondered why (part of her mental health condition being overthinking) so "already paranoid" now that the team of 10 people were talking about her in a group chat, be it positive or negative, made her feel uncomfortable and this was the start of sleepless nights, overthinking of what the office work saying about her and why she was not added to the group. Miss Maguire's evidence was that the Whatsapp group was rarely used and, therefore, it did not feature in setting the claimant up once she joined the team. She accepted, however, that with hindsight the claimant should possibly have been added to the group but repeated that it was hardly ever used.

7.38 The Tribunal agrees that it would have been better if the claimant had been included in the Whatsapp group as, not being so, allowed her to feel that she had been deliberately excluded from a means of communication within the team. In this respect the Tribunal notes that this evidence of the claimant with regard to the impact upon her of not being a member of the Whatsapp group was (perhaps understandably) not challenged by the respondent.

7.39 In the event, the claimant went off sick on Friday, 30 September 2022. She reflected on things over the weekend and, when she went into work on Monday 3 October she spoke to Miss Maguire. She told her that she did not want to continue her secondment to Partner Services. Miss

McGuire agreed that she could return to the Contact Centre and said that she would speak to Mrs Knox that morning, which she did. The claimant's evidence was that the duty on the respondent to make any reasonable adjustment did not arise until Monday 3 October 2022 after this conversation with Miss Maguire.

7.40 Mrs Knox then met the claimant that day who told her of her experiences in Partner Services, which she said was affecting her mental health.

7.41 Mrs Knox asked the claimant if she would be prepared to give it another try in Partner Services if her work were structured differently and, at the end of their meeting, the claimant agreed at least to have another discussion with Miss Maguire. During that discussion with Miss Maguire the claimant told her that she would give it another go.

7.42 The claimant's evidence was that Mrs Knox had told her that she could not return to the Contact Centre because there was no budget for her in that Department and also stated that Mr Saveraux should never have told her that she could return. Mrs Knox denied each of these points. The Tribunal does not accept this evidence of the claimant, which is inconsistent with the very concept of a secondment with which Mrs Knox would have been familiar. Additionally, this was make clear in the confirmatory letter to the claimant, "Your secondment may potentially take you up to the end of the year, but we will endeavour to give you as much notice before it comes to an end as possible" (241) and in the Change to Employee Terms document in which the Date Effective is said to be, "12/9/22 Secondment potentially through to 31st December 2022" (142). In that form the Team Leader/Manager is said to be Joanne Knox and it is unlikely that she would have been unaware of its terms.

7.43 In light of these findings, the Tribunal accepts the evidence of Mrs Knox of what occurred at her meeting with claimant and particularly that she had said that having asked the claimant if she would be prepared to give Partner Services another try she had agreed at least to have another discussion with Miss Maguire.

7.44 After her meeting with Miss Maguire the claimant met the Contact Centre Deputy Operations Manager, GR, in the corridor. She became very upset and told him of the issues she was facing, the effects on her and that no one was listening. The upshot was that the claimant then went home and GR undertook to telephone her later.

7.45 GR informed Miss Maguire of the claimant being upset, which reinforced in her mind the need to make changes. She discussed these matters with colleagues in the Partner Services Department and measures to give some comfort and support to the claimant were agreed. Miss Maguire confirmed this in an email to Mrs Knox and GR at 11:43 that day as follows, "rather than launch her into the world of transport invoicing and completing activity reports, if it would help, we can concentrate on handing over more customer service kind of tasks, such as monitoring and replying

to client emails coming into the support box etc" (257). As mentioned above, in that email she also stated, "we are all over the moon with the support Leyanne has been able to give".

7.46 As he had promised to do, GR telephoned the claimant shortly after noon that day. He then sent an email to Miss Maguire and Mrs Knox timed at 12:10 on 3 October (256). He stated that he thought Miss Maguire's idea of the work that the claimant could do in her Department (as set out in her email in the preceding paragraph), "would be ideal to give her that comfort and support she will need". This being so, the Tribunal considers it reasonable to infer that GR would have informed the claimant of Miss Maguire's proposals in respect of her work. This is especially so given that GR concluded his email, "FYI, I have just come off the phone to Leyanne 5 mins ago. She is happy to give it another go and will be on site tomorrow."

7.47 The claimant's account of her exchanges with GR is significantly different. She says that after she had met him in the corridor and had told him of her issues and the effects of her secondment on her he responded that he would, "have this sorted and my original job back". The Tribunal considers it reasonable to infer that if the claimant had told GR how she was being affected by recent events that would have included that Mrs Knox had said that she could not return to her original role. The Tribunal does not consider it credible, therefore, that GR, who was Mrs Knox's deputy, would have informed the claimant that she could return to that original role as (on the claimant's account) that would have been directly contrary to the decision of GR's superior. The claimant's account continues that when GR telephoned her he told her that she "was not able to go back to my original post and that the big boss man (TF) said that I had to go back to partner services …. I should give this another chance and not try to run before I could walk." [*TF was the Contact Centre Manager.*] Once more, the Tribunal does not consider it credible that GR would have told the claimant that TF had said that she could not return to the Contact Centre and would have to go back to Partner Services, which is again inconsistent with a short-term secondment for, potentially, some fifteen weeks.

7.48 Fundamentally, the Tribunal finds that the respondent's position in the above respects is supported by the contemporaneous email from GR referred to above (256) and it is not satisfied that he would have written such an email if the circumstances had been as the claimant has described them.

7.49 Some two hours later, however, the claimant sent a text message to GR. From how the claimant's message begins it is implicit that he had asked her a question to the effect of whether she was feeling any better. She stated, "No not really I can't seem to bring myself around and my panic attacks are getting worse….ive spoken with my psychotherapist and she wants to see me tomorrow so shoukd I just ring HR as normal im not good for myself never mind work….im so sorry to let you down" (258). The

Tribunal is satisfied that that final phrase is indicative of the claimant having previously told GR when he telephoned her earlier that she was happy to give Partner Services another go and would be at work the next day, as is recorded in GR's email set out above.

7.50 On 5 October the claimant was certified as not being fit for work for four weeks, her medical certificate citing, "Work related stress" (259). At the expiry of the claimant's fit note at the beginning of November certain of the respondent's managers (Miss Maguire, Mrs Knox and Mr Ormston) were engaged in email correspondence in respect of whether the claimant had returned to work, where she should be placed when she did return and whether it might help her if she were to be told that she would not be expected to return to Partner Services (379-385). The Tribunal considers that those exchanges reflect those managers attempting to be accommodating in respect of the claimant and recognising the stress that working in Partner Services had caused her. The managers' preparedness to return the claimant to the Contact Centre and is also inconsistent with the claimant's contentions that Mrs Knox told her that she could not do so because there was no budget for her position there and that GR told her that TF had also stated that she could not return to Partner Services.

7.51 Another point of significance arising from these email exchanges is that it is recorded that when Mrs Knox spoke to the claimant on 10 November she had told her that she was, "nowhere near ready to return to work" (379), which obviously ruled out a return to the Contact Centre or any other department on any basis.

7.52 In the event, the claimant never returned to work, her subsequent medical certificates continued to cite work related stress or, latterly, stress at work and stated that she was "not fit for work". On no occasion did the doctor suggest on the certificates that the claimant could return to work in a different role or if adjustments were made.

7.53 After a short hiatus during which it would appear that the matter of who should contact the claimant during her absence seemed to fall between Miss Maguire and Mrs Knox it was decided that the latter should be her point of contact as, although the claimant was not technically part of her team, she had known her for several years whereas she had only been in Miss Maguire's team for a few weeks. Mrs Knox primarily contacted the claimant by text messages, the first contact being on 10 November 2022 (267-270). The claimant subsequently requested that Mrs Ferris-Lawson, who was a personal friend, should take over her welfare checks (284), which was agreed as from 24 January 2023 (391). Once more, the primary means of contact was by text message (279-287).

7.54 Every year the respondent provides each department with a budget of £30 per head with which to fund a social event for the members of that department. In December 2022, it was agreed that, exceptionally, the Contact Centre could hold a Christmas party in March 2023. Mrs Ferris-Lawson took on the task of organising that party and it was arranged for 4

March 2023. She sent emails to all staff in the Contact Centre, which she addressed to the Inbound Contact Centre Team group, which comprises all Contact Centre staff, including any on sick leave (276-278). It follows that the claimant did not receive these emails or any information about the party as, being on secondment to Partner Services, she was not a member of the Contact Centre for whom it was being arranged.

7.55 Also, in December 2022 Mr Saveraux was told to contact everyone in his team to confirm their availability to attend the party, which he did. On 21 December 2022 he sent a message to one member of his team who was on sick leave at the time due to a broken arm asking if she would be interested in attending but she declined (265). Mr Saveraux confirmed in evidence that he had also contacted colleagues on maternity leave but had not contacted the claimant because she was not in his team at the time.

7.56 The claimant explained in oral evidence that in around February 2023 she had had been in touch with ACAS about her work situation. Having done so, she contacted Mr Ormston by email of 20 February 2023 and asked for the respondent's grievance procedure, which he sent to her (273). They also spoke by telephone at this time when the claimant mentioned that the grievance was related to Mrs Knox. Mr Ormston therefore advised her that the grievance should be sent to TF as he was Mrs Knox's manager. Mr Ormston mentioned this to TF now and then but as neither of them had received anything further he concluded that the claimant had decided not to submit a grievance.

7.57 On 1 March 2023 Miss Maguire wrote to Mr Ormston, with a copy to Mrs Knox, asking if the claimant could be transferred back to the Contact Centre as her secondment was only intended to be to the end of 2022 (389). Her motivation was that her Partner Services team was about to receive a 5% pay rise whereas employees in the Contact Centre would receive a pay rise of 9%. Thus the claimant is wrong to state in her witness statement that Miss Maguire asked for her to be removed from Partner Services, "so I did not receive a pay rise". Although the claimant remained absent due to sickness at this time Mr Ormston agreed that he would move her "on the system to the CC as of 1st march" (388). He confirmed this change in a letter to the claimant that day, 1 March 2023 (399).

7.58 While this change on 1 March preceded the Christmas party for members of the Contact Centre on 4 March 2023 neither Mrs Ferris-Lawson nor Mr Saveraux were aware of this somewhat technical change in the department to which the claimant was assigned, which was not of any day-to-day significance given her continued absence from work. Hence they considered that the claimant remained in the Partner Services Department and did not think to invite her to the Christmas party for the Contact Centre department. In these circumstances, the Tribunal rejects the claimant's contention in her witness statement that she was being excluded "because of my condition".

7.59 The claimant's mental health was not improving. As recorded in an NHS Initial Response Service Referral Form dated 11 January 2023 she reported that she had had thoughts of wanting to self-harm although she had no plans to action (318). She was referred to the mental health Community Treatment Team in January 2023 and received an appointment for an initial assessment on 10 March 2023 (326). A summary of that assessment was sent to the claimant's doctor by letter of 24 March 2023 (332). While the Tribunal does not make a great deal of this point the historical and current factors referred to in that letter are personal rather than work-related.

7.60 A Universal Credit Medical Report Form was completed in respect of the claimant arising from an examination on 24 April 2023 (335). Once again, the references in that form are to personal rather than work-related issues. In the section of that report relating to the claimant's capacity for work, having confirmed the claimant's formal diagnosis of Anxiety and Depression and summarised her condition (including that she "had a near attempt to overdose in 2014 and then impulsively overdoses in 2021") it is stated, "Therefore, severe disability is likely in the area of initiating and completing personal action" (343). Mr Mensah explained that this was the basis upon which the respondent had conceded that the claimant was a disabled person from the date of that report, 24 April 2023.

7.61 Although, as mentioned above, it had appeared to Mr Ormston that the claimant had decided not to submit a grievance she did. The claimant explained in her witness statement that while she had intended to follow Mr Ormston's advice and submit her grievance to TF she had realised that he had previously been involved in such matters as GR had told her that he had spoken to "big boss man", whom she took to mean TF. She therefore decided that she would send her grievance to a director of the respondent, KR, which she did by email of 21 February 2023 (275). She attached a detailed grievance letter of that date, 21 February 2023 (294).

7.62 KR did not receive the claimant's email or the attached grievance. In evidence Mr Ormston confirmed that having received a copy of the claimant's email to KR as part of disclosure in connection with these proceedings the respondent had been able to locate that email on its servers. He explained that, having spoken to KR and the respondent's IT team, it was believed that the claimant's email was quarantined as an 'imitation' email. Further, that as KR receives approximately 32 to 40 notifications about such emails each day, and was not expecting anything from the claimant, he must have unwittingly missed or deleted any notification he had received about the claimant's email. The Tribunal has no reason not to accept that explanation.

7.63 It is also a fact that Mr Ormston had told the claimant to write to TF. Furthermore, the claimant did not pursue with Mr Ormston or anyone else at the respondent the point that she had not received any response to her grievance, whether within the 15 days provided for in the respondent's grievance procedure or otherwise.

7.64 As mentioned above, by email of 4 May 2023 the claimant resigned from her employment with immediate effect (293). Amongst other things, that email included the following:

7.64.1 She stated, “You should be aware that I am resigning in response to my employers repudiator breach of contract and I consider myself Constructively dismissed.”

7.64.2 She gave the following reasons, “You rejected my grievance on 21st February …. and discriminated against my disability by not finding a reasonable adjustment for my working situation”.

7.64.3 She continued, “I had begged and pleaded to remove me from what was causing me harm The position in partner services was affecting my mental health and I had declined dramatically due to the situation, numerous meetings asking for help were ignored and changes promised to be made never surfaced, advising me my original position as customer services advisor was no longer available for me left no other choice but to call my doctors and they advised due to previous events I had to remain from the situation unfit to work.”

7.64.4 She concluded, “I now believe my position at Whistl Fulfilment (Gateshead) Ltd is untenable, my working conditions intolerable and any trust I had has now gone which leaves me no choice but to resign in response to your breach.”

7.65 On receipt of the claimant’s resignation Mr Ormston wrote to her seeking clarification of where and to whom her grievance had been sent and when and by whom she was advised that her position as customer services adviser was no longer available. In his letter he clarified that that role had never been in question and that her secondment to Partner Services was temporary, until the end of 2022 at which point her role reverted back customer services adviser. He concluded, “Its my sincere hope that these issues can be address and that you can reconsider your resignation, I look forward to your reply” (292).

7.66 Although the claimant replied to Mr Ormston that she had sent her grievance to KR on 21 February, and attached “a copy for your records”, she was clear, “My resignation still stands” (292).

7.67 Notwithstanding that the claimant had resigned Mr Ormston wrote to her on 31 May 2023 (304). He explained that despite an initial investigation her original grievance had not been located. He acknowledged that the claimant had confirmed that her resignation stands but stated that the respondent would like the opportunity for her grievance to be heard, which would be by KR as originally intended by the claimant. Mr Ormston asked the claimant to call him or email him and gave his personal contact details. The claimant did not reply.

Submissions

8. After the evidence had been concluded the respondent's representative and the claimant made submissions. Each of them relied upon written skeleton arguments, which in the case of Mr Mensah he supplemented orally carefully addressing in detail the matters that had been identified in the list of issues in the context of relevant statutory and case law. For her part, the claimant said that she was content to rely upon her written submissions. It is not necessary for the Tribunal to set out the respective submissions in detail here because they are a matter of record and the salient points will be obvious from its findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made and the parties can be assured that they were all taken into account by the Tribunal in coming to its decision.

9. That said, the key points made by Mr Mensah on behalf of the respondent included as set out below, in each case as expanded upon by Mr Mensah in his written and oral submissions:

    9.1 For the reasons contained in his written submissions, he urged by reference to the well-known case law upon which he relied, that the claimant's complaints in respect of acts or omissions which took place prior to 11 December 2022 had been brought out of time. As to the complaints under the 2010 Act there had not been any continuing act and it would not be just and equitable to extend time. As to the complaint of constructive unfair dismissal, there was no evidence that it was not reasonably practicable for the claimant to present her claim in time.

    9.2 The respondent had conceded that the claimant satisfied the definition of disability by reason of anxiety and depression from 24 April 2023 onwards but not at the material time she relied upon. Further, the claimant did not satisfy the definition between September 2021 and March 2023.

    9.3 The respondent did not know and could not reasonably have been expected to know that the claimant was disabled and (particularly given her attendance record and excellent performance) that her disability was liable to disadvantage her substantially in the workplace. It is to the credit of the respondent that it did not need notice of disability to make reasonable adjustments.

    9.4 The Tribunal is invited to prefer the evidence of Mr Saveraux as to what he actually said regarding Robin Williams, which the claimant confirmed was a one-off act. Further, even if it occurred it was not less favourable treatment because of disability, which the claimant had accepted with her answer in cross examination, "It is not my case that he made that comment because of disability". In any event this complaint is massively out of time.

    9.5 As to the complaint of failure to make reasonable adjustments, Mr Mensah again relied upon familiar case law.

He accepted the observation made by the Employment Judge that, in accordance with the decision in Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10, it can be a reasonable adjustment if there is a prospect that the adjustment would prevent the claimant from being at the relevant substantial disadvantage without there needing to be a good or real prospect. Thus, it is not for the claimant to prove that the suggested adjustment will remove the substantial disadvantage, it is sufficient if the adjustment might give the claimant a chance that the disadvantage would be removed and not that it would have been completely effective or that it would have removed the disadvantage in its entirety: see Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 and South Staffordshire and Shropshire Healthcare NH Foundation Trust v Billingsley UKEAT/0341/15.

9.6 To the claimant's credit she had accepted that the respondent had made reasonable adjustments: see paragraph 10 of the particulars of claim attached to her claim form. The respondent adapted the claimant's working arrangements, facilitated her change to a Warehouse role in August 2021 and provided appropriate and compassionate support to the claimant throughout.

9.7 There is no documentary evidence that the claimant was hating Partner Services and wanted to leave or that her mental health required her to do so. Indeed, the respondent had an incredibly favourable impression of how she was getting on. In cross examination she accepted that the failure to make a reasonable adjustment only related to after she spoke to Miss Maguire on 3 October 2022.

9.8 There were then no time to provide the claimant with a suitable alternative role as the claimant was then absent from work.

9.9 There was a requirement for the claimant to work in Partner Services undertaking the secondment for which she had applied.

9.10 The claimant was provided with sufficient work as shown in the database printout in light of which it is very difficult for her to argue that she had insufficient work.

9.11 The claimant was expected to do the work given to her and attempts were made to provide her with training. In the database the claimant has confirmed a total of 17.25 hours training from 13 to 29 September.

9.12 If is right that the claimant was not provided with access to the Whatsapp group by which the Partner Services team communicated but it is not clear how not being part of that group would have placed the claimant at a substantial disadvantage in comparison with non-disabled employees. There is no evidence of the claimant missing out on anything of merit or value by not being included in the group.

9.13 The answer to the issue, “Were these circumstances provisions, criteria or practices of the respondent that put the claimant at a substantial disadvantage in comparison with persons without a disability because she found them difficult to cope with due to her existing mental health condition and the circumstances caused the claimant to feel uneasy, anxious, upset and led to difficulty sleeping, tiredness and a deterioration in her mental health” is, “No”.

9.14 It would not have been reasonable to remove the claimant from her secondment and find her a suitable alternative role. She had been working there for a very short period. It is accepted that the claimant asked to return to her previous role when she met managers on 3 October 2022 but she was then unfit for work and there was no opportunity for her to return to her substantive role. The claimant’s GP advised that she was not able to return to work even to the previous role (which is confirmed in the fit note) and there was therefore no prospect of this adjustment alleviating any disadvantage.

9.15 The claimant was not invited to the Christmas party in March 2023 because she was not a member of the Contact Centre team when the arrangements were made. When she was transferred back on 1 March 2023, while on sick leave Mr Saveraux was unaware

9.16 The above circumstances provide an innocent, non-discriminatory explanation for the claimant not being invited to the party, which had nothing whatsoever to do with a disability.

9.17 There was no fundamental breach in the contract of employment entitling the claimant to resign.

9.17.1 Mr Saveraux’s comment about Robin Williams did not constitute a fundamental breach of contract by the respondent entitling the claimant to resign. It did not occur as alleged and even if it did was not a fundamental breach of contract and any breach was waived and the contract affirmed.

9.17.2 The claimant is hamstrung by the really short timescale and there is no evidence to the effect that the claimant was unhappy in Partner Services or how it was adversely affecting her mental health yet the respondent nonetheless kept her in Partner Services.

9.17.3 There is a non-discriminatory explanation for not inviting the claimant to the party but, in any event that cannot constitute a fundamental breach of contract.

9.18 The respondent did not breach the implied term of trust and confidence by doing any of the above things.

9.19 The claimant did not leave in response to any breach. There was a significant delay between the Robin Williams comment and her resignation. Also, it was pretty obvious that the claimant was passionate

about Reiki and massage and in which she invested significant sums and began offering services from at least June 2023, generating revenue from that point. This represents a very clear and obvious reason for resigning, which the claimant did not disclose to the respondent.

9.20 The claimant delayed too long before resigning. Some 19 months in relation to the Robin Williams comment, eight months from 3 October 2022 in relation to the secondment and around six months in relation to the Christmas party. Thus the claimant waived any breach by delaying until 4 May 2023 before resigning.

9.21 The respondent did not discriminate against the claimant by constructively dismissing her as none of the allegations represent a fundamental breach of contract and none were related to any disability.

10. The key points made by the claimant in her skeleton argument included as follows:

10.1 She had given many examples of how she had been treated by the respondent including the Robin Williams comment, having to request another meeting for a reasonable adjustment to be put back in place, the hostile environment in which she had worked when she was handed over to another manager with no disclosure of her mental health and not having been invited to the Christmas party.

10.2 At the meetings on 27 and 28 September 2021 the respondent had been made aware of her mental health condition and how it impacted on her day-to-day activities.

10.3 Her original reasonable adjustment was removed without warning, which caused added stress as she was having to request meetings to be listened to again about her mental health. She had requested more work while in Partner Services, which was not produced, and had requested that her emails be set up correctly. She actively spoke to Miss Maguire about how she was feeling but was not listened to. This is borne out by the evidence in the bundle and the witness statements. Her mental health would not have deteriorated so much if a reasonable adjustment was made because of her disability on 3 October 2022.

10.4 Not being included in the Whatsapp group was harassment and she was at a disadvantage to others who were in the group. She was excluded from the Christmas party for the Contact Centre, which made her feel intimidated scared and paranoid. The only reason for her exclusion was because she had a mental health condition.

10.5 She felt forced into resigning due to the lack of empathy she received from the respondent after sending her grievance, which was ignored. This made it impossible for her to trust the respondent. She had left it as long as she did as she did not want to leave. She was a good employee and loved her job, which provided a safe place where she could go to switch

off from the battle she faces every day with her mental health. She was never told KR had not received her grievance.

10.6 In August to September 2023 she did a course in sound healing and is proud to say that she is now a sound healing therapist working approximately six hours a month.

10.7 Much of the remainder of the claimant's skeleton argument essentially addressed her having a mental health condition and the impact of that upon her, which she said was made worse by her employment by the respondent and the inhumane way in which she was treated. She also referred to the effects these proceedings had had upon her. While the Tribunal had regard to this section of her skeleton argument it did not actually constitute submissions based upon the evidence before the Tribunal. That said, similar matters are raised in the claimant's Disability Impact statement (73) to which the claimant did refer in her witness statement and, therefore, have been brought into account.

10.8 Finally, the claimant set out recommendations that she would wish to see implemented and referred to compensation and her schedule of loss.

The Law

11. The principal statutory provisions that are relevant to the issues in this case are set out below. In relation to the complaint of unfair dismissal, only a limited excerpt from section 98 of the 1996 Act has been given because the respondent has relied solely upon its contention that the claimant was not dismissed and has not sought to address the reason for or the fairness of any such dismissal in respect of which the remainder of that section 98 would have been relevant.

11.1 Disability discrimination - Equality Act 2010

"6 Disability

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

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

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

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability —

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) —

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability."

"13 Direct discrimination

(1) 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."

"20 Duty to make adjustments

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

"21 Failure to comply with duty

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

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

"26 Harassment

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(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.

(5) The relevant protected characteristics are -
…..
disability;
…..”

“39 Employees and applicants

(2) An employer (A) must not discriminate against an employee of A’s (B) -
…….
(c) by dismissing B;

(d) by subjecting B to any other detriment.

“40 Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B) –

(a) who is an employee of A’s

“136 Burden of proof

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

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

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

“212 - General interpretation

(1) In this Act -
…..
“detriment” does not, subject to subsection (5), include conduct which amounts to harassment;
….

"substantial" means more than minor or trivial;
…….

(5) A duty to make reasonable adjustments applies to an employer."
"136 Burden of proof

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

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

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

11.2 Unfair dismissal - Employment Rights Act 1996

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if ……

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) ….
(3) ….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Application of the facts and the law to determine the issues

12. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

13. There is a degree of overlap between the complaints presented by the claimant that the Tribunal has considered and each of those complaints was born in mind throughout our deliberations. That said, the Tribunal has reminded itself that its determination of the claimant's complaint that the respondent failed to comply with the duty to make adjustments will inform our decision in respect of the complaints of her dismissal having been **both** discriminatory and unfair.

14. In the following paragraphs, the Tribunal has addressed the several questions contained in the List of Issues, the numbering in parenthesis in the headings reflecting the paragraph numbering in that List.

Disability

A disabled person (3)

15. The Tribunal first reminded itself of the following three key sources of material to be brought into account in determining this question: first, Schedule 1 to the 2010 Act, Part 1 of which is headed "Determination of Disability"; secondly, the Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011); thirdly, the related provisions of the EHRC Code of Practice on Employment (2011) ("the Code"). It brought such matters into account in respect of this issue 3 and all other issues in this case in which it is of relevance.

16. The above Guidance and Appendix 1 of the Code both make provision as to the meaning of disability including the following: a "substantial adverse effect is something which is more than a minor or trivial effect"; a "long-term effect" of an impairment includes one "which has lasted at least 12 months"; "normal day-to-day activities" are things most people do on a fairly regular and frequent basis; if someone with an impairment is receiving medical or other treatment which alleviates or removes the effect, the impairment is to be treated as having a substantial adverse effect if, but for the treatment, it is likely to have that effect – as simply put in the Code, "the treatment is ignored".

17. The Tribunal addressed the several elements of section 6 of the 2010 Act with the above source material in mind. Having done so it is satisfied, on the evidence before it, including the GP records and the evidence of the parties relating to, for example, the claimant's request to be moved to the Warehouse in July 2021 and what occurred at the meetings on 27 and 28 September 2021 (more detail of all which is given below), that at the times material to this case the elements of the claimant having a mental impairment which had a substantial adverse effect on her ability to carry out normal day-to-day activities are met.

18. The question then becomes, however, whether the impairment had a long-term adverse effect. The Tribunal has found above that the first reference to the claimant facing issues with regard to her mental health was when, on 29 July 2021, she wrote to Mr Saveraux informing him that she was "massively struggling talking to people on the phones while my mental health seems to be deteriorating". This brief summary of the claimant's mental health at this time is borne out by several references in her GP notes. For example, on 25 August 2021, a diagnosis of "Depressive disorder", references to the claimant being stressed including at work and having had some suicidal thoughts and a note of prescribed medication (351); on 6 September 2021 again a diagnosis of "Depressive disorder"; on 14 September 2021 a note that the claimant was "still struggling" and of the prescribed medication (350). The GP records note an improvement, however, from 23 September 2021, "Feeling better and going back to work"; on 24 September 2021, "Requesting a letter to restart year at University"; on 6 October 2021, "Now back at work but still finds overwhelming at times and had to go home early" and a note of continued relevant medication (350); on 28 October 2021, continued relevant medication; on 4 November 2021, "has been feeling much better on mirtazapine …. advised to stop fluoxetine" (349). There is then a gap of more than a year until the next reference on 5 October 2022 to "problems at work stress++" and a diagnosis of "Work related stress" (349). This entry on 5 October 2022 ties in with the Tribunal's findings in relation to what occurred at work on 3 October 2022 when the claimant met Miss Maguire, Mrs Knox and GR.

19. As outlined above, considering the above entries in the GP records and the other evidence before the Tribunal it is satisfied that in the period 29 July 2021 to 14 September 2021 the claimant had a mental impairment which had a more than minor or trivial effect on her ability to carry out normal day-to-day activities. As to whether the adverse effect of the impairment on the claimant's ability to carry out normal day-to-day activities was long-term, the Tribunal notes that the situation then seems to have improved somewhat in September 2021, as evidenced by the references to her feeling better and restarting at University. The Tribunal reminded itself, however, that as is clear from the Code, the effect of paragraph 5(1) of the above Schedule 1 is that the effect of medical treatment on the impairment should be ignored. Put another way if an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect. In accordance with the guidance it draws from the decision in Goodwin v Patent Office [1999] ICR 302, EAT, the Tribunal considered what the effects of the claimant's impairment would have been but for the medication and the therapy/counselling that she was receiving: what is sometimes referred to as "the deduced effects".

Having done so, it considered whether the actual and deduced effects of the impairment on the claimant's ability to carry out normal day-to-day activities were substantial (more than minor or trivial) and long-term. With that guidance in mind, the Tribunal is satisfied that it is likely that that improvement from September 2021 was brought about by the combination of medication and therapy as referred to in the GP records and the Universal Credit Report referred to above in the latter of which it is noted that medication continued until February 2022 and the claimant undertook therapy/counselling until December 2022. That being so, the Tribunal is further satisfied that the impairment is to be treated as having a substantial effect and a long-term effect given that it lasted for at least 12 months.

20. Further, in accordance with section 6(4) of the 2010 Act, the provisions of that Act apply in relation to a person who was had a disability in the past in the same way as they apply in relation to a person who currently has a disability. This reflects the concession by the respondent that, based on the Universal Credit Medical Report Form, from the date of that report (24 April 2023) the claimant was a disabled person

21. Thus, considering that total period from 29 July 2021 until December 2022, the Tribunal is satisfied that each of the elements contained in section 6 of the 2010 Act are met and, as such, the claimant satisfied the definition of a disabled person; and, by virtue of section 6(4) of the 2010 Act she continued to satisfy that definition thereafter.

Knowledge of disability (4a)

22. It will be apparent from the above that in coming to its decision that the claimant was a disabled person the Tribunal had regard to the matters referred to in the claimant's GP records and the Universal Credit Medical Report, and it acknowledges that the respondent did not have direct knowledge of those matters at the relevant time. The respondent was, however, aware from at least 29 July 2021 that the claimant had mental health issues. Further, at the meeting with Mr Saveraux on 27 September 2021 she had been very upset and emotional and informed him that she had tried to take her own life, and at the meeting with both Mr Saveraux and Mr Ormston on 28 September 2021 she had told them that she had driven somewhere and sat and thought about taking her own life. Additionally, at that meeting on 28 September 2021, an adjustment to the claimant's working arrangements was made to the effect that, if she needed to, she could work from home.

23. The Tribunal is satisfied that, in light of these disclosures and events, the respondent knew or could reasonably have been expected to know that the claimant was a disabled person. If there had been any doubt about that, the respondent could have referred the claimant to its occupational health provider. It did not do so and it cannot hide behind that failure in support of a contention that it lacked knowledge of the claimant's disability. That is clear from paragraph 6.19 of the Code in which it is stated, "The employer must, however, do all they can reasonably be expected to do to find out whether" a worker has a disability and is, or is likely to be, placed at a substantial disadvantage.

Knowledge of substantial disadvantage (4b)

24. Especially given that "substantial" is said to mean something that is more than minor or trivial, the Tribunal is satisfied, on the same bases as set out above, that the respondent knew or could reasonably have been expected to know that the claimant's disability was liable to disadvantage her substantially in the workplace.

On what dates? (5)

25. The Tribunal has determined above that the respondent had such actual or constructive knowledge no later than 28 September 2021.

Direct disability discrimination

Robin Williams comment (6)

26. The Tribunal has recorded above its findings as to what it is satisfied that Mr Saveraux said regarding the actor, Robin Williams, and that it does not accept the claimant's evidence in this respect. As such, on the basis of those findings the Tribunal is not satisfied that, in relation to this issue, Mr Saveraux described the claimant as "being like Robin Williams always making people laugh and seemed happy yet he ended up taking his own life".

Less favourable treatment (7)

27. As the Tribunal is not satisfied that Mr Saveraux described the claimant in those terms it follows that is not satisfied that he subjected the claimant to less favourable treatment because of her disability by saying what the claimant alleges he said; for the obvious reason that the Tribunal does not accept that Mr Saveraux said that.

28. For completeness, however, the Tribunal has nevertheless addressed this question with reference to what it has found Mr Saveraux did say, namely words to the effect, "If you look at Robin Williams, he appeared to be a very jovial and very happy guy to the public, but he had mental health issues that weren't clear on the surface". On that basis, the Tribunal is satisfied that what Mr Saveraux said was not less favourable treatment because of disability.

Christmas party (20)

29. The decisions of the Tribunal regarding the complaint of harassment in relation to the Christmas party in March 2023 are recorded below. As to the complaint that the circumstances amounted to direct disability discrimination, the Tribunal is not satisfied that what occurred in relation to the claimant not being invited to the Christmas party amounted to less favourable treatment because of disability.

30. On the contrary, the Tribunal has found above that the reason why the claimant did not receive the emails informing staff in the Contact Centre about the party that was being arranged for them was that she was not a member of the Contact Centre team. Likewise, when Mr Saveraux contacted everyone in his team

regarding their availability to attend the party he did not contact the claimant as she was not a member of the team. Thus, neither the claimant not being sent the email invitation nor being contacted by Mr Saveraux had anything to do with disability.

31. It is right that the claimant was transferred back to the Contact Centre team on 1 March 2023 and that date preceded the date of the party by some three days but the Tribunal has accepted, as a fact, that no one in the Contract Centre team, particularly Mrs Ferris-Lawson and Mr Saveraux who took on the arrangements for the party, were made aware of what the Tribunal has described above as a "somewhat technical change".

Failure to make adjustments

32. The following propositions (in no particular order) can be said to emerge from relevant case law in the context of the above statutory framework and the Code to which the Tribunal has had regard:

    32.1 As set out above, section 20(3) of the 2010 Act provides that the duty to make adjustments arises where an employer's PCP "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled".

    32.2 It is for the disabled claimant to identify the provision, criterion or practice ("PCP") of the respondent on which she relies and to demonstrate the substantial disadvantage to which she was put by that PCP.

    32.3 It is also for the disabled claimant to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage;she need not necessarily in every case identify the step(s) in detail but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable. There must be before the tribunal facts from which, in the absence of any innocent explanation, it could be inferred that a particular adjustment could have been made: Project Management Institute v Latif [2007] IRLR 579.

    32.4 A Tribunal must first identify the PCP that the respondent is said to have applied: Environment Agency v Rowan [2008] IRLR 20.

    32.5 There must be a causal connection between the PCP and the substantial disadvantage contended for: as was said in the decision in Nottingham City Transport Ltd v Harvey UKEAT/0032/12, "It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(i) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP."

32.6 The test of reasonableness is an objective one: Saveraux v Churchills Stairlifts plc [2006] ICR 524, CA.

32.7 Making a reasonable adjustment may necessarily involve treating a disabled employee more favourably than the employer's non-disabled workforce.

32.8 "Steps" for the purposes of section 20 of the 2010 Act encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP: Griffiths.

32.9 It is important to identify precisely what constituted the "step" which could remove the substantial disadvantage complained of: General Dynamics Information Technology Ltd v Carranza [2015] ICR 169.

32.10 It can be a reasonable adjustment if there is a prospect that the adjustment would prevent the claimant from being at the relevant substantial disadvantage without there needing to be a good or real prospect: Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10. Thus, it is not for the claimant to prove that the suggested adjustment will remove the substantial disadvantage, it is sufficient if the adjustment might give the claimant a chance that the disadvantage would be removed and not that it would have been completely effective or that it would have removed the disadvantage in its entirety: see Griffiths and South Staffordshire and Shropshire Healthcare NH Foundation Trust v Billingsley UKEAT/0341/15 in which it is stated as follows:

> "Thus the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under Section 15(1) of the 2010 Act."

32.11 Notwithstanding the above, in Romec Ltd v Rudham [2007] UKEAT 0069/07/1307 it was held that the essential question for an employment tribunal is whether the adjustment would have removed the disadvantage experienced by the claimant. In that case, in remitting the issue to the same tribunal, the EAT directed that if the tribunal concluded that there was no prospect of the suggested adjustment succeeding, it would not be a reasonable adjustment: if, however, the tribunal found a real prospect of the adjustment succeeding it might be reasonable to expect the employer to take that course of action. Thus, an employer can lawfully avoid making a proposed adjustment if it would not be a reasonable step to take Royal Bank of Scotland v Ashton [2011] ICR 632. Similarly, the Code, at paragraph 6.28, provides that one of the factors that might be taken into account when deciding what is a reasonable step for an employer to take

is, "whether taking any particular steps would be effective in preventing the substantial disadvantage".

32.12 Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step: Latif.

32.13 The question of whether it was reasonable for the respondent to have to take the step depends on all relevant circumstances, which will include the following:

32.13.1 the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
32.13.2 the extent to which it is practicable to take the step;
32.13.3 the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;
32.13.4 the extent of the respondent's financial and other resources;
32.13.5 the availability to it of financial or other assistance with respect to taking the step;
32.13.6 the nature of its activities and the size of its undertaking.

32.14 If a Tribunal finds that there has been a breach of the duty, it should identify clearly the PCP, the disadvantage suffered as a consequence of the PCP and the step that the respondent should have taken.

33. In the context of the above general position, the Tribunal moves on to consider the claimant's complaint in this case. The adjustments that have been contended for by the claimant are set out in paragraphs 8 to 14 of the List of Issues, which the Tribunal addresses in turn below.

Failure to remove the claimant from secondment (8)

34. Findings of fact made by the Tribunal in this connection include the following:

34.1 Prior to the discussion the claimant had with Miss Maguire upon her return from holiday (which the Tribunal has taken as being on 29 September 2022) there was nothing to suggest that the claimant wanted to be removed from her secondment. Indeed, from the perspective of Miss Maguire and the other members of the Partner Services team, the contrary was the case.

34.2 The claimant's evidence was that the duty on the respondent to make any reasonable adjustment did not arise until Monday 3 October 2022 after she spoke to Miss Maguire and told her that she did not want to continue her secondment to Partner Services.

34.3 When the claimant informed Miss Maguire of this, Miss Maguire agreed that she could return to the Contact Centre and that she would speak to Mrs Knox that morning, which she did.

34.4 The claimant then met Mrs Knox that same day and at the end of their meeting the claimant agreed at least to have another discussion with Miss Maguire about continuing her secondment, which she did.

34.5 During that subsequent discussion with Miss Maguire the claimant told her that she would give it another go.

34.6 When GR telephoned the claimant that day, 3 October, she informed him that she was "happy to give it another go and will be on site tomorrow."

34.7 The claimant was then absent from work but at the expiry of her fit note the respondent's managers corresponded about whether the claimant had returned to work, where she should be placed when she did return and whether it might help her if she were to be told that she would not be expected to return to Partner Services.

34.8 The reality, however, was that the medical certificates provided to the claimant continued to state that she was simply "not fit for work" and never suggested that she could return to work in a different role or if adjustments were made.

35. Given these findings, the Tribunal is satisfied that it cannot be said that, in the terms of this issue 8, the respondent failed "to comply with a duty to make reasonable adjustments after 12th September 2022 by failing to remove the Claimant from a secondment that she started on 12th September 2022".

Failure to find a suitable alternative role (9)

36. As noted above, the claimant's evidence was that the duty on the respondent to make any adjustment in this regard arose on Monday 3 October 2022, that being the day on which she spoke to Miss Maguire and told her that she did not want to continue her secondment to Partner Services. She confirmed this in cross examination when she accepted that the failure to make a reasonable adjustment only related to after she spoke to Miss Maguire on 3 October 2022.

37. After that date, the claimant then did not attend work and was certified as being unfit for work on 5 October 2022. In those two days the respondent did not find her a suitable alternative role but that was understandable given that the claimant had said that she would give Partner Services another go. After that date of 5 October the claimant was never fit to return to work in any role.

38. Thus, while it might be strictly accurate that the respondent failed to find a suitable alternative role for the claimant, the Tribunal is satisfied that that was attributable to the above facts and is not something for which the respondent can be held to be accountable.

A requirement or expectation that the claimant work in Partner Services (10)

39. This issue records what the Tribunal has found to be is a fact: namely, that from 12 September 2022 there was a requirement or expectation that the claimant

should work in Partner Services on a secondment that she accepts she applied for and agreed to undertake.

Insufficient work (11)

40. For the reasons set out fully in its findings of fact above, the Tribunal is not satisfied that insufficient work was provided to the claimant. Those reasons include the following:

    40.1 The details of work or other activities undertaken by the claimant during a working day, which she personally input onto the respondent's system.

    40.2 The holiday notes prepared by a colleague in the Partner Services Department, which include several references to the claimant undertaking a variety of work and for a number of clients.

    40.3 Miss Maguire's oral evidence about the claimant being shocked at how busy work in Partner Services was and that she was struggling with the work situation, and her agreement with the claimant that she would pare back the work she was doing, which she did by agreeing with managers to limit the number of client accounts the claimant was working on and to reduce the number of different tasks she was allocated.

Invoicing work with limited training (12)

41. The Tribunal has considered this issue in the context of the strategy that it accepts Miss Maguire had in mind when she recruited a secondee to work in the Partner Services department. As she explained, he or she would start off working on Zendesk to help manage email queries from clients. The claimant had gained relevant experience in both the Contact Centre and the Warehouse and she appeared to find it relatively straightforward to pick up the new work in Partner Services without significant training. The strategy then was to train the claimant onto different tasks such as preparing activity reports for clients and transport invoices. Although there were sets of instructions available on the respondent's network to which employees could make reference, in practice the most practical and effective way of training someone had been found to be to pair them up with a more experienced member of staff to see how the job was done in practice and ask questions on a 1:1 basis. Examples of work undertaken by the claimant in this respect included entering data for clients in relation to weekly and monthly reports, which was then used for month-end invoicing. Thus it would be seen how the claimant dealt with specific tasks before moving to the next one when necessary training would be provided.

42. In this connection, the Tribunal has recorded above its findings regarding the claimant's own evidence that Miss Maguire had sat her with RN to train on invoicing clients, her email that "Marie was class at showing me stuff" and the holiday notes which record that the claimant had been shown how to complete transport invoices.

43. A further factor is that the claimant personally input onto the respondent's database the time that she spent undertaking training, which showed that she had undertaken a total of 17.25 hours' training from 13 to 29 September.

44. For the above reasons the Tribunal is satisfied that the claimant received the training that she required, and at the appropriate times, in order to do the invoicing and other work to which she was assigned. As such, in respect of this issue, it is not satisfied that the claimant was expected to do invoicing work with limited training.

Access to emails and relevant software (13)

45. There are two aspects to this issue: namely, the expectations that the claimant would, first, start work without access to emails and, secondly, carry out invoicing work when access to the relevant software had not been provided.

46. These matters have been fully addressed in the Tribunal's findings of fact above.

47. As to the first aspect, the Tribunal has recorded above its findings that it is satisfied that the claimant had been provided with the necessary access to perform her first and priority task of working on Zendesk and that prior to the claimant's arrival in her department Miss Maguire wrote to the respondent's IT services requesting that a login be set up for the claimant to WCMS. The Tribunal is satisfied that these steps enabled the claimant to start work and, as recorded above, she was then given such additional access as she required as she developed in her role. The Tribunal considers there to be no logic to the claimant's suggestion that Miss Maguire, having identified the need to recruit a secondee, did not ensure that the claimant could access the emails she needed in order to start work.

48. The Tribunal's findings regarding the second aspect of this issue 13 are fully set out above (particularly at paragraph 7.30) together with the Tribunal's conclusion that, in its experience, the respondent made timely and helpful responses both to the requests of the claimant and her needs in relation to the work she was expected to undertake.

49. For the above reasons, the Tribunal is not satisfied that there were these expectations of the claimant as set out in this issue.

WhatsApp group (14)

50. There is no dispute that a Whatsapp group had been set up to facilitate communications between members of the Partner Services department, albeit being rarely used, or that the claimant was not a member of that group.

Provisions, criteria or practices putting the claimant at a substantial disadvantage (15)

51. In this connection, the Tribunal first considered what is meant by the term, a PCP. While that term is not defined in the 2010 Act, the Code states at paragraph 4.5 that it "should be construed widely so as to include, for example,

any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions".

52. The reference in this issue to "these circumstances" is somewhat vague but it has been taken to mean each of the circumstances referred to in paragraphs 8 to 14 inclusive of the List of Issues. Be that as it may, for the reasons referred to above the Tribunal is satisfied that of the several PCPs contended for by the claimant in those six paragraphs, only the establishment of the Whatsapp group within the Partner Services department amounted to at least an arrangement and, therefore, that it comes within the term PCP.

53. The next question, therefore, becomes whether that PCP put a disabled person at a substantial disadvantage in comparison with persons who are not disabled as only then will the duty to make adjustments arise. As set out above, section 212(1) of the 2010 Act provides that "substantial" means more than minor or trivial.

54. In respect of that PCP, the Tribunal brings into account the evidence of Miss Maguire that the Whatsapp group was rarely used but, with hindsight, the claimant should have been a member of it. The Tribunal also brings into account the evidence of the claimant in respect of the impact upon her of not being a member of that group chat as recorded in its findings of fact. In light of that evidence, in accordance with the decision in Environment Agency v Rowan [2008] ICR 218, EAT, the Tribunal then considered the nature and extent of any disadvantage in this case in order to ascertain, first, whether the duty to make adjustments arose and, secondly, if so, what adjustments would have been reasonable. In this connection, the Tribunal had in mind the guidance it draws from the decision in Chief Constable of West Midlands Police v Gardner EAT 0174/11 to the effect that a tribunal should consider what it is about a claimant's disability that gave rise to the problems that put him or her at the identified substantial disadvantage.

55. A further consideration is that the duty to make adjustments arises where a disabled person is placed at a substantial disadvantage "in comparison with persons who are not disabled" and, therefore, a tribunal must undertake a comparative exercise. The Tribunal is satisfied that in this case the comparator group consisted of the other members of the Partner Services department, there being no suggestion that any of them had the particular disability of the claimant.

56. Drawing together the above considerations and bearing in mind the claimant's mental health (including her being already paranoid and overthinking things), the Tribunal is satisfied that the establishment of the Whatsapp group, the PCP, did put a disabled person at a substantial disadvantage in comparison with others by virtue of being excluded from that group and consequently being unaware of the communications (albeit limited) between other team members; and that disadvantage was significant as due to the total exclusion from that group chat.

57. For these reasons, the Tribunal is satisfied that, in the terms used in this paragraph 15 of the List of Issues, this PCP regarding communication within a Whatsapp group (but only this PCP) put the claimant at a substantial

disadvantage in comparison with persons without a disability because she found not being a member of that group very difficult to cope with due to her existing mental health.

58. This being so, the Tribunal moved on to consider the question of knowledge as provided for in paragraph 20(1) of Schedule 8 to the 2010 Act. So far as is relevant to this case, that paragraph provides as follows:

> "20 Lack of knowledge of disability, etc.
>
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know —
>
> (a) ….
>
> (b) 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."

59. It is apparent that paragraph 20(1)(b) above refers to, first, knowledge of an interested person's disability and, secondly, knowledge that such person is likely to be placed at the disadvantage. That is made clear in the decision in Wilcox v Birmingham CAB Services Ltd EAT 0293/10 in which it was stated that an employer is not under a duty to make reasonable adjustments "unless he knows (actually or constructively) *both* (1) that the employee is disabled *and* (2) that he or she is disadvantaged by the disability in the way set out at in" section 20(2) of the 2010 Act.

60. The Tribunal has already addressed, in relation to issue 4(a) above, the first aspect of knowledge of disability and has decided that it is satisfied that the respondent knew or could reasonably have been expected to know that the claimant was a disabled person.

61. It therefore turns to consider the second aspect of whether the respondent had actual or constructive knowledge that the claimant was likely to be placed at the disadvantage by the PCP. It is repeated that the Tribunal accepts the evidence of the claimant about being paranoid and overthinking things but she has not provided any evidence that she made the respondent aware of this or anything similar and neither is there any evidence before the Tribunal that the respondent had knowledge of such matters.

62. In these circumstances, while the Tribunal has found the majority of factors in relation to this issue in favour of the claimant, her contentions fall down on the final element of whether the respondent had actual or constructive knowledge that she was disadvantaged by the disability by the PCP. As such, the Tribunal is not satisfied that this issue is made out.

Removal from secondment and finding a suitable alternative role (16)

63. As the Tribunal has not found in favour of the claimant in respect of any of her complaints regarding a failure to make reasonable adjustments it follows that the question in this paragraph 16 of the List of Issues becomes academic and need not be addressed.

64. For completeness, however, the Tribunal refers to its decision in relation to issue 8 above in respect of which similar considerations arise and repeats that there was an extremely short period of two days from 3 October (when the claimant contended that the duty to make adjustments arose following her conversation with Miss Maguire that day) until 5 October 2022 when she was certified as being unfit for work with no indication thereafter that she would be able to return in any capacity; the claimant did not attend work during that period of two days; she had stated more than once on 3 October that she was prepared to give her secondment to Partner Services another go.

65. Thus, while it might be strictly accurate to say in the terms of this issue 16 that it would have removed any disadvantage to remove the claimant from her secondment and find her a suitable alternative role, the Tribunal is satisfied that in the circumstances, it would not have been reasonable to expect the respondent to have done that.

Harassment

Christmas party (17-19)

66. There is no dispute between the parties regarding issue 17. The claimant was not invited to the Christmas party held in March 2023.

67. Turning to issue 18, the reason for that was that as the claimant was not a member of the Contact Centre team she did not receive the emails from Mrs Ferris-Lawson informing staff in that team about the party and neither did Mr Saveraux contact her regarding her availability to attend the party. To adopt a phrase from Mr Mensah, this is “an entirely innocent explanation”.

68. Further, as recorded above, although the claimant was transferred back to the Contact Centre team on 1 March 2023, which date preceded the date of the party by some three days, no one in the Contract Centre team, particularly Mrs Ferris-Lawson or Mr Saveraux, were made aware of what (given that the claimant was not actually at work the time) the Tribunal has described above as a “somewhat technical change”.

69. Issue 19 reflects section 26(1)(b) of the 2010 Act but that statutory provision only comes into play if 26(1)(a) of that Act is also satisfied; namely that there has been unwanted conduct related to disability. For the reasons set out above, the Tribunal is not satisfied that in this case any conduct of which the claimant complains was related to disability.

70. Once more completeness, however, the Tribunal has nevertheless, considered this issue 19. Drawing upon the findings of fact and the reasons both of which are set out above, the Tribunal is not satisfied that the conduct complained had the purpose proscribed by section 26(1)(b) of the 2010 Act or, given the considerations set out in section 26(4) of the 2010 Act, that such conduct had that effect.

Unfair dismissal

Repudiatory breach of implied term of trust and confidence (21)

71. The Tribunal first notes that in the comprehensive list of complaints that it was agreed at the Preliminary Hearing on 16 October 2023 the claimant was making (102/3), this general issue 21 of whether there was a breach of contract by the respondent is not expressed as a separate complaint. Rather, that list of complaints is limited to the three particular alleged breaches of contract that are referred to in issue 22, which the Tribunal therefore turns to address.

Robin Williams comment (22a)

72. The Tribunal has already addressed this alleged comment in relation to issues 6 and 7 above. Quite simply, it is satisfied that what Mr Saveraux said was reasonable and acceptable in the circumstances and (while taking care not to conflate the two separate issues) in the same way as it was not discriminatory, it did not and could not amount to something constituting a fundamental or repudiatory breach of contract on the part of the respondent in the required sense of conduct "calculated or likely to seriously damage the relationship of confidence and trust between employer and employee": see Woods v WM Car Services (Peterborough) Limited [1981] IR LR 347, EAT.

Not letting the claimant end her secondment (22b)

73. The Tribunal has also already addressed this allegation, particularly in relation to issue 8 above. Put more briefly, for the reasons set out there, the Tribunal is not satisfied that it is accurate to say that the respondent did not let the claimant end her secondment. This is particularly so given that on 3 October 2022, the claimant twice said that she was prepared to give her secondment to Partner Services another go and, although the managers looked into where the claimant could be placed on her return to work from sickness, she never did return and, therefore, the opportunity to let her end her secondment never arose.

74. Once again, therefore, it cannot be said that the conduct of the respondent in this connection could amount to a fundamental breach of the contract of employment.

Not inviting the claimant to the Christmas party (22c)

75. Once more, this allegation has already been addressed. In summary, it is right that the claimant was not invited to the party but the reasons for that as found by this Tribunal are such that they could never be said to amount to a fundamental breach of the contract employment.

The claimant's grievance

76. In both the record of the Preliminary Hearing held on 16 October 2023 and in the List of Issues, the three breaches of contract relied upon by the claimant are limited to the above three allegations. In evidence, however, the claimant also referred to the respondent's failure to respond to or even acknowledge the grievance, which she submitted on 21 February 2023. Although that is not contained in the list of complaints recorded as having been agreed at that Preliminary Hearing or in the List of Issues, given the importance that the claimant appeared to attach to it, the Tribunal addresses it for completeness.

77. The Tribunal is satisfied that the claimant's grievance was not responded to simply because the respondent was genuinely unaware that it had been received. That cannot give rise to a fundamental breach of contract. Further (although after the termination of the contract and, therefore, not strictly relevant) when it became known to the respondent that her grievance had been received Mr Ormston offered to allow the claimant to pursue it but that offer was declined.

Breach of the implied term (23)

78. At risk of repetition, the Tribunal is not satisfied that by doing any of the above three or even four things, the respondent breached the implied term of trust and confidence in the sense described in Woods.

Resignation in response to any breach (24)

79. As the Tribunal has found that there was no breach of contract by the respondent it is neither necessary nor proportionate for the Tribunal to address this issue.

Waiver of breach and affirmation of contract (25)

80. The above paragraph applies equally.

Discriminatory dismissal (26)

81. In this issue, the question of whether the respondent discriminated against the claimant is predicated on the reason for that discrimination allegedly being "by constructively dismissing her". The Tribunal has found above that the claimant was not constructively dismissed and, therefore, it follows that the respondent cannot be said to have discriminated against her by doing so.

Jurisdiction (1 and 2)

82. As the Tribunal has not found in favour of the claimant in respect of any of the matters contained in the List of Issues, it is unnecessary and would be disproportionate to consider whether the claimant's claims have been brought out time by reference to the relevant provisions of either the 2010 Act or the 1996 Act.

Conclusion

83. In conclusion, the unanimous judgment of the Tribunal is as follows.

83.1 The claimant's complaint that the respondent directly discriminated against her contrary to section 39(2)(d) of the Equality Act 2010 by treating her less favourably than others because of disability, with reference to section 13 of that Act, is not well-founded and is dismissed.

83.2 The claimant's complaint that, contrary to section 21 of the 2010 Act, the respondent failed to comply with its duty under section 20 of that Act to make adjustments is not well-founded and is dismissed.

83.3 The claimant's complaint that the respondent subjected her to harassment related to disability contrary to section 40 of the 2010 Act, with reference to section 26 of that Act, is not well-founded and is dismissed.

83.4 The claimant's complaints that her dismissal by the respondent was discriminatory contrary to section 39(2)(c) of the 2010 Act and unfair, being contrary to section 94 of the 1996 Act with reference to Section 98 of that Act, are not well-founded and are dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 5 April 2024

APPENDIX

List of Issues

s.123 Equality Act 2010

Jurisdiction

1. Have any of the claims being pursued by the Claimant under the Equality Act 2010 been brought outside of the relevant statutory time limits?

2. If so, does the tribunal have jurisdiction to hear them?

s.6 Equality Act 2010

Disability

3. Did the Claimant satisfy s.6 by reason of Anxiety and Depression between September 2021 and March 2023?

4. If so, did the Respondent know, or could it reasonably have been expected to know, that:

    a. the Claimant was disabled; and
    b. the Claimant's disability was liable to disadvantage her substantially in the workplace?

5. If so, on what date(s) did the Respondent have such actual or constructive knowledge?

s.13 Equality Act 2010 Direct disability discrimination

Complaint 1: Comment in September 2021

6. On 27th September 2021 did Mr Saveraux describe the Claimant as *"being like Robin Williams always making people laugh and seemed happy yet he ended up taking his own life.'*

7. If so, was this less favourable treatment because of her disability?

s.20 Equality Act 2010 Reasonable adjustments

Complaint 2: Failure to make reasonable adjustments

8. Did the Respondent fail to comply with a duty to make reasonable adjustments after 12th September 2022 by failing to remove the Claimant from a secondment that she started on 12th September 2022?

9. Did the Respondent fail to find a suitable alternative role for her (whether her substantive post or some other position)?

10. From 12th September 2022, was there a requirement or expectation that the Claimant work in Partner Services (on a secondment that she accepts she applied for and agreed to undertake)?

11. Was insufficient work provided to the Claimant?

12. Was she expected to do invoicing work with limited training?

13. Was there an expectation that she would start work without access to emails and carry out invoicing work when access to the relevant software had not been provided?

14. Was the team communicated with in a WhatsApp group that the Claimant was not a member of?

15. Were these circumstances provisions, criteria or practices of the Respondent that put the Claimant at a substantial disadvantage in comparison with persons without a disability because she found them difficult to cope with due to her existing mental health condition and the circumstances caused the Claimant to feel uneasy, anxious, upset and led to difficulty sleeping, tiredness and a deterioration in her mental health?

16. Would it have been reasonable and removed any disadvantage to:
Remove the Claimant from her secondment and find her a suitable alternative role for her? (from the first week of the secondment)

s.26 Equality Act 2010 Harassment

Complaint 3: Christmas party

17. Was the Claimant invited to a Christmas party which was being organised to take place in March 2023?
18. If not, why not?

19. Did this constitute unwanted conduct related to her disability that had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

s.13 Equality Act

Complaint 3: Christmas party

20. Was this less favourable treatment because of her disability?

s.94 Employment Rights Act 1996

Complaint 4: Constructive dismissal

The Claimant resigned on 4th May 2023.

21. Was there a breach of contract by the employer (either an actual breach or an anticipatory breach?)

22. Was there a fundamental breach in the contract entitling her to resign? Namely,

    a. Mr. Saveraux's alleged comment about Robin Williams;
    b. not letting her end her secondment; and
    c. not inviting her to the Christmas party.

23. Did the Respondent breach the implied term of trust and confidence by doing these things?

24. Did the employee leave in response to the breach and not for some other unconnected reason?

25. Did the employee affirm the contract by delaying too long before resigning?

26. Did the Respondent discriminate against the Claimant by constructively dismissing her?

Martin Mensah
Counsel for the Respondent
13th February 2024