THE INDUSTRIAL TRIBUNALS

CASE REF: 12499/18

CLAIMANT: **Ms J**

RESPONDENTS: **1. NGO**
2. Ms P
3. Ms R

JUDGMENT

The claimant's claims for disability discrimination and unfair dismissal are hereby dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Mrs Ó Murray**

Members: **Ms F Cummins**
Ms N Wright

APPEARANCES:

The claimant represented herself.

The respondent was represented by Ms R Best, Barrister-at-Law, instructed by Ms El-Dardiry solicitor of Bates Wells Braithwaite solicitors.

THE CLAIM

1. The claimant claimed unfair dismissal in the form of constructive dismissal. The claimant also claimed under the Disability Discrimination Act 1995 (as amended) (DDA) in the form of direct discrimination and harassment and that her dismissal was an act of discrimination under DDA.

THE ISSUES

2. The following document was agreed by the parties to comprise the legal issues and the main factual issues. In particular seven allegations of detrimental treatment are set out at paragraph 10 of that issues document. The title given to each of the allegations of detriment in this judgement is referred to in square brackets at paragraph 10 within this paragraph in bold below. The issues document stated as follows:

"Constructive Unfair Dismissal

1. *Did the First Respondent breach the implied term of mutual trust and confidence in the Claimant's contract of employment?*

2. *If so, was the breach sufficiently serious so as to constitute a repudiatory breach?*

3. *If so, did the Claimant waive the alleged repudiatory breach?*

4. *If not, did the Claimant resign in response to the breach or for some other reason?*

5. *If the Claimant was entitled to terminate the contract without notice by reason of the First Respondent's conduct, was the dismissal fair having regard to Article 130(4) of the Employment Rights (Northern Ireland) Order 1996?*

6. *If the dismissal was unfair and the Claimant is entitled to any compensation should such compensation be reduced to reflect contributory conduct and/or Polkey?*

Direct Discrimination on the grounds of disability

7. *Has each of the complaints of direct disability discrimination been submitted within the statutory time period of three months?*

8. *If not, has the last complaint of direct disability discrimination been brought in time and do some or all of the other complaints amount to conduct extending over a period?*

9. *If not have any of the complaints of direct disability discrimination that have been brought out of time been presented within such further period as the tribunal thinks just and equitable?*

10. *Did the following acts or omissions occur:*

10.1 *in August 2017, was the Claimant ordered to work from home by the Second Respondent* ***[Working from home issue];***

10.2 *on Tuesday 8 August 2017, was the Claimant not allowed to turn on her computer, was she shouted at across the office by Ms Q and/or were her personal circumstances shared in the office* ***[Office interaction issue]****;*

10.3 *on Monday 21 August 2017, did the Second Respondent tell the Claimant that she was going to contact social services in relation to her daughter because of her hospitalisation in April 2017* ***[Gateway Referral issue];***

10.4 on 25 September 2017, was there a breach of the Claimant's confidentiality in an email from the Second Respondent ***[Betrayal of Confidence issue];***

10.5 did the Respondents fail to communicate with the Claimant appropriately during her sickness absence ***[Contact issue]****; and*

*10.6 were the contents of the referral to OH dated 20 April 2018 inappropriate or inaccurate? [****OH Document issue];***

11. Were the Respondents concerned between April and August about the Claimant's behaviour, absences and lateness, and if so, did the Respondents fail to raise those concerns with the Claimant and support her? ***[Concerning behaviour issue].***

12. If so (in respect of the acts of omissions set out in paragraphs 10 and 11 above), did any of them constitute less favourable treatment?

13. If so, was the Claimant afforded this treatment because she is disabled?

<u>Harassment on the grounds of disability</u>

14. Has each of the complaints of harassment been submitted within the statutory time period of three months?

15. If not, has the last complaint of harassment been brought in time and do some or all of the other complaints amount to conduct extending over a period?

16. If not have any of the complaints of harassment that have been brought out of time been presented within such further period as the tribunal thinks just and equitable?

17. Whether the acts set out in 10.1 and 10.6 constitute acts of harassment?

18. If any of the above acts/omissions did occur, do they amount to unwanted conduct?

19. If so did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

20. If so, was this conduct because of the Claimant's disability?"

3. It was clear from the evidence and from the claim form that part of the claimant's claim was that there was a course of adverse treatment leading to a last straw event which precipitated her resignation. The claimant claimed both unfair dismissal simpliciter in that regard and that the dismissal was by reason of her disability. This was the agreed position.

SOURCES OF EVIDENCE

4. The tribunal had written statements and oral evidence from the following witnesses:

   (a) **For the Claimant:**

      (i) The claimant

      (ii) Ms K

      (iii) The claimant's sister Mrs L

   (b) **For the respondent:**

      (i) Ms M. She was a colleague of the claimant's and gave evidence about some of the claimant's concerning behaviours and the '*office interaction*' issue.

      (ii) Mr N a qualified social worker who gave evidence about the safeguarding issues and the D system which is the respondent's internal on-line system for recording safeguarding concerns.

      (iii) Ms P who was a manager two steps above the claimant in the management structure and who was also the line manager of Ms Q.

      (iv) Ms Q the claimant's friend and line manager at the relevant time.

      (v) Ms R the HR Manager who dealt with the claimant at various key points.

CASE MANAGEMENT

5. A Restricting Reporting Order (RRO) was made with the agreement of both sides to restrict reporting of the identity of any of the parties or witnesses or anyone involved in the case that might lead to the disclosure of the identity of those persons. As the 2020 Rules came into operation in January 2020 a fresh RRO was made under those Rules in the same terms on 28 July 2021 and its duration is extended as set out in the Order accompanying this judgement.

6. It was agreed at the outset of the hearing that when the claimant was being cross-examined on sensitive matters to do with her medical history everyone would leave the room voluntarily for that evidence to be given in the presence of the panel and representatives alone. The Employment Judge made clear to the parties at the outset of the hearing that at any point in the hearing they could make an application for a private hearing. In the event no member of the public or press attended on any of the days of hearing and the hearing therefore proceeded throughout as a public hearing.

7. At the end of the Submissions Hearing Ms Best applied under Rule 44 for an Anonymity Order to anonymise all the parties, witnesses and those involved in the events which were the subject of this case. The claimant agreed to that Anonymity Order and the Order was duly made on that day and written confirmation

of the Order (whose duration was also extended) was provided to the parties along with this judgement. This judgement was issued to the parties on 10 February 2022. Publication of the judgement was deferred by Order of the tribunal (to 3 March 2022 which date was extended to 19 March 2022) so that publication would not take place before 19 March 2022 in order to allow the parties time to make any application for redaction or further amendment to address any risk of identifying the parties or any of the witnesses. The claimant made application by emails dated 8 March 2022 and 14 March 2022 for removal of some of the detail from paragraph 42 of the judgement. In accordance with Rule 44 and in particular Rules 44(1)(a) and (b), 44(2), 44(3)(b) and (c), and by agreement of the parties, paragraph 42 was amended to read as now set out in this judgement.

8. At the outset of the second day of hearing the claimant's sister could not attend due to an emergency the previous evening involving her child. The claimant was given the option of adjourning the case that morning to enable someone else to attend with her but she was clear that she did not want to adjourn as she wanted to proceed.

9. The claimant had a friend or her sister in attendance on each day of the hearing to assist her in taking notes, in referring to documents and for moral support. The claimant in particular was given regular breaks as and when required especially when she became upset. The claimant was clear at various points when she became upset that she preferred to proceed rather than avail of the option of a break as she wanted to get through the hearing as she found it very stressful. In this respect the Employment Judge was guided by the claimant as to whether she wanted to have a break or to continue at various points throughout the hearing.

10. On 11 October 2019 (the fifth day of hearing) the claimant became unwell and the hearing had to be abandoned as the claimant was unfit to proceed. The hearing was listed on two subsequent occasions but could not proceed as it had to be adjourned for Covid-related reasons. There was then a delay before the hearing could resume due primarily to Covid-related shutdowns in the tribunal but also due to the illness of the Employment Judge and due to difficulties in arriving at dates to suit all the parties, witnesses and tribunal panel. The parties were given the option at a CMPH on 24 August 2020 of starting afresh before a new panel (as the Employment Judge was at that point off ill) but declined that option preferring instead to continue with the tribunal panel that had part-heard the case.

11. The reconvened hearing was listed for 13 to 15 September 2021. In advance of that hearing the claimant was offered, and availed of, a familiarisation session with the technology in Killymeal House shortly before the hearing dates, in case a Covid issue might arise in the hearing leading to a witness giving evidence remotely. In the event the hearing proceeded as an entirely in-person hearing.

12. The evidence concluded in the three days allotted to the reconvened hearing from 13 to 15 September 2021. There was time to have oral submissions immediately after the evidence, however the claimant was offered, then requested and was granted time to compose written submissions. Both sides were therefore directed to share their written submissions one week after the hearing which allowed a further week before the reconvened hearing on 30 September 2021 when the oral submissions were to be heard. The claimant stated at that point that this would be sufficient time for her to prepare her submissions and to consider the respondents'

submissions. Both sides were also alerted by the Employment Judge (when she listed the Submissions Hearing) to the Orders available under Rule 44 ie the Privacy Orders. The parties were invited to consider submissions as regards anonymity in particular. It was made clear to the claimant at that point that she was entitled to object to the anonymisation of any of the witnesses or of the NGO.

13. At the outset of the Submissions Hearing on 30 September 2021 the claimant explained that she had felt unwell in the days before the hearing and had therefore found it difficult to deal with the submissions. The claimant was therefore given the option at that point of adjourning the case if she was medically unfit to enable her to prepare further for the oral Submissions Hearing. The claimant however stated that she did not wish to adjourn the case as she wanted to get the hearing over with. The claimant was advised that if she did not feel well enough to deal with the hearing she could ask for an adjournment but she chose not to do so. The submissions hearing therefore proceeded with appropriate breaks and finished by lunchtime that day.

THE LAW

Direct discrimination

14. Under the DDA direct discrimination on grounds of disability is defined at s3A(5) which provides as follows:

> *"3A(5)- A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability is relevant circumstances, including his abilities, by the same as, or not materially different from, those of the person"*

15. Section 4(2) of DDA provides where relevant:

> *"4. **Discrimination against applicants and employees***
>
> *(2) It is unlawful for an employer to discriminate against a disabled person whom he employs–*
>
> *…*
>
> *(d) by dismissing him, or subjecting him to any other detriment".*

16. It is for the claimant to prove that she suffered detriment and less favourable treatment. The claimant must prove facts from which a tribunal could conclude that an act of direct discrimination on grounds of disability occurred. If she does so, the burden of proof shifts to the respondent to provide an explanation that is untainted by such discrimination. In this case both DDA detriment and DDA dismissal were alleged.

Harassment.

17. Harassment is defined at section 3B of the DDA as follows:-

"3B. – (1)… a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of –

(a) violating the disabled person's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it could reasonably be considered as having that effect."

18. The test for harassment has therefore both a subjective element and an objective element. In determining whether conduct has the effect of violating the claimant's dignity or creating the relevant environment the tribunal must take into account the claimant's perception, the circumstances and whether the impugned conduct could reasonably be considered as having that effect.

19. The burden is on the claimant to prove facts from which the tribunal could conclude that she suffered such unwanted conduct related to her disability, which could reasonably be considered as having the required purpose or effect. If the claimant proves such facts the burden shifts to the respondent to prove that the treatment was not related to disability or that it should not reasonably be considered as having the alleged purpose or effect.

20. In this case the allegations of detriment for the direct discrimination claim under DDA, were also relied upon by the claimant for her claim of harassment under DDA. In this case whether certain acts could reasonably be considered to amount to harassment within the meaning of s3B was at the heart of the claim of harassment.

Detriment and less favourable treatment

21. Detriment is determined using the ***Shamoon*** test which is whether a reasonable worker would or might take the view in all the circumstances that the treatment was to the claimant's detriment in the sense of being disadvantaged. It is not necessary to demonstrate some physical or economic consequence. An unjustified sense of grievance cannot amount to detriment. The tribunal assesses this objectively from the claimant's point of view by assessing whether the claimant's opinion that she had suffered a detriment was a reasonable one to hold. (***Shamoon v Chief Constable RUC [2003] IRLR 285 (HL***)).

22. Any detriment must be due to an act or deliberate failure to act on the part of a respondent and the facts must be such that the tribunal could conclude that the detriment suffered was on grounds of the claimant's disability.

23. Whether any detrimental act or deliberate omission was on grounds of disability is an issue of causation. In this case the Tribunal must examine the reason why any adverse treatment occurred (ie the factual basis on which it was done) by assessing all the circumstances and any inferences it is appropriate to draw from the facts.

24. It is for the claimant to prove less favourable treatment compared to a comparator whether real or hypothetical. In this case a hypothetical comparator was relied upon. As set out in the ***Shamoon*** decision, the relevant circumstances of the comparator must be the same or not materially different to the claimant's except that the comparator does not have the claimant's disability. It is therefore for the claimant in this case to prove a difference in treatment between herself and her comparator; a difference in status ie that the comparator does not have her disability; and "something more" before the burden shifts to the respondent to prove that in no sense whatsoever were the acts on grounds of the disability. This is the import of the authorities in relation to the burden of proof in discrimination cases.

25. In the case of ***McCrory v McKeith [2016] NICA*** the Court of Appeal stated as follows as regards applying the burden of proof provision:

> *"This provision and its English analogue have been considered in a number of authorities. The difficulties which tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in* ***Igen v Wong [2005] 3 ALL ER 812*** *considered the equivalent English provision and pointed to the need for a tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in* ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333.*** *It stated that in considering what inferences and conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In* ***McDonagh v Royal Hotel Dungannon [2007] NICA 3*** *the Court of Appeal."*

26. As stated by the English Court of Appeal in the case of ***Madarassy v Nomura International PLC [2007] IRLR 246***:

> *"The Court in* ***Igen v Wong*** *expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".* (Paragraphs 56 and 57).

27. The ***Madarassy*** approach was endorsed by the Court of Appeal in ***Newry and Mourne District Council [2009] NICA 24*** and in ***Curley v Chief Constable PSNI [2009] NICA 8.***

28. The EAT guidance in the case of ***London Borough of Islington v Ladele*** was upheld by the English Court of Appeal ([2010 IRLR 211]) and in the following extract Lord Justice Mummery cites the House of Lords case of ***Nagarajan*** on the "*reason why*" test. The following extract was cited by Ms Best in her submissions as it comprises a summary of the position as regards direct discrimination:

> *"The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:*
>
> *(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in* ***Nagarajan v London Regional Transport [1999] IRLR 572, 575****— "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.*
>
> *(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in* ***Nagarajan*** *(p 576) as explained by Peter Gibson LJ in* ***Igen v Wong [2005] EWCA Civ 142, [2005] ICR 931, [2005] IRLR 258 paragraph 37****.*
>
> *(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in* ***Igen v Wong****.*
>
> *(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So, the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. …*
>
> *(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the* ***Igen*** *test: see the decision of*

the Court of Appeal in ***Brown v Croydon LBC [2007] EWCA Civ 32, [2007] IRLR 259 paragraphs 28–39****. …*

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in ***Anya v University of Oxford [2001] EWCA Civ 405, [2001] IRLR 377 esp. paragraph 10****.*

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in ***Watt (formerly Carter) v Ahsan [2008] IRLR 243, [2008] 1 All ER 869 … paragraphs 36–37) …"*** **([2009] ICR 387 EAT at paragraph 40)."**

Dismissal

29. The right not to be unfairly dismissed is set out at Article 126 of the Employment Rights (Northern Ireland) Order 1996 (as amended) (ERO). At Article 127(1)(c) is outlined the provision relating to constructive dismissal.

30. At Article 130 of ERO are outlined the potentially fair reasons for dismissal. It is for the employer to show the reason for dismissal and that it is one of the potentially fair reasons listed in ERO. If the employer discharges that burden there is then a neutral burden as to whether or not the dismissal was fair or unfair in all the circumstances. This is known as a claim of unfair dismissal simpliciter.

31. In a constructive dismissal case the initial burden is on the employee to show that she resigned in response to a repudiatory breach of contract and that her resignation therefore amounted to dismissal. The tribunal then goes on to assess whether the employee resigned because of the conduct and did not delay too long before resigning.

32. The case of ***Western Excavating v Sharp Limited [1978] IRLR 27*** outlines the elements of constructive dismissal which the claimant must prove. They may be summarised as follows: -

(i) There must be a breach of contract by the employer;

(ii) The breach must be sufficiently serious to justify the employee resigning;

(iii) The claimant must leave in response to the breach and not for some other unconnected reason; and

(iv) The employee must not delay too long in terminating the contract in response to the employer's breach as otherwise she may be deemed to have waived the breach of contract.

33. As regards any delay point there is no fixed time within which an employee must make up her mind to resign in response to a breach of contract; the surrounding circumstances are key.

34. Under the "last straw" principle, an employee can be justified in resigning following a relatively minor event if it is the last in a series of acts one or more of which amounted to a breach of contract, and cumulatively the acts amounted to a sufficiently serious breach of contract to warrant resignation thus amounting to dismissal. The last straw does not have to amount to a breach of contract itself but it must contribute something to the events which cumulatively are alleged to amount to a breach of contract. ***(Omilaju v Waltham Forest LBC [2005] IRLR 35 (CA)).***

35. In the case of ***Malik v BCCI [1997] UKHL 23 (HL),*** the House of Lords confirmed that there is an implied term in the employment contract that the employer will not conduct itself in a manner calculated or likely to damage the relationship of trust and confidence between the employer and the employee. If the employer breaches that term, it can amount to repudiation of the contract. This is the contractual term relied upon in this case

36. In this case the claimant claimed unfair dismissal simpliciter and also claimed that her dismissal was an act of discrimination under DDA. In a claim of constructive dismissal in relation to disability the focus of the tribunal is on the reason or principal reason for the dismissal. The tribunal must analyse the respondent's reasons for any detrimental conduct by looking at the respondent's mental processes to establish the factual reason why the respondent behaved in the way that gave rise to any alleged fundamental breach of contract.

37. The claimant's perception is irrelevant to the exercise of establishing the '*reason why'* any impugned conduct occurred but it is relevant to the issue of why she left, ie the acceptance of any repudiatory breach by the respondent NGO.

38. Ms Best referred to the following authorities in relation to the DDA claims:

    (a) ***Igen v Wong [2005] IRLR 258 CA.***

    (b) ***McDonagh and Others v Hamilton Thom Trading As The Royal Hotel, Dungannon (2007) NICA.***

    (c) ***Madarassy v Nomura International Plc (2007) IRLR 246.***

    (d) ***Laing v Manchester City Council (2006) IRLR 748. (CA)***

    (e) ***Mohmed v West Coast trains Ltd (2006) UK EAT 0682053008.***

    (f) ***London Borough of Islington v Ladele CA: [2010] IRLR 211(CA).***

    (g) ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 (HL).***

    (h) ***Reed and Bull Information Systems v Stedman [1999] IRLR 299 EAT.***

    (i) ***Richmond Pharmacology* v *Dhaliwal [2009] IRLR 336 EAT*.**

(j) ***Nazir and Aslam* v *Asim and Nottinghamshire Black Partnership [2010] ICR 1225 EAT.***

39. The claimant made no reference to any specific authorities in her submissions but focussed on factual points and legal principles.

FINDINGS OF FACT AND CONCLUSIONS

40. The tribunal considered all the evidence both oral and documentary to reach findings of fact and having applied the legal principles to the factual findings reached the following conclusions. It is important to note that this judgment does not record all the competing evidence but rather records the principal findings of facts drawn from the evidence presented to it.

41. The claimant was employed by the first respondent from 1 May 2013 to 19 July 2018 when her resignation took effect after the claimant's resignation email dated 19 June 2018. The effective date of termination (EDT) therefore was 19 July 2018. The claim form (ET1) was presented to the tribunal on 15 August 2018 and was thus within the relevant time limit for the unfair dismissal/constructive dismissal claim. The time point raised by the respondent related to whether any detrimental acts should be connected together to form a continuing act but in view of our findings and conclusions set out below, we did not have to reach a conclusion on this issue.

42. The claimant had had a long history of mental health issues. At the relevant time her home circumstances were that she was a single mother living with her young child. The claimant is very highly educated.

43. The first respondent is a Non-Governmental Organisation (NGO) that deals with very vulnerable people. The claimant's role involved her having interactions with very vulnerable service users.

Event Thursday 3 August 2017- Betrayal of Confidence and Gateway Referral Issues

44. The key event which led to a chain of events culminating in the claimant's resignation, occurred on Thursday 3 August 2017 after the claimant had returned after three weeks' holidays. This event and its immediate aftermath comprised two of the key allegations of detriment namely the "*Breach of Confidence*" issue and the "*Gateway Referral*" issue referred to in further detail below.

45. The claimant's Manager at that point was Ms Q who was also her friend. Ms Q had been temporarily promoted to Manager a few months before the event and at that point had become the claimant's line manager.

46. On 3 August 2017 the claimant was speaking to Ms Q as her line manager about changing her full-time work pattern to a job-share pattern. Later that day at lunchtime the claimant was outside smoking with Ms Q and told her about having received a letter from Social Services. In the course of the conversation the claimant revealed that the letter had been received following her hospitalisation in April 2017 following an overdose which the claimant had taken on 20 April 2017. This was a revelation to Ms Q as Ms Q and the claimant's employer had been told

by the claimant at the time of her absence that it had been due to her having been sick with a relatively minor physical ailment.

47. Ms Q was very concerned about what she had been told and she therefore spoke that day to her line manager Ms P. This in turn led Ms P to speak to the claimant later that day about the overdose incident. There was a discussion between Ms P and the claimant about the support she had at that time and Ms P was concerned that the claimant appeared not to have the support that she would have expected as the claimant had told her that she had only received one telephone call from Social Services.

48. Both Ms Q and Ms P had received safeguarding training as this was a central issue in the activities of the NGO and they therefore were acutely aware of, and attuned to, safeguarding issues. Ms Q and Ms P's evidence, which we accept, was that the fact that the claimant had revealed this was very concerning as it might have been a further "*cry for help*". We find that they also reasonably believed that this raised a safeguarding issue in relation to the claimant and, potentially, in relation to her child as the claimant's child was at that time ten years old and the claimant was her sole carer at home.

49. Ms Q's evidence was that she felt could not keep that information to herself given her position as the claimant's line manager. She further stated that it was primarily due to her concern for the claimant's safety but also out of concern for the wellbeing of her child, that Ms Q took the step of informing Ms P of what she had been told.

50. The claimant's case to this tribunal in essence was that Ms Q should not have shared that information and it was the sharing of that information which led to the chain of events and adverse treatment of her and ultimately caused her to resign. As the information shared was about her disability, the claimant's case in tribunal was that this incident and subsequent events amounted to discrimination and harassment on grounds of her disability. As set out below, we reject this argument.

51. It was common case that the claimant reacted very strongly to the fact that Ms P spoke to her about the overdose incident. The claimant felt very strongly that her confidence had been betrayed by Ms Q as the claimant felt that she had shared that information with Ms Q as her friend and it was thus shared in confidence.

52. We do not fault Ms Q for the actions that she took on that day. We accept the evidence of Ms Q and Ms P and in particular Mr N (the NGO's safeguarding expert) in relation to the safeguarding issues. Mr N gave compelling evidence in relation to the importance of considering whether to share information such as this with relevant authorities to see if any further intervention might be warranted especially as the claimant was sole carer for her young child.

53. We do not regard Ms Q's action of informing her manager as an act of detriment. We do not find the later suggestion by Ms P that a Gateway referral might have to take place, to amount to an act of detriment. If we are wrong on the issue of detriment, we find that these two acts did not amount to less favourable treatment because someone in similar circumstances without the claimant's disability would have been treated the same.

54. It is not enough for the claimant to suggest that "*but for*" her disability the acts would not have occurred as this is not the applicable legal test. Our task in order to determine the grounds on which acts were done is to find the factual reasons for the impugned acts. We find that the factual reason for both acts (ie the alleged betrayal of confidence and suggestion of a Gateway referral) was that the two managers held valid safeguarding concerns relating to both the claimant and her child and as a consequence of that factual finding we conclude that the acts were not done on grounds of the claimant's disability.

Working from Home Issue

55. On Friday 4 August 2017 the claimant came into work with her eye swollen because she had been repeatedly scratching her eye. According to Ms P the claimant stated that it would be best for her to go home whereas the claimant stated that she was advised to go home ie it was not her decision. One of the seven allegations of detrimental treatment made by the claimant in this case was that she was told to work from home over the next few days when that was detrimental for her mental health.

56. In tribunal the claimant agreed that she was unwell at that point, that there was discussion with Ms P as to whether or not she was fit to be in work, and the claimant could not remember if the suggestion to go home came from her or Ms P.

57. We find that there were discussions between Ms P and the claimant in relation to the advisability of her being in work. We accept Ms P's evidence which was that homeworking was not beneficial to the organisation. Having assessed the relevant emails and documents to which we were referred on this point we find that there was an agreement between Ms P and the claimant that she work from home for a few days. In these circumstances we find that this did not amount to detrimental treatment, was not less favourable treatment and we therefore reject the claimant's case that this was an act of disability discrimination.

Tuesday 8 August 2017 – Office interaction issue

58. The claimant had been off on Monday 7 Aug 2017 having asked to take that day as a sick day.

59. The claimant complained in tribunal that she was treated detrimentally when she called into work on Tuesday 8 August 2017 because Ms Q shouted at her, told her not to turn on her laptop and effectively ordered her home. The claimant was adamant that Ms M had witnessed this incident when in fact Ms M was on holiday at the relevant time and could not have witnessed it. Ms Q candidly accepted that she probably said something along those lines but that any such comment was not shouted, was made in a jovial way and was born of concern for the claimant because of what the claimant had revealed to her about her overdose in April. Ms Q was also concerned about some of the claimant's behaviours (see below) over the previous period, and she knew that there was an agreement with the claimant that she work at home.

60. We do not find the claimant's account of this incident to be accurate nor do we find her interpretation of this to be reasonable as we accept the evidence of Ms Q and

Ms M on this event. We find in these circumstances that it was not an act of detriment at all and did not amount to less favourable treatment.

Concerning Behaviour Issue- Chronology of Key Events

61. The information which the claimant volunteered on 3 August 2017 (about her overdose in April 2017) was made against a background where there were existing concerns on the part of her managers about her behaviour, lateness and pattern of absence. One of the claimant's allegations of detriment was that these concerns were not specifically raised with her at the time. The key events before and after 4 August 2017 are as follows.

62. There had been concerns raised with the claimant by her previous line manager Mr S about her ongoing lateness. The claimant did not dispute this. We accept that Ms Q (when she took over as the claimant's line manager) was advised by Mr S to keep a note of the claimant's lateness in order to monitor it. The document which was being kept in that regard also recorded some incidents of concern.

63. The full list of key incidents of concern is as follows:

    (i) In late June 2017 the claimant brought her child to an event with vulnerable families who were service users of the NGO. The claimant was admonished for this in July 2017 and provided an apology by email. It was common case that it was entirely inappropriate for the claimant to bring her child to this work event as it involved the very vulnerable people that the first respondent worked with.

    (ii) In July 2017 the claimant posted photographs on her Facebook of the NGO's users. Again it was common case that this was entirely against policy and inappropriate.

    (iii) On 4 August 2017 the claimant had come into work with her swollen eye due to repeated scratching and it was agreed that she should go home because she clearly was not well.

    (iv) There was a concerning email from the claimant to Ms P in the early hours of the morning on 9 August 2017 which we find Ms P reasonably interpreted as the claimant appearing to be in despair which meant that Ms P reasonably had concerns about her welfare. As a result Ms P rang the claimant and urged her to contact her GP and the claimant asked to take the rest of the week off. The claimant agreed in tribunal that an OH referral was appropriate thereafter.

64. As a result of this sequence of events and due to concerns about the claimant's wellbeing an Occupational Health (OH) referral document was completed by Ms R of HR on 10 August 2017 with a view to making that referral.

65. One of the claimant's allegations of detrimental treatment was that the respondent's concerns about her behaviour, lateness and absence were not raised with her and the respondent thus did not support her. We reject the claimant's case on this. We find in the circumstances that the fact that this record was kept did not amount to detrimental treatment nor did it indicate a lack of support. Her lateness had been

raised with her, it was appropriate to note her lateness and concerning behaviours and the response of the respondent namely an OH referral was an appropriate response. We find that none of this amounted to detrimental treatment and did not amount to less favourable treatment. It therefore did not amount to unlawful discrimination: these were the actions of a concerned and supportive employer in the circumstances in this case.

66. Such was Ms P's concern that on 14 August 2017 she also spoke to the Safeguarding Officer Mr N and also spoke to the claimant. This led to an entry on D which was the NGO's internal system used to report incidents or near misses from health and safety and safeguarding perspective.

67. Ms P stated in her statement in relation to the D entry:

> *"Someone then reviews the incident reported resulting in further investigation or actions and once the issue has been resolved or required no further action the file is closed. By way of example in my role as a safeguarding protection officer (SPO) if a single parent service user told me they had been hospitalised I would be concerned about their child and who was taking care of them when the parent was in hospital, and so I would discuss with the parent and other agencies involved to ensure necessary support was in place and complete D to report this with key actions. This would be reviewed for further action or closed if statutory support was put in place."*

68. The claimant agreed in tribunal that the actions outlined by Ms P in her statement as set out above would be appropriate in the circumstances outlined and that it was therefore legitimate to put an entry on D in those circumstances. This is relevant to the issue of how a comparator would have been treated in that the claimant effectively agreed that a comparator would have been treated the same when she was hospitalised as the focus would be on the supports available. We find that Ms P's focus in the claimant's case was clearly on the supports issue when she suggested a Gateway referral might be necessary (see further below).

69. Further incidents of concern then occurred as set out in this and the following paragraphs. On several dates up to and including 14 August 2017 the claimant had sent inappropriate abusive Facebook message to Ms Q. The claimant agreed that the content of the messages was inappropriate and threatening.

70. The claimant returned to work on 17 August 2017 and had her back to work interview with Ms Q during which the claimant appeared to be disorientated.

71. On 21 August 2017 Ms P had a further meeting with the claimant to discuss her concerns about the revelation the claimant had made to Ms Q that she had been hospitalised in April 2017 with an overdose. Ms P raised the issue of making a referral to Gateway (ie to Social Services) because of potential concerns about the claimant's daughter. The claimant reacted very strongly to this and then told Ms P that she had support from her Mental Health Team and from Lifeline. We accept Ms P's evidence which was that this was the first time that she had been told by the claimant that there was that support available to her. In the event there was no referral made by Ms P to Gateway because of this further information that the claimant provided and Ms P thereafter closed the D entry on the NGO's system for the same reason. The suggestion that a Gateway referral might need to be made in

the circumstances did not therefore amount to a detriment nor did it amount to less favourable treatment as Ms P's focus was on the supports available to the claimant and no referral was made once the claimant outlined the full scope of the supports that she had.

72. On 21 August 2017 the claimant overslept during a lunch break leading to Ms M being locked out. We accept Ms M's evidence that this occurred, and that it was legitimately recorded as an issue of concern by Ms Q. We therefore reject the claimant's point that this should not have been alluded to in the OH document (see below).

73. On 22 August 2017 the claimant sent further abusive Facebook messages to Ms Q. The claimant agrees that these were inappropriate. Ms Q decided of her own volition not to send copies of them to Ms P in consideration of the claimant's illness. On that day the claimant went off sick and remained on sick leave until her resignation by email of 19 June 2018 which was approximately 10 months later.

74. The claimant's sent a text to Ms P dated 23 August 2017 stating:

> *"Hi [P]. I left phone charger in work so phone was dead. Dr has signed me for 10 days as it takes two weeks for change in medication to take effect and symptoms can be worse during that period. And because my anxiety is so high. I think we seen how a slight thing could send me over edge into irrationality so I'm going to take their advice"* (emphasis added)

75. On 30 August 2017 the claimant was hospitalised on mental health grounds because the previous night the PSNI had observed her erratic behaviour and had taken her to hospital. On 31 August 2017 the claimant texted Ms P from hospital and this led to Ms P ringing her. The claimant then told Ms P that the PSNI had brought her to the hospital because of her erratic behaviour which included cutting her hair off. On that day Ms P closed the D entry (ie the internal record of a potential safeguarding issue) because there were satisfactory safeguarding measures in place.

76. In or around 12 September 2017 Ms P was informed that the claimant was contacting a mother's group of service users and mentioned her mental health to them in an inappropriate way. The claimant agrees that this occurred and was inappropriate.

77. On 22 September 2017 an inappropriate email was sent by the claimant to all staff in response to an email to all staff relating to someone leaving the organisation. The claimant agreed that the content of the email was inappropriate. Ms P then tried to contact the claimant and also sent an email around that group to explain that the claimant was currently off for "*welfare issues*". The claimant's complaint in tribunal was that Ms P inappropriately categorised her absence as a welfare issue when she should have said that the claimant was off because she was "*seriously ill*". We do not criticise Ms P for her email as, in the circumstances, it was reasonable, and it was not detrimental to the claimant to fail to describe her as seriously ill.

78. On 24 October 2017 the claimant was hospitalised because she had taken an overdose (the previous overdose had been on 20 April 2017). She remained in hospital until 2 December 2017.

The Allegations of detriment

79. There were in total seven allegations of detrimental treatment made by the claimant as set out in the issues listed at paragraph 2 above. We reject the claimant's case as set out above, on three of those allegations namely:

    (i) Working from home issue - 4 August 2017;

    (ii) Office interaction issue - 8 August 2017; and

    (iii) Concerning behaviour issue which related to the claimant's allegation that she was unsupported as there was a failure to raise concerning issues with her about her behaviour, lateness and absence.

80. There are four remaining allegations of detriment made by the claimant in this case which we refer to below with our findings and conclusions.

Betrayal of Confidence Issue

81. The allegation is that Ms Q betrayed the claimant's confidence by telling Ms P on 3 August 2017 that the claimant had volunteered to her that she had taken an overdose and that that was the reason why she had been in hospital in April 2017.

82. As set out above we do not fault Ms Q for relaying the information to her line manager given the seriousness of it and given the background of concerning behaviour by the claimant which had already occurred. We accept that Ms Q and Ms P had genuine concerns about the safety of the claimant and potentially about her 10 year-old especially given that the claimant had made comments about going home and feeling she could not engage with her child.

83. This did not constitute a detriment and did not amount to less favourable treatment as we find that a comparator in similar circumstances without the claimant's disability would have been treated the same.

The Gateway Referral Issue

84. The allegation is that Ms P told the claimant on 21 August 2017 that they were going to have to contact social services ie Gateway.

85. We do not fault Ms P for raising the issue of a Gateway referral with the claimant on 21 August 2017 as her focus was on the supports available to her. It was clear from the evidence (and we so find) that the actual referral did not take place due to the fact that the claimant provided information about the further supports available to her. The claimant's case to the tribunal was somewhat confused on this point in that she agreed at certain points that it was justifiable for a Gateway referral to be considered but her complaint was that the way it was being done was the problem for her. The claimant also agreed in tribunal that a D entry was appropriate; that in similar circumstances a referral might need to have been made in the interests of

safety; and she agreed that if a child was involved it might necessitate a referral because the welfare of the child is paramount.

86. We found Mr N's evidence to be particularly compelling on this point. In the context of the activities of this NGO which deals with very vulnerable people, we accept that its managers were particularly alert to safeguarding issues in general and it was therefore reasonable of them to be so attuned to potential safeguarding issues arising from the claimant's circumstances.

87. We find that the suggestion of a Gateway referral did not amount to detriment, did not amount to less favourable treatment and therefore did not amount to discrimination on grounds of disability. A comparator without the claimant's disability would have been treated the same. The claimant effectively conceded a key aspect of this this when she accepted that the D entry was appropriate where the focus was on the supports available.

OH Document Issue

88. The allegation is that the OH referral document dated 23 August 2018 contained incorrect information. The OH document stated where relevant as follows:

> *"[J]'s manager first noticed a series of sickness and lateness in March 2017. [J] had confirmed this was due to anxiety. In April 2017 [J] was admitted into hospital which was later disclosed as suicide attempt. She returned to work however in May June 2017 there was another series of late mornings due to anxiety of leaving home. She then had further absence."*
>
> *"[J]'s behaviour at work had been erratic she had been taking diazepam and she had feelings of disorientation. She had agreed to work from home as [J] stated she did not feel too good when opening front door of home to leave."*
>
> *"[J] had returned to work and had agreed a manageable work plan with her managers. She stated she was having difficulty in concentrating and had an inability to finish tasks. She fell asleep at work in one of the meeting rooms as a volunteer was waiting outside to gain access to the building. [J] had said the change in the medication had caused her to feel drowsy."* (emphasis added)

89. The claimant's complaint in tribunal was that this content was "*untrue and fabricated*" when it referred to the parts underlined in paragraph 88 above ie the following:

    (i) That the claimant took diazepam.

    (ii) That the claimant overslept during a lunch break leading to a volunteer being locked out.

90. We accept the evidence of Ms Q that the content of the OH document, which was based on points that she had recorded, was factually correct. As regards the reference to diazepam the claimant was very careful to say in tribunal that she had never taken diazepam in work but was candid that she had been given it at some point in the past as part of her treatment. We accept Ms Q' evidence which was

that the claimant told her on more than one occasion that she had taken diazepam to deal with her anxiety. Our primary reasons for so finding is that we found Ms Q to be a truthful witness; her evidence was supported by that of Ms M; and her evidence in relation to diazepam was supported by the medical records.

91. In all of this it was clear from the evidence that the respondents' approach was that they did not regard the taking of diazepam as anything negative: it was simply part of the information which they believed was relevant to the OH referral. We find that this was a reasonable approach for them to adopt. It was clear to this tribunal that the NGO through its managers was making efforts to get the claimant back to work in its referral to OH. We find that the content of the OH document was not detrimental nor was it less favourable treatment and it therefore did not amount to discrimination under DDA.

92. Even if the content of the OH document was not acceptable to the claimant (and she clearly took offence at it) we find that that did not constitute a last straw, and it did not amount to a breach of contract at all never mind a breach of contract of sufficient seriousness to justify the claimant resigning some months later. Any perceived inaccuracies were being addressed by HR and an amended form had been sent to the claimant for her agreement. It was then the claimant who failed to progress the OH matter and she then decided to resign.

Contact Issue

93. The allegation is that there was a lack of contact/communication with the claimant: from August 2017, when she went off sick; after she was hospitalised on 30 August 2017; in the period following her overdose on 24 October 2017; and in the weeks before her decision to tender her resignation. Overall the claimant alleges firstly, that the NGO and Ms P failed to communicate with her at all or appropriately and secondly, that an unauthorised and inappropriate decision was made to communicate with her sister instead.

94. The background to this issue of contact is that the claimant was very unwell over a period due to mental health issues (evidenced by the concerning behaviour) which led to her hospitalisation three times: in April 2017, on 30 August 2017 and on 24 October 2017. A recurring point made in tribunal by the claimant was that the respondents treated her differently when they would not have treated her that way if she had had a physical disability.

95. It is important to note at this point that different treatment is not necessarily detrimental treatment nor less favourable treatment. In this case it was evident to this tribunal from an assessment of the evidence as a whole, that managers were at pains to try to minimise any further distress to the claimant given her evident fragile mental state especially when she was hospitalised. We find that this was neither detrimental treatment nor less favourable treatment. The correct comparator for the period of hospitalisation is someone hospitalised and in great mental distress who does not have the claimant's disability. We find that such a comparator would have been treated no differently by the respondents. Similarly, when the claimant was not in hospital but clearly very unwell, the comparator is someone without the claimant's disability who was unwell and in clear distress and we find that such a comparator would have been treated no differently.

96. We have assessed very carefully the emails during the relevant period and the evidence of Ms P and Ms R, the claimant and the claimant's sister in relation to the level and nature of communication which took place.

97. The claimant agreed that abusive texts, abusive Facebook messages and inappropriate emails were sent by her but she stated in tribunal that this happened due to her impaired mental health at that time. Texts and emails were also sent in the early hours of morning which reasonably caused concern to the respondents. It is against that background that Ms P contacted the claimant's sister as the emergency contact on 25 September 2017. The claimant agreed in tribunal that they were within their rights to contact her sister on 25 September.

98. We accept (and so find) that Ms P made reasonable attempts overall to communicate with the claimant and reasonably believed that there was an agreement with the claimant's sister that communication should be with her while the claimant was unwell. This actually occurred on several occasions and at no point were the respondents told by the claimant or her sister that they should not do so or that they were not authorised to do so. Overall we do not fault the respondent's managers for the nature or level of contact.

99. We find that the claimant has failed to prove that the respondents committed a detrimental act or deliberate omission in relation to their contact with her. We so find for the following principal reasons:

(i) It was common case that the claimant's sister spoke to Ms P at one point to ask her not to contact the claimant so much as the claimant was very unwell. Having carefully assessed the evidence of the claimant's sister and Ms P in light of the documents we accept that Ms P reasonably understood that communication would thereafter be through the claimant's sister.

(ii) Having analysed the emails it is clear that there was text, phone and email contact with the claimant's sister. At no point in that contact did the claimant's sister tell the managers that they should not contact her. In addition in one email from the claimant's sister the claimant was copied into it and there is no reference to, nor protest from her about, the fact that it was her sister that was being contacted instead of the claimant.

(iii) A letter of 17 November 2017 to the claimant's GP from the psychiatric nurse in the Mental Health Assessment Centre at the hospital stated as follows:

> *"She reports a management restructuring in her employment around March 2017 and she has had ongoing issues re-her new manager. [J] did not wish to discuss these issues. Reports she had previously obsessing over thoughts about work so had been advised to forget about work for time being and her sister has been dealing with her employers*". (emphasis added).

(iv) The claimant conceded that she did not check her emails on a regular basis and thus did not see relevant emails at certain key points during this period. The claimant had also changed her email address at one point without informing the respondent. We find that it was not reasonable for the claimant

to blame the respondent for any difficulties with email contact and for failing to elicit contact details from her in these circumstances.

(v) The claimant did not check emails and only advised the respondent of this when she set out her grievances in her email of 5 April 2018. In that email she refers to an alleged agreement that she should be sent a text to alert her to emails. Ms P emphatically denied that this was the arrangement and said so in writing in immediate response to that email. We accept Ms P's evidence on this.

(vi) Other contemporaneous emails show that the claimant was told on more than one occasion that email was the way to contact her employer and that texts were not suitable. We therefore do not accept that it was the case that the claimant was to receive a text to alert her to emails. The claimant's failure to check her emails regularly contributed to her belief that she was not receiving contact.

(vii) We accept Ms P's evidence that both she and HR tried to ring the claimant on her mobile number but on numerous occasions the recipient simply hung up before speaking. The claimant explained in tribunal that she had given her phone to her child and her child rejected the calls because they were from an unknown number. The claimant at some point took back that phone as she later used it to communicate with the respondent. Neither the claimant nor her sister had told the respondent that the mobile number had changed at various points nor that she had given her phone to her child. We do not accept the claimant's point that the respondent should be blamed for some of the difficulties in communicating by telephone in these circumstances.

(viii) One of the points made by the claimant was that, given the nature of her illness, it was incumbent on the employer to make more positive efforts to try to contact her. We find that it was unreasonable for the claimant to have held this belief as the respondents were making efforts to do so using the contact details which she had provided in circumstances where neither she nor her sister had updated them and where difficulties with contact were largely down to the claimant.

(ix) Ms P reasonably developed a reluctance to respond immediately to the claimant because of abusive text messages that she had received on more than one occasion from the claimant. Ms Q had also received abusive messages. We find Ms P's overarching concern was that the claimant was clearly unwell and she properly sought advice from HR. For example a barrage of angry texts were sent to Ms P from the claimant during October 2017 and she did not respond because of her concerns about the claimant's well-being, she did not want to exacerbate the problem, and also because she had been communicating with the claimant's sister from 25 September 2017. The claimant accepted in tribunal that they were angry and accusatory in relation to both Ms P personally and the NGO.

100. One of the claimant's key allegations about contact related to a telephone conversation on 6 November 2017 when she rang HR from hospital to ask about her pay and spoke to Ms R. The claimant's allegation was that Ms R told her in that

conversation that she would not speak to her stating that they were only to talk to her sister. Ms R emphatically denied that she had said this and gave compelling evidence about how upset the claimant was and how Ms R's primary concern was that she should get better. We accept the accuracy of Ms R's contemporaneous note of this conversation and accept her account of this conversation.

101. We accept Ms R's evidence that her primary concern that she conveyed to the claimant in that conversation was that the claimant should not worry about work and she should just focus on getting better. We do not accept the claimant's evidence that Ms R told her that they would not speak to her. In our judgement our factual finding on the content of this conversation detracts from the reliability of the claimant's evidence generally given that we have rejected entirely the claimant's characterisation and account of the content of this telephone call.

102. The first protest raised by the claimant (or anyone on her behalf) with regard to the nature of this contact (ie this telephone call and contact with her sister) is contained in her lengthy email of 5 April 2018 (ie five months after the conversation with Ms R on the 6 November 2017) where that email states as follows:

> *"I even called HR from the hospital and was told they could not speak to me because [P] had told them I was ill and she was communicating directly with my sister. Again unless someone is granted power of attorney over me my employer has no right to refuse to discuss my own situation with me. My sister called them to say that [P] had also failed to respond to her mails text and calls and he HR kindly provided the sick policy [P] had failed to in August when it was first requested. This was November"*

103. The claimant clearly believed that her employer was not doing enough to contact her. We find however from an assessment of all the evidence that overall in the relevant period, the managers were making reasonable efforts to contact her in the circumstances and that the deficiencies in that regard where largely due to the lack of up to date contact details and due to the agreement that contact be via her sister.

104. In summary the managers reasonably believed that contact through her sister was authorised and appropriate. The claimant's sister was one of the emergency contacts in the respondent's record for the claimant. It was evident to everyone who had dealings with her during this period, that the claimant was very unwell and the relevant managers were therefore at pains to try not to add to her distress.

The Alleged Dismissal and 'Last Straw'

105. The claimant's case is that the seven allegations of detriment listed in the issues at paragraph 2 above amounted to a series of detrimental acts and deliberate omissions which culminated in a last straw and together amounted to a breach of contract justifying her resignation in response. Our overall finding is that the allegations of detriment relied upon for the breach of contract for the constructive dismissal claim, did not amount to a breach of contract either individually or cumulatively.

106. The claimant stated in her resignation letter that the last straw was, firstly, the content of the OH referral document (ie the reference to diazepam and falling

asleep at work) and, secondly, the lack of contact from her manager Ms P in the four weeks before she decided to resign.

107. The claimant became aware of the allegedly inaccurate content of the OH referral in the telephone call from HR on 1 May 2018 and the resignation email is dated 19 June 2018 ie over 6 weeks later.

108. When the claimant became aware of the content of the OH referral document in the telephone call with HR on 1 May 2018, she became very upset at that content. An outcome of that telephone call was an agreement that Ms T of HR would draft a document for the claimant's approval to enable the OH referral to proceed.

109. Ms T then sent a two-page document to the claimant asking her to agree its contents for the OH referral. The claimant at no point responded to that and thus effectively became the block to the OH referral proceeding.

110. The claimant's point in tribunal was that she felt at that time that she was not wanted back at work because she had not received enough contact from her manager Ms P and that she believed that that was necessary in order for her to start the process of being brought back to work. The claimant therefore decided not to respond to Ms T's efforts to agree the OH referral document which was (from the respondent's point of view) the way of getting the claimant back to work. The claimant instead decided (without reference to HR) to wait to see if Ms P would contact her and, when there was no contact after four weeks, she decided that she should resign.

111. In all the circumstances we find that it was unreasonable of the claimant to decide that she should be contacted by Ms P for the respondent to prove that she was wanted back at work. From the respondent's point of view HR was trying to progress the OH referral which needed the claimant's consent to the draft document from Ms T before it could go ahead. The claimant simply did not respond to Ms T on that draft and that was unreasonable on her part given that the OH referral was something that she wanted to take place.

112. In her evidence to this tribunal the claimant was clear that the content of the OH document was the final straw and that she decided to give another four weeks to see if there is more communication. It was therefore the lack of communication on the back of the content of the OH referral document which was the issue and was relied upon as the last straw.

113. It is for the claimant to prove a last straw in relation to a course of conduct ie an event causing her to resign. As stated above the last straw relied upon was the content of the OH referral which she became aware of on 1 May 2018 together with the lack of contact from her line manager in the four week period referred to. She resigned by email sent to HR on 19 June 2018 and it took effect on 19 July 2018.

114. We do not find the lack of communication in that period to amount to a last straw given our findings above and our findings on contact generally. Further we do not find the lack of communication in that period to constitute a breach of contract at all never mind a breach of contract of sufficient seriousness that it warranted the claimant's resignation in response.

115. Our judgment is that the claimant has failed to show a last straw event which justified her resignation in response. We so find because it was effectively the claimant who blocked the OH referral and it was not reasonable for the claimant to decide that she would only engage if Ms P contacted her. This is against the background of very fraught communications between the claimant and Ms P over the previous period when Ms P reasonably was wary about further contact in case she exacerbated the claimant's problems and for this reason Ms P kept in close contact with HR on how to proceed. It was therefore HR which at the crucial period was taking the lead in progressing the OH referral which the claimant decided not to engage in as set out above.

116. The claimant therefore fails on the first hurdle of whether or not she was dismissed as she has failed to prove that any breach of contract occurred given our findings on all the alleged detrimental acts relied upon. We therefore find that she resigned and was not dismissed.

117. We find that any difficulties with the contact or lack of contact in the relevant period did not amount to a detrimental act or deliberate omission on the part of the respondent in the form of Ms P or anyone else. The claimant has therefore also failed to prove detriment on the part of the respondents in relation to contact. The claim under DDA on this point therefore fails.

Less Favourable Treatment - Comparator

118. Is for the claimant to prove she was treated detrimentally and that any detrimental treatment amounted to less favourable treatment when compared to a hypothetical comparator.

119. The claimant in preparation for the case relied on the following comparators as set out in the replies to the Notice for Additional Information where she states:

> *"I wish to compare my treatment with a hypothetical comparator of a single mother who does not have a disability.*
>
> *I will also use a comparator who had a physical disability and not a mental disability".*

120. Ms Best stated that the comparator in this case is a non-disabled employee or an employee without the claimant's disability who behaved as she did. Ms Best submission was that there was no evidence before the tribunal that they would have been treated any differently to the way the claimant was treated and that there was thus no less favourable treatment.

121. Both sides were invited to make submissions on whether or not the characteristics of the hypothetical comparator might be as follows in relation to the Betrayal of confidence and Gateway Referral issues: someone in relation to whom safeguarding concerns relating to an adult and/or a child arose and where communication to a senior manager of those concerns and consideration of a Gateway referral was appropriate. The claimant's answer to that was that if mental health had not been a feature of her circumstances no referral would have been considered.

122. The first task for the tribunal is to identify the factual reason for the alleged betrayal of confidence and for the suggestion that a Gateway referral might have to be made. In our judgment the reason for the acts was the fact that the claimant's circumstances gave rise to a safeguarding issue. The claimant's disability was not the reason for the treatment as our finding is that it was the safeguarding issue which was the factual reason for the treatment. In addition we do not find that the claimant was treated detrimentally in relation to the suggestion of a Gateway referral. We also find that a comparator without the claimant's disability but whose circumstances gave rise to legitimate safeguarding concerns, would have been treated the same in relation to both of these acts.

123. In this regard it is important to note that the claimant agreed in evidence that it was appropriate for Ms P to consider a Gateway referral but that her complaint was that it was the way that it was done which was a detriment to her. It was not at all clear what the claimant meant by this. In our judgment the fact that the claimant agreed that consideration of a Gateway referral in her circumstances was appropriate and that the D entry was justified, fundamentally undermines her argument on this point.

124. In summary, using the ***Shamoon*** test, our judgment is that the claimant has failed to prove detrimental treatment in relation to the seven acts of detriment relied upon. If we are wrong on that, she has in our judgment failed to prove less favourable treatment as the hypothetical comparator in similar circumstances aside from the claimant's disability would not have been treated any differently by the respondent.

SUMMARY

125. Overall, our findings are that the claimant has failed to prove detrimental treatment, has failed to prove less favourable treatment compared to a hypothetical comparator and has failed to show that she was dismissed.

126. Our summary findings on the seven detriments relied upon are as follows:

(a) Working from Home issue. The claimant has failed to prove that she suffered detriment because she agreed to work from home and it was to her benefit.

(b) Office interaction issue. The claimant has failed to prove detriment because she has failed to prove that she was shouted at and ordered home as alleged by her.

(c) Gateway Referral issue. We have found that this did not amount to a detriment and did not amount to less favourable treatment. The fact that this was considered at one point was an indication of the measure of concern for the claimant's wellbeing which was reasonably held by relevant managers.

(d) Betrayal of Confidence issue. We do not fault Ms Q on her actions and find that it did not amount to a detriment and did not constitute less favourable treatment. This was the action of a concerned and supportive manager.

(e) Contact issue. The fact that contact was made with the claimant's sister was neither detrimental treatment nor less favourable treatment as the respondent reasonably believed that that was the way contact was to take

place. Neither the claimant nor her sister objected to this until the claimant raised in April 2018 an issue about her conversation with Ms R in November 2017.

As set out above we have accepted the accounts given by Ms P and Ms R on this point and again regard this as a measure of the concern felt by both women for the claimant's wellbeing in light of the repeated, concerning messages and fraught contact which clearly revealed just how unwell the claimant was at that point.

We do not find there to have been detrimental treatment by the respondent generally in relation to contact as the respondents' efforts to contact the claimant were unsuccessful for the most part because of issues on the claimant's part. Later the contact with the claimant shifted to HR so any lack of contact from Ms P (against a background of fraught communications) did not amount to detrimental treatment nor less favourable treatment of the claimant. We further find that a hypothetical comparator would have been treated the same.

(f) OH document issue. The content of the OH document was neither detrimental nor less favourable treatment as we accept that it was factually correct and it was relevant to the assessment to be taken by the OH. The claimant agreed that an OH referral was appropriate. In the event when the claimant protested about the wording in the OH referral document it was reworded and sent to her for her approval and at that point she unreasonably decided not to engage further with OH and unreasonably turned her attention to waiting for Ms P to contact her.

(g) Concerning Behaviour issue. We find that the respondent in the form of its managers dealt appropriately with this in the circumstances by monitoring the behaviour and then passing the matter to HR to make an OH referral. This was the action of reasonable and supportive managers in the circumstances. This did not amount to detrimental treatment and even if it did, it did not amount to less favourable treatment in the circumstances as we find that a comparator without the claimant's disability would have been treated the same. This also did not amount to a breach of contract.

127. As we have found that the allegations relied upon did not amount to detrimental or less favourable treatment, the claimant has failed to prove facts from which we could conclude that discrimination under DDA occurred. The claimant's claim of discrimination under DDA therefore fails.

128. Given our findings on the allegations of detrimental treatment, the harassment claim also fails. We find that it could not reasonably be considered that the conduct relied upon amounted to harassment. Whilst the claimant's perception was that this was the effect of the events set out above, we find that it was not reasonable for her to consider these events as having that effect (as set out in detail above) because one or more of the following applied to each allegation:

(a) They did not happen as she alleged;

(b) They were not detrimental to her;

(c) They were not on grounds of her disability as the factual reason for them was other than her disability.

129. Our assessment overall is that the respondent in the form of its managers acted reasonably and out of concern for the claimant in view of the information she had revealed to them. Thereafter they made reasonable efforts to contact and support her despite difficult and inappropriate communications from the claimant to Ms P and Ms Q and despite the difficulties with establishing contact at various points which were principally due to the claimant.

130. The claim of unfair dismissal fails because the claimant has failed to prove a last straw event and a breach of contract justifying her resignation in response which means that she has failed to prove she was dismissed. As a result, her claim of unfair dismissal simpliciter is dismissed.

131. As the claimant has failed to prove that she was dismissed, her claim of DDA dismissal is also dismissed.

132. The claimant's claims are therefore dismissed in their entirety.

Employment Judge:

Date and place of hearing: **7, 8, 9, 10, 11 October 2019 and 13, 14, 15 and 30 September 2021, at Belfast.**

This judgment was entered in the register and issued to the parties on: