



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Karen Ounsworth

**Respondents:** 1) University of Nottingham  
2) Ms N Anderton  
3) Ms M Potts

**Heard at:** Nottingham - hybrid

**On:** 30 January 2023 – 14 February 2023  
In Chambers on 13 and 14 March 2023

**Before:** Employment Judge Victoria Butler  
Ms F French  
Mr J Purkis

## Representation

**Claimant:** In person (with her husband to support)  
**Respondents:** Ms N Motraghi, Counsel

# RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is:

1. The claims of direct disability discrimination against all Respondents fail and are dismissed.
2. The Claimant was not disabled by reason of obsessive compulsive order and generalised anxiety disorder at the material time.
3. The claim of unfair dismissal fails and is dismissed.

4. The claim of victimisation fails and is dismissed.
5. The claim that the 1<sup>st</sup> Respondent failed to pay the Claimant her holiday pay fails and is dismissed.
6. The claim that the 1<sup>st</sup> Respondent made unauthorised deductions from the Claimant's wages fails and is dismissed.

## RESERVED REASONS

### Background

1. The Claimant submitted her claim to the Employment Tribunal on 14 May 2021 following a period of early conciliation between 3 March 2021 and 13 April 2021. She was employed by the 1<sup>st</sup> Respondent as a Creative Manager when she was dismissed by reason of redundancy with effect from 7 December 2020.
2. On 30 July 2021, the parties attended a preliminary hearing for case management purposes at which the Claimant was ordered to provide further information about her claim. The Respondents were able to identify what the allegations against them were within numerous spreadsheets provided by her
3. On 6 January 2023, the Claimant made an application to postpone this hearing because of additional stress in her life caused by a range of family and work matters, including caring for family members and a stressful full-time job in the NHS. She was concerned about her mental health and felt at breaking point with all the responsibilities on her. An urgent preliminary hearing by telephone was called on 19 January 2023 at which the Claimant's application was considered but refused.
4. The parties attended a further preliminary hearing before me on 27 January 2023 to discuss arrangements for this hearing. The Claimant indicated a preference to attend the hearing by video link. I agreed to both parties appearing by video and we (the Tribunal) attended in person.
5. By way of adjustments, it was also agreed that we would break every forty-five minutes for fifteen minutes and take a full hour for lunch to accommodate the effects of the Claimant's impairments. We also timetabled the allocated twelve days.
6. The Respondents conceded prior to the hearing that the Claimant was disabled for the purposes of the Equality Act 2010 ("EQA") by reason of fibromyalgia. However, they did not concede she was disabled by reason of obsessive compulsive disorder ("OCD") and generalised anxiety disorder ("GAD"). As such, we were required to determine this issue.
7. The Claimant also said that she has ADHD but does not rely on this as a disability

in these proceedings.

**The issues**

8. The 1<sup>st</sup> Respondent prepared a list of issues in advance of the hearing which was sent to the Claimant. She was given further time to read and digest it at the commencement of the hearing and confirmed that it accurately reflected her complaints, save a few amendments as the hearing advanced which are highlighted below.

9. The issues agreed between the parties are as follows:

**1 Time limits**

1.1 *Given the date the claim form was presented and the dates of early conciliation, the first Respondent states that none of the complaints have been brought in time.*

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

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

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

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

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

(i) *Why were the complaints not made to the Tribunal in time?*

(ii) *In any event, is it just and equitable in all the circumstances to extend time?*

1.3 *Were the unfair dismissal and unauthorised deductions complaints made within the time limit in sections 111 and 23 of the Employment Rights Act 1996? The Tribunal will decide:*

1.3.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / date of payment of the wages from which the deduction was made (or in relation to the unauthorised deductions claims), if not, was there a series of deductions and was the claim made*

*to the Tribunal within three months (plus early conciliation extension) of the last one?*

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

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

## **2 Unfair dismissal**

2.1 *What was the reason or principal reason for dismissal? The First Respondent says the reason was redundancy.*

2.2 *If the reason was redundancy, did the First Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant in accordance with section 98(4) Employment Rights Act.*

## **3 Disability**

3.1 *At the material time (i.e. the dates upon which the Claimant contends the relevant acts/ omissions took place), did the Claimant have a relevant disability as defined in section 6 of the Equality Act 2010?:*

3.1.1 *Did the Claimant have a physical or mental impairment: namely OCD and/or GAD? (Fibromyalgia has been conceded by the Respondents)*

3.1.2 *Did such impairment have a substantial adverse effect on her ability to carry out day-to-day activities?*

3.1.3 *If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*

3.1.4 *Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?*

3.1.5 *At the relevant time, were the effects of the impairment long-term? The Tribunal will decide:*

(i) *did they last at least 12 months, or were they likely to last at least 12 months?*

(ii) *if not, were they likely to recur?*

**4 Direct disability discrimination (Equality Act 2010 section 13)**

4.1 *Did the Respondents do the things set out in Schedule 1 of the further information? (p124-133)*

4.1.1 *Did the Second Respondent tell the Claimant at an introductory meeting in August 2017, that:*

(i) *the Claimant was not qualified for her role?*

(ii) *the Second Respondent expected someone in the Claimant's role to dress more creatively?*

(iii) *the Second Respondent made a comment about the Claimant's workspace?*

4.1.2 *Did the Second Respondent comment that James Tomkinson's (the Claimant's line manager at the time) return to work meeting with the Claimant was quite "challenging" and saying that "there is quite a history with this individual" in an email dated 19 April 2018?*

~~4.1.3 *Did the Second Respondent resist the Claimant accessing training opportunities and specifically decline the Claimant's request for approval to go on the LMA Leadership Course following an email dated 18 September 2018?*~~

4.1.4 *Did the Second Respondent sit next to the Claimant in October 2019 and talk her through how to design her work and roadmap in front of her team and the office.? Did the Second Respondent leave the Claimant to work on this on her own after telling her she needed it by the next day?*

4.1.5 *Did the Second Respondent lose her temper during a training course on 3 November 2019?*

4.1.6 *Did the Second Respondent sit next to the Claimant in January 2020 to take her through how to design her power point presentation?*

4.1.7 *Did the Second Respondent threaten to remove the Claimant's reasonable adjustments and flexible working arrangements?*

4.1.8 *Did the Second Respondent tell the Claimant on 8 March 2020 that WhatsApp was not an appropriate channel to communicate within the team and to use MS Teams/Outlook?*

4.1.9 *Did the Second Respondent's "to do list" correspond with a phone call that she had with the Claimant on 2 April 2020?*

- 4.1.10 *Did the Second Respondent call the Claimant on 6 May 2020 “out of the blue” while she was off sick and “grill” the Claimant on the state of her mental health?*
- 4.1.11 *In relation to furlough:*
- (i) *Did the Respondents follow the correct furlough procedures?*
  - (ii) *Did the Second Respondent tell the Claimant if furlough was optional?*
  - (iii) *Did the Second Respondent fail to inform the Claimant about pastoral/counselling support for those who had been furloughed?*
  - (iv) *Did the Second Respondent instruct the Claimant to stay out of her work emails and Teams?*
  - (v) *Did the Second Respondent fail to tell the Claimant that she had un-furloughed a member of the Claimant’s team?*
  - (vi) *Was the Claimant offered part-time furlough when it became available?*
  - (vii) *Did the Second Respondent, on 24 June 2020, fail to offer the Claimant the option to return after furlough?*
- 4.1.12 *Did the Second Respondent insist that the Claimant take 29 June 2020 as leave because the Claimant was not available for a KIT call during furlough?*
- 4.1.13 *Was the Claimant unfairly selected for redundancy? See paragraph 2 above.*
- 4.1.14 *Did the Second Respondent fail to inform the Claimant of secondment opportunities, of the Covid-19 Secondment Scheme, or to invite her to volunteer for the clearing hotline or Student Enquiry Centres?*
- 4.1.15 *Did the Second Respondent laugh during a redundancy consultation meeting on 11 August 2020?*
- 4.1.16 *Was the Claimant asked to call in sick rather than work from home?*
- 4.1.17 *Did the Second Respondent send an Occupational Health report to HR?*

- 4.1.18 *Did the Second Respondent request that a particular email that the Claimant was due to send to faculty colleagues be sent to the Second Respondent for approval?*
- 4.1.19 *Did the Third Respondent fail to complete written briefs?*
- 4.1.20 *Did the Third Respondent ask the Claimant's team to do things for her directly, cutting the Claimant "out of the loop"?*
- 4.1.21 *Did the Third Respondent ask the Claimant if she would like to be a copywriter?*
- 4.1.22 *Did the Third Respondent ask the Claimant if she would like to be a scrum-master?*
- 4.1.23 *Did the Third Respondent fail to acknowledge the Claimant at the start and end of the day?*
- 4.1.24 *Did the Third Respondent plug in her laptop to block the Claimant?*
- 4.1.25 *Did the Third Respondent deny the Claimant training opportunities and specifically:*
- ~~(i) the opportunity to attend a training session on content?~~
- (ii) *the opportunity to attend a conference in London in October 2019?*
- 4.1.26 *Did the Third Respondent fail to acknowledge the Claimant's emails during an absence from November 2019 to December 2019?*
- 4.1.27 *Did the Third Respondent speak to the Brand team regarding an instruction during the Claimant's sick leave in December 2019 and refuse to discuss this with the Claimant?*
- 4.1.28 *Did the Third Respondent fail to include the Claimant in a working group to review the Style Guide?*
- 4.1.29 *Was there a disagreement between the Claimant and the Third Respondent in relation to the Manuscripts and Special Collections?*
- 4.1.30 *On 6 January 2020, did the Claimant greet the Third Respondent and ask if she had a good break and did the Third Respondent say "yes thanks" and then did they sit in silence for half an hour?*

- ~~4.1.31~~ ~~Did the Third Respondent reference the Claimant being off sick in a way that sounded “frustrated and judgmental” about her reliability and impact on Global Review on 29 January 2020?~~
- 4.1.32 Did the Third Respondent fail to acknowledge the Claimant on 6 February 2020?
- 4.1.33 Did the Third Respondent fail to arrange anything with the Claimant verbally despite sitting next to her and having her mobile number and was all communication via email?
- 4.1.34 Did the Third Respondent send an email to the Claimant on 25 February 2020 in relation to the Claimant’s working from home arrangements?
- 4.1.35 Did the Third Respondent, on 3 March 2020, ask if a colleague was in that day, or off, or working from home and say “ok, never mind, I’ll email him later”?
- 4.1.36 Did the Claimant receive an email from the Third Respondent in March 2020 in relation to her working from home patterns, attitude and email responsiveness?
- 4.1.37 Did the Third Respondent tell the Claimant that she needed to print off and send sick notes?
- 4.1.38 Was the Claimant’s line management transferred from the Third Respondent to the Second Respondent on 11 March 2020 with no explanation and no telephone conversation in a manner akin to being put on a PIP?
- 4.1.39
- (i) Did the Third Respondent at the First Respondent fail to give instructions in writing?
  - (ii) Did the first ~~Third~~ Respondent fail to follow up a workplace assessment?
  - (iii) Did the first ~~Third~~ Respondent fail to provide equipment (second screen and arm rest)?
  - (iv) Did the first ~~Third~~ Respondent fail to ask what adjustments the Claimant might need?
  - (v) Was a joke about OCD sent to the Claimant’s share team email by her former line manager?



(vi) *Did James Tomkinson, the Claimant's former manager, fail to submit sick notes?*

4.2 *Was such treatment at paragraph 4.1 less favourable treatment? The Tribunal will decide whether the Claimant was treated less favourably than the Respondent/s treated or would have treated others. There must be no material difference between their circumstances and the Claimant's.*

4.3 *Did the Respondents' treatment amount to a detriment?*

4.4 *If so, was it because of disability?*

**5 Victimisation (Equality Act 2010 section 27)**

5.1 *Did the Claimant do a protected act as set out in Schedule 3 of the further information? (p134)*

5.1.1 *Did the Claimant raise the allegation that the Second Respondent informed the Claimant that she was not qualified for her role in August 2017 with her then line manager, James Tomkinson, at the time and in her return to work on 18 April 2018?*

5.1.2 *Did the Claimant raise an issue regarding excessive unpaid hours and the allegation that Mr Tomkinson had not progressed her flexible working request?*

5.2 *Did the Respondents do the things set out in Schedule 1 of the further information?*

5.2.1 *See para 4.1 above.*

5.3 *By doing so, did the Respondent/s subject the Claimant to detriment?*

5.4 *If so, was did it/they do so because the Claimant did the alleged protected act at paragraphs 5.1.1 and 5.1.2 above?*

**6 Holiday Pay (Working Time Regulations 1998)**

6.1 *Did the First Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?*

**7 Unauthorised deductions**

7.1 *Did the First Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?*

**The Hearing**

10. The hearing was listed over a period of twelve days and the first two days were reading time for the Tribunal.
11. There were various delays on the Claimant's part whilst she was giving evidence (headaches/sickness/urgent medical appointment/technical problems) which impacted on the agreed timetable. Fortunately, we were able to conclude the witness evidence and submissions on 14 February 2023. We met in Chambers on 13 and 14 March 2023 to deliberate.
12. As the hearing got underway, the Claimant said she needed to break every forty minutes (rather than forty-five) for fifteen minutes which we accommodated.
13. From time to time, the Claimant would disconnect from the hearing without leave, usually when she became upset or was facing difficult cross examination. However, this did not affect the timetable in any way.
14. The 3<sup>rd</sup> Respondent, Ms Potts, confirmed in her witness statement that she previously worked for Boots. I also previously worked for Boots at around the same period of time albeit in a completely different department. I did not work with, or know, Ms Potts and all parties agreed with me that there was no conflict of interest in me presiding over the case.
15. On 13 February 2023, the penultimate day of the hearing, the Claimant made an application to admit evidence of text messages between her and a former employee of the 1<sup>st</sup> Respondent. The text message chain was incomplete and, given the lateness of the application, we refused it.

### **The Evidence**

16. We heard evidence from the Claimant and her husband, Mr Robert Ounsworth, who also works at the 1<sup>st</sup> Respondent.
17. For the Respondents we heard evidence from:
  - Ms Maddy Potts.
  - Ms Nicola Anderton.
  - Ms Lisa Driver.
18. We heard evidence from the Claimant first and did not consider her to be a reliable witness. We found her to be evasive when questioned on matters that seemingly did not help her case. By way of example, an allegation against the 2<sup>nd</sup> Respondent was that she failed to tell the Claimant that furlough was "*optional*". On exploring this allegation, I asked the Claimant if she objected to being put on furlough and what difference it would have made had she been told it was "*optional*". Her answers were confusing, contradictory and ultimately, no satisfactory answer was given to what were straightforward questions.

19. We also agree with Ms Motraghi that the Claimant's approach to evidence was contradictory at times. As an example, she criticised the 3<sup>rd</sup> Respondent for not putting creative briefs in writing at the same time as criticising her for putting everything in writing.
20. The Claimant also describes herself as an award-winning journalist with over a decade of experience and, on numerous occasions during the hearing, confirmed her understanding of the importance of making contemporaneous notes of key events or meetings. However, it became apparent that she made no notes of evidentially important meetings yet would e-mail herself about other trivial matters (see allegation 4.1.35). On realising her difficulty in cross examination, she changed her position or re-classification of what she considered to be '*meeting*'.
21. Mr Ounsworth's evidence added little to the case. We accept Ms Motraghi's submissions that much of his evidence was inevitably informed by what the Claimant had told him. However, we do not consider, nor was it suggested, that there was any attempt on his behalf to mislead the Tribunal.
22. Conversely, we found the Respondents' witnesses to be entirely credible, open and honest and their evidence accorded with the contemporaneous documents and/or accounts they gave at the material time.
23. Accordingly, where there was a conflict on the evidence, we preferred that of the Respondents.

### **The Facts**

24. We made our findings of fact based on the material before us, taking into account the contemporaneous documents where they existed and the conduct of those concerned at the time. We resolved any conflicts of evidence on the balance of probabilities.
25. Having made primary findings of fact, we considered what inferences we should draw from them for the purposes of making further findings of fact. We have also stood back to look at the totality of the circumstances to consider when, taken together, they may represent an ongoing regime of discrimination as alleged by the Claimant.

### **General background**

26. The 1<sup>st</sup> Respondent has comprehensive policies and procedures, including grievance and disciplinary, sickness absence and redeployment policies.
27. The sickness absence policy deals with reasonable adjustments and provides:

*“the manager should discuss with the employee the question of appropriate reasonable adjustments which should be reviewed by the employee and the manager regularly. It may be appropriate for the line manager to seek*

*professional advice to help make an informed decision in relation to reasonable adjustments. Where the manager does need to seek advice, this should be facilitated in consultation with the HR Employment Relations Team...” (Page 178).*

28. The Claimant commenced employment with the 1<sup>st</sup> Respondent on 1 November 2010 and was employed as a Creative Manager within the Design Team when she was dismissed by reason of redundancy. The Claimant had two direct reports, Mr Green and Ms Tolliday. Ms Potts, the 3<sup>rd</sup> Respondent, was the Claimant’s line manager from 4 June 2019 until 11 March 2020. Ms Anderton, the 2<sup>nd</sup> Respondent, was Ms Potts’ line manager and had overall responsibility for the wider department.
29. Prior to Ms Potts joining the 1<sup>st</sup> Respondent, the Claimant submitted a flexible working request to her line manager at the time, Mr James Tomkinson to condense a four-and-a-half-day week into four days (pages 218 - 220). The application was not resolved when the Claimant commenced a period of lengthy sickness absence in November 2017 due to fatigue and fibromyalgia.
30. At a return-to-work interview on 18 April 2018, the Claimant raised the fact that her application had not been progressed and that she was, in her view, working excessive unpaid hours. She subsequently submitted a second application requesting a reduction in her working pattern from full-time to four days per week. The application was refused on the basis that a change in her working pattern might limit her opportunities in an upcoming restructure. Further, an occupational health report stated that a change was not necessary on health grounds (pages 256 – 259).
31. The same occupational health report recommended that the 1<sup>st</sup> Respondent undertake a workplace assessment, but this did not take place at the time. However, Mr Tomkinson ordered additional equipment for the Claimant, namely a second screen and an arm rest which the Claimant received (pages 274 – 276).
32. The Claimant appealed the outcome of her flexible working application, and her appeal was upheld by Tim Watkinson, Director of Communications and Advocacy (pages 278 – 281). As part of his appeal outcome, Mr Watkinson recommended that the Claimant move to a four-day week and workplace assessments be conducted within four weeks thereafter. He also recommended the commission of a further occupational health report. The Claimant refused to attend an initial appointment (page 302) and subsequently refused to disclose the report after she did attend (page 305).

**Facts Relevant to the allegations against the 3rd Respondent, Ms Potts**

33. When Ms Potts became the Claimant’s line manager, the Claimant told her that she had fibromyalgia. Ms Potts shared that a family member also had the same impairment.
34. The Claimant’s working pattern was four days per week, and she would work from

home on a Tuesday or Wednesday with an occasional additional working from home day to account for her health. Ms Potts had not seen any formal documentation in relation to the Claimant's fibromyalgia but accepted the adjustments as explained to her. The Claimant told Ms Potts that the arrangement worked well for the team and initially Ms Potts had no reason to doubt it.

35. They had an amicable relationship and at all times, Ms Potts was fully supportive of the Claimant both professionally and personally. Ms Potts' door was always open to the Claimant. By way of example, Ms Potts says to the Claimant *"Our next catch up is next Monday – if you want to chat before then, just pop something in my diary, its fairly free this week and I want to make sure you got the support you need!"* (page 1076).

*Written briefs*

36. The Claimant told previous managers and Ms Potts that she required written briefs for new pieces of work because of her fibromyalgia and resultant brain fog. Ms Potts was fully supportive of this requirement and would complete them, encouraging others to do so as well. By way of example, on 23 July 2019 Ms Potts said to the Claimant in an e-mail: *".... if she or her team comes straight to yours without a brief, let me know"* (page 115).
37. However, the Claimant explained to Ms Potts that she did not need a brief from the within the Design Team and the main reason for them as follows:

*"....yes that's fine. No brief needed as you have given me the context, which is the main reason we want the brief as it focuses people's minds on what they are trying to achieve, rather than being fixed on a particular piece of collateral. I need to know what format? The dimensions, the print or digital*

*when it come from within the team, tbh Anne always asks and then often fills in a brief anyway, even when we say its fine not to as we have discussed it face to face. Debs and Paul usually just ask"* (pages 116).

*Ms Potts' laptop – allegation 4.1.24*

38. The Design Team shared an open plan office which could be accessed through two doors. From time-to-time, Ms Potts would plug her laptop into a socket across the walkway because there were no other ones available for her to use. It did not cause the Claimant or anyone else in the team any particular difficulty. However, the Claimant would deliberately enter the office through the door near Ms Potts' desk knowing that she would be obstructed by her laptop lead simply to make a point. This was unnecessary given she could have accessed her desk by an alternative route, as others in the team did.

*Training – allegation 4.1.25*

39. The Claimant was kept up to date with all relevant training opportunities and Ms

Potts was fully supportive of any training that she wanted to attend.

40. On 4 October 2019, Ms Potts announced a training opportunity on Teams as follows:

*“Hi Team! There is capacity for some team members to attend an Adobe event.... which takes place on 17 October in Brick Lane. There is only limited availability and of course we require cover in the office on this day, but please indicate if you’re keen! It’s an early start so apologies to those for whom a 7.00am train isn’t feasible. Rest assured we will play back all the content at the best opportunity”* (page 1050).

41. The Claimant replied ten days later, by which time the places had already been allocated and trains booked. As such, there was no capacity for the Claimant to attend. She did not approach Ms Potts to tell her that a delegate had dropped out the course nor did she ask if she could take their place. Accordingly, Ms Potts did not say ‘no’ in response.

*The Claimant’s dissatisfaction with her role more generally – allegations 4.1.21 & 4.1.22*

42. Due to the open nature of the relationship between the Claimant and Ms Potts, the Claimant had told her that she was not enjoying her role. By way of example, in an email dated 17 October 2019 the Claimant said:

*“the reason I don’t enjoy my job is that it has increasingly been shrunk in terms of skills, responsibility, profile and autonomy in the past three years...on this note, re the EDI job, I have only told you and Chris and I’ll tell Nic when she is back. I haven’t decided yet whether to go for it but have chatted with someone in a similar role, but I’d rather keep it under my hat until I decide”* (page 1136).

43. During their conversations, the Claimant expressed an interest in other areas of design such as copywriting and general creative project management. As such, during one of their catch-ups Ms Potts asked the Claimant if she would like to be a copywriter or a scrum master. Her question was simply in the context of the Claimant’s request to explain to her what jobs might be available to her as part of the wider digital engagement. The discussion was entirely supportive and initiated by the Claimant’s open dissatisfaction in her role.

*Ms Potts’ behaviour towards the Claimant – allegations 4.1.23, 4.1.32, 4.1.33*

44. Ms Potts did not ignore the Claimant which was the position supported by Mr Green when he was interviewed as part of the Claimant’s grievance. He said he:

*“Felt this was far from the truth, CG felt there were times KO didn’t realise MP was on a call or a meeting but would still ask questions, CG witnessed this a few times. Can’t comment on any of the times did not witness any ignoring....”*

*MP was supportive from day one, open forum in the office, always flexible and polite. Efficient and factual when supporting on work, flexible and capable of making informed decisions. KO didn't like MP coming directly to CG or NT, preferred hierarchical approach. Sometimes we may go to MP if KO wasn't available, but always conscious about how KO would respond to that..."* (page 1229).

45. On the return from 2019/20 Christmas break, Ms Potts did not reply to the Claimant's question about having a good Christmas by saying, "yes thanks" and sitting silence for half an hour.
46. Nor did Ms Potts ignore her on her return from sickness absence on 6 February 2020. Rather, she e-mailed her later that day saying, "Hope you're feeling better – and taking it easy!.... How does the end of next week sound to rework? Absolutely fine by me if you rather one of the others picked it up whilst you catching up" (page 1086).

*Ms Potts keeping the Claimant in the loop – allegation 4.1.20*

47. At no point did Ms Potts keep the Claimant out of the loop. On the contrary, Ms Potts went out of her way to ensure the Claimant was kept in the loop where appropriate. By way of example, on 17 October 2019, Ms Potts received a request for work via e-mail. She replied copying in the Claimant saying that she was happy for the Claimant 'to make the call'.
48. Shortly after, the Claimant e-mailed Ms Potts saying she felt: "quite strongly about colleagues asking you if my team can do some work, rather than asking me as they have done for the past 3 years....".
49. Ms Potts replied: "as discussed previously I am in agreement hence forwarding to you. It's simply a case of re-educating stakeholders and colleagues on the process they should follow which Carla I'm sure will now do. If it presents a persistent problem from the same colleague, I can pick it up with them directly" (page 1135).

*The Claimant's absence in November 2019 – allegation 4.1.26*

50. The Claimant had a period of sickness absence between November 2019 and December 2019. On her return, she did not see Ms Potts before she herself was also off sick. The Claimant acknowledged this in a later e-mail dated 11 February 2020 in which she said; "I think I didn't see you and then you were ill yourself so I sent the GP note to payroll" (page 1140).
51. On 27 November 2019, the Claimant e-mailed Ms Potts saying she didn't get a response to an earlier e-mail whilst off sick and Ms Potts replied "Yes! Sorry lovely been a bit manic this week. Hope you feel better soon, keep me in the loop. Hope to see you Monday." (Page 1139).

*Fit note – allegation 4.1.37*

52. On 5 December 2019, Ms Potts was chased by the Respondent's Payroll Services Team for either a self-certification or fit note from the Claimant. Ms Potts e-mailed the Claimant and said *"Hope your starting to feel a little better! FYI the below – if you could send in a fit note asap please"* (Page 1160).
53. The Claimant failed to do so until she was chased again in February 2020. The Claimant said: *"I'll print these off but thought you might like a digital copy to file"*. The Claimant queried whether Ms Potts wanted to send a physical copy to payroll or if she should do it and Ms Potts replied, *"I am happy for you to send to payroll on whichever way will make it to them!"* (Page 1140). Ms Potts did not instruct any particular format.

*The OCD e-mail*

54. On 20 August 2020 whilst the Claimant was on furlough, Mr Green, was working on a barely visible change to one of the 1<sup>st</sup> Respondent's icons. He e-mailed Ms Potts and Ms Hutchby (the Claimant's former line manager) from the Design Team e-mail account with the changes. After a playful exchange, Ms Hutchby commented *"I'm just going to leave you two in your OCD room of joy 😊"* (page 111 supplemental bundle). The e-mail did not relate to, nor was it addressed to, the Claimant.

*The Style Guide – allegation 4.1.28*

55. On 25 February 2020, the Marketing Team held a workshop to try and secure *"buy in"* from different stakeholders within the first Respondent to using its style guide. It was not a workshop to develop the style guide but a measure to ensure a consistent approach across the 1<sup>st</sup> Respondent. The invitees were selected colleagues across the department and wider University who had *"different relationships"* with the style guide and creating content for the 1<sup>st</sup> Respondent (page 1182).
56. The Claimant was not excluded from the workshop. Rather, there was no need for her to attend. However, she was informed that she would have the opportunity to be involved in the development of the new style guide at a later stage of the process.

*Manuscripts and special collections - allegation 4.1.29*

57. The Claimant had a disagreement in relation to manuscripts and special collections ("MSC"), but not with Ms Potts. Rather it was with a colleague who was the Claimant's peer in the Brand Team. The Claimant unfairly criticised the peer for taking a meeting with the MSC team despite being asked to do so by her manager.
58. Ms Potts' only involvement was when the matter was escalated to her by the Marketing Manager. Ms Potts replied by e-mail saying, *"I'll pick up directly with Karen – again – and have reassured Rose she's in the right (as I am sure you are too!)"* (Page 1181).



*Allegation 4.1.33 - did Ms Potts fail to arrange anything with the Claimant verbally despite sitting next to her and having her mobile number and was all communication via e-mail?*

59. Ms Potts had always understood from the Claimant that she wanted communications and work requests in writing. Ms Potts scheduled 1:1 catch ups in the diary which were repeatedly declined.

*The Claimant's direct reports*

60. In February 2020, both Mr Green and Ms Tolliday approached Ms Potts separately to complain that the Claimant was frequently absent from the office, unreliable with work and unresponsive when she was working from home. They were also having to shield phone calls from dissatisfied colleagues whose work was late or missing.
61. Ms Potts met with them both on 25 February 2020 to discuss their concerns which were summarised by Mr Green in the grievance interview at page 1228:

*“CG explained how KO had several managers prior to and after CG’s appointment, KO expressed to CG she had found some of those appointments challenging. Previously relationship with James Tomkinson was distant, KO expressed concern with MP appointment, loss of autonomy and control, verbalised it as being a threat to the norm and to her authority. CG’s observation was at the start KO was professional, but KO became progressively more negative, felt challenged about working processes. Conversations between MP and others witnessed by CG were always professional, felt that MP was helping the team come up to speed and understand the team’s processes. KO’s reactions were negative when explaining processes. Interactions from MP were polite and always open and supportive..... CG expressed 5 years ago KO was supportive, downward trajectory there onwards, she can be very caring and supportive but as a manager she herself would say she is a bad manager and CG would agree. After Kat handed in her notice things when downhill. KO’s absences became a big issue, attendance was erratic, ability to manage when absence spoke for itself, CG explained would have to pick up a lot of work for KO during her absence, from clients, some which weren’t on the system, catalogue of issues, and felt was unable to bring it to the attention of management because was made to feel job was at risk by KO. Had to mitigate KO’s reaction as to external stakeholders. Told MP of concerns over KO of the record one day, only said this of the record because was scared of what would happen... CG explained KO’s presence in the office was intermittent from October 2019 to March 2020, understood there was a period of 6 sickness absence and offered sympathy for this. But there were difficulties getting response or were received intermittently, no consistency in responses... CG explained that KO expected us (a team) to agree with her at all times, CG described a time when he openly disagreed against comment from KO in front of other colleagues, KO didn’t speak to him for 6 months other than the bare minimum of work related*

*exchanges (2016/2017). CG described how he felt KO was awkwardly open/vocal in her critique of some senior colleagues and others generally in conversation.... CG stated that he felt MP had been a breach of fresh air to the team".(Pages1128-1230).*

*The e-mail on 25 February 2020 – allegation 4.1.34*

62. Towards the end of 2019, Ms Potts observed that the Claimant’s attendance in the office had reduced to around once per week and she was failing to keep her informed of her whereabouts on any particular day, making it increasingly difficult to manage the team and projects. The Claimant was also becoming unresponsive to e-mails, frequently declining meetings and failing to make use of Microsoft Teams to stay in touch.
63. Given Mr Green and Ms Tolliday’s feedback in addition to her own observations, Ms Potts took advice from HR who recommended a basic expectation setting meeting with the Claimant.
64. Ms Potts sent a meeting request on 25 February 2020 and the Claimant declined it saying *“I don’t know what this is regarding? However, I WFH today. Do you want to suggest another time please? And if you could give me an indication of what the meeting is about so that I can be prepared? Thanks.”* (page 1164).
65. Ms Potts replied saying, *“Working from home (outside of any predetermined regular arrangements) needs to be arranged in advance with me as your Line Manager – please ensure you do that in future. Additionally, colleagues working from home should be available for meetings via MS Teams – let me know if that presents an issue for you. Regarding the meeting, I want to catch up with you about the style guide work. I’ll put another event in on Thursday morning”* (page 1164).
66. The Claimant replied as follows:

*“I am sorry if there has been any confusion. I WFH on a Tuesday or a Wednesday – as does Rob, and have done for over a year. It is useful to have a set day however we do switch between if necessary to be flexible for colleagues needs and to accommodate meetings. Rob had to be in the office today so I am WFH.*

*However, it has also been the case since my last OH disability review that I can WFH if I am in pain due to fibromyalgia and arthritis as how fibromyalgia presents can vary from day to day. Unfortunately, WFH due to unpredictable pain doesn’t allow for advanced notification. When this happens, like yesterday I let me team know as soon as I wake. I am not usually able to make a phone call or log on to access my emails, I just text them. If you’re happy for me to have your mobile number I will add you in future when that happens....*

*If I plan to WFH outside of Tuesday or Wednesday in future I will let you know.*

*Re MS meetings, I have never used it so I have no idea, sorry I am in regular contact with Nic and Chris via phone, WhatsApp, email and Trello when I WFH but generally, if I have a meeting, I just switch my day, in the same way that Friday is my designated day off, but I would change that to accommodate meetings, training courses, open days etc as required” (page 1164/5).*

67. Ms Potts took advice from HR on the Claimant’s e-mail and responded as follows:

*“I appreciate your being flexible to accommodate pre booked meetings, that can be really helpful. However, as the working from home arrangement is in place to accommodate a medical condition, it should not be dependent on Rob’s working patterns.*

*I have spoken with Alan; Employment Relations Advisor and I am – of course – happy to make any allowances as recommended in your latest Occupational Health Report provided that’s shared with me. Could you share a copy with me please?*

*Regarding MS Teams, we need colleagues working from home to be online and available for Teams chats and video conferencing so that work isn’t held up as a result of remote working. I can run through the programmes with you in our next one to one so that you can be online and ready to be available to me, the team and other colleagues when working from home.*

*As with all flexible working arrangements, this remains under review and we need to ensure it works for continued service delivery for colleagues and stakeholders”. (Pages 1163–1165).*

68. The Claimant did not respond to this e-mail. Ms Potts chased on 3 March 2020 and again on 9 March 2020 requesting a copy of her latest Occupational Health Report. She said:

*“Without this report I am unable to understand and follow recommendations on how we can best support you – if you are unable to send this report then I will request a new Occupational Health appointment for you.*

*In addition, I’ll be setting up an expectation – setting meeting to discuss email response sickness, availability during remote working, and meeting attendance. I am happy to have a colleague from the Employee Relations team to facilitate that conversation if you prefer – can you please let me know either way” (page 1165).*

69. The Claimant replied that afternoon and explained the delay was because she was seeking advice. She referred to her working from home arrangement as a ‘protected arrangement’ and said that:

*“While the OH report is relevant, there has been no change in my condition or working practices and there is no need to revisit this. As you know I have had*

*a high turnover of Line Managers and it is unreasonable to request evidence of an acknowledge condition when the only change is handover between managers. I would also like to point out that I was advised by OH to share the report on a strictly need to know basis as it is hugely personal. Am I sure James has explained context to you? For now, I do not wish to share my OH report – the need for the agreed reasonable adjustments has not changed and I see no need to revisit this.... There has never been any suggestion that I am not available when WFH nor of email unresponsiveness. Your meeting invite would appear to suggest these are issues. I do feel I am being unfairly singled out and, pending further advice from my Union, I have declined this request” (page 1166).*

70. The Claimant’s response caused Ms Potts concern because she had made a number of false claims. In particular, i) the Claimant claimed that she worked from home on one day per week but the reality was that she worked from home much more than that: ii) she said that her working pattern was not dependent on her husband contrary to her e-mail of 25 February 2020: iii) she said she was not required to specify a day to work from home, but then claimed it would be better for her team if she tried to stick to a set day: iv) she said that she notified colleagues with as much notice as possible of working from home but had never done so to Ms Potts or her team: v) she referred to her working from home as a protected arrangement whereas the understanding was that the working pattern was not necessary on health grounds; and, vi) she said there had never been any suggestion that she was not available despite it being raised by Ms Potts on numerous occasions.
71. Accordingly, Ms Potts forwarded the e-mail to Ms Anderton, and it was agreed that given her seniority, Ms Anderton would take over the Claimant’s line management thereon in. Thereafter, Ms Potts relationship with the Claimant improved and Ms Potts continued to remain friendly, helpful and professional to the Claimant at all times.

*3 March 2020 - allegation 4.1.35*

72. On 3 March 2020, Ms Potts had a scheduled catch-up with another direct report but could not see him in the office. She asked the team generally if he was in that day, off or working from home. When she was told that he was not in, Ms Potts said: “*never mind, I’ll e-mail him later*” She was merely checking to see if someone knew where he was, rather forming an opinion about it as he may well have been in another room or in a meeting with students.
73. The Claimant e-mailed herself a note of Ms Potts’ comment despite this being an innocuous matter.

### **Facts relevant to the allegations against the 2<sup>nd</sup> Respondent**

*Ms Anderton’s e-mail to the Claimant dated 11 March 2020 headed ‘review of your working arrangements’ – allegations 4.1.7, 4.1.8, 4.1.38, 4.1.16, 4.1.18*

74. On 11 March 2020, Ms Anderton emailed the Claimant confirming that she would now deal with the working arrangements issue and take over her line management in the short term until it was resolved.
75. Ms Anderton responded to each of the points raised by the Claimant in the 9 March 2020 e-mail. Her comments were fair, measured and in line with the 1<sup>st</sup> Respondents policies. She explained to the Claimant that if she was unable to work because she was unwell, she should take the day as sick leave. Also, MS Teams was the preferred communication channel, and the Claimant was expected to use it for all remote meetings in future. She also asked the Claimant to move all communications from WhatsApp to Teams Chat (Page 675).
76. Ms Anderton confirmed that a review meeting would take place to reset and re-establish expectations and also discuss the Occupational Health Report. However, this meeting did not take place because of the first lockdown which was announced on 23 March 2020.
77. At no point did Ms Anderton threaten to remove the Claimant's adjustments. In fact, she confirmed the working from home arrangement on 2 April 2020 following a conversation they had had the previous week (page 389).

*The Teams meeting on 2 April 2020 and follow-up e-mail - Allegation 4.1.9,*

78. Ms Anderton was keen to move from Trello (the Claimant's preferred work stream planner) to Office 365. During a Teams meeting on 2 April 2020, she had asked the Claimant to "*reinvestigate*" MS Planner but also to run discovery on other options which "*must be visible to [her] and must be zero cost!*".
79. The Claimant was asked to draft a proposal on a system to use and how best to manage job numbers, requests and workflow including a review of online forms. The Claimant's view was that this was too big a job and she thought that Trello was better than Planner, in part because she had introduced it. She did not raise her fibromyalgia during the call. Ms Anderton followed up the call with an e-mail reflecting what they discussed and with the action points.
80. In the same email, Ms Anderton confirmed that design work on certain events would stop for the time being and asked the Claimant to draft a holding email to relevant stakeholders to notify them that work would be suspended. Ms Anderton said, "*please ensure you run this by me before sending out*" because the email in question was quite contentious. It was Ms Anderton's usual practice to review sensitive communications before they were sent to stakeholders and the Claimant did not challenge her request at the time (page 388).

*Cost saving initiative April 2020*

81. At a senior leaders' meeting on 1 April 2020, it was announced that the first Respondent needed to take swift action to protect its finances. All departments were asked to find permanent savings of 15% and proposals were RAG rated (Red,

Amber, Green).

82. Ms Anderton identified the following in the Design Team to achieve the required savings: i) one vacant role which could be deleted, and ii) one further redundancy on the back of a proposal to reduce print and design support for in-house events more generally. She had not given any thought to who would be made redundant at that time (pages 385–386).

*Furlough – allegation 4.1.11*

83. Given the impact of covid and the first lockdown, the Design Team was suddenly without work. A number of immediate projects had been cancelled, alongside the abrupt cessation of all on-campus events for which internal design support was typically sourced.
84. When the furlough scheme was introduced, Ms Anderton and Ms Potts identified which roles were most affected by the change in circumstances alongside business and individual needs. The department needed reduced but full-time cover and, as such, the decision was made to furlough the Claimant and Ms Tolliday who both worked reduced hours. Mr Green was full-time and was able to provide cover five days a week, so he was selected to remain in work. The concept of flexi furlough had not yet been introduced.
85. Accordingly, Ms Anderton telephoned the Claimant to inform her that she was being furloughed and the reasons for it and read from a script provided to her by a HR. She explained to the Claimant that she was not to do any work including emails. She also advised the Claimant not to check or look at emails because there was a risk that she would get pulled into a work “vortex” when she should not be working. The Claimant confirmed that her preferred method of keeping in touch was email and phone calls.
86. Ms Anderton did not tell the Claimant during this call that furlough was optional because firstly, she was not aware that it was and secondly, it was not in the script provided to her by HR.
87. Ms Anderton asked the Claimant not to contact the team until she had spoken to everyone.
88. Ms Anderton informed Ms Tolliday the same day that she was also being furloughed using the same script. Ms Anderton also texted the Claimant afterwards to advise her that she could contact the team.
89. In respect of accessing work accounts, it was subsequently clarified by Ms Anderton that: *“no reason Nic and Karen can’t log into work accounts. However, we have agreed they will keep out of emails to avoid being sucked into a work vortex. Teams Chat and video might be good channels as you can keep the conversation social. No rules that they can’t use work tools, rather that they can’t do work – but keeping in touch is good and to be encouraged on all levels!”* (Page

31 additional bundle).

90. Whilst the Claimant was furloughed, she had access to the 1<sup>st</sup> Respondent's policies and procedures online in the usual way. This included information and FAQs in respect of furlough and covid more generally. There was no specific pastoral/counselling support offered to those who had been furloughed.
91. Despite the agreement not to access work emails, the Claimant did so in any event to send work emails to herself in preparation for her future grievances.
92. Ms Anderton kept in touch with the Claimant by the agreed format of telephone calls and email.
93. Ms Anderton did not advise the Claimant about a secondment scheme introduced by the 1<sup>st</sup> Respondent because it was for clinicians and those with technical skills in health care and the Claimant fell into neither category. The Claimant had access to details of the Scheme on the 1<sup>st</sup> Respondent's intranet anyway.
94. Ms Anderton did not invite the Claimant to volunteer for the clearing hotline or Student Enquiry centre because there was no need for her to do so.

*Ms Tolliday's return to work from furlough – allegation 4.1.11 (v)*

95. In early June 2020, Ms Anderton took the decision to un-furlough Ms Tolliday because she was not paid as much as the Claimant and could cover Mr Green's upcoming annual leave. She was also feeling very isolated on furlough.
96. On 15 June 2020, the Claimant emailed Ms Anderton because she had not received any official furlough information. She also said that she was surprised to learn Ms Tolliday had been un-furloughed. Ms Anderton replied and said that she was sure they had spoken about Ms Tolliday coming back on their call on 8 June 2020. She said: *"I had agreed it earlier that week with Maddy to cover Chris's holiday and it was on my list to cover in the call. I am sorry that I was not clear. Re your return to work. At the moment we are managing with one design team member only, Chris returns from leave the week after next. So, there is no immediate need for you to return from furlough..."* (pages 465-466).
97. At the bottom of the email, Ms Anderton asked the Claimant whether 29 June 2020 worked for their next keeping in touch call. The Claimant confirmed that she could not attend but gave no explanation why not. She simply said: *"Monday isn't possible, sorry. Tuesday or Wednesday would be better"* (page 477).
98. Ms Anderton asked HR to send the Claimant her furlough paperwork.
99. Whilst the Claimant was on furlough, she undertook unpaid work for two charities. She did not want to be un-furloughed and confirmed this in an email dated 14 August 2020 in which she said:

*"Re Nicola's question – did I want to be unfurloughed? If there is a business*

*case to be unfurloughed then I will return as needed. However, I was advised that although I could not do any paid work during furlough, I could do voluntary work. I am actually doing some voluntary work for two charities.... I would of course fit that in around my paid UON work if I needed to be unfurloughed. However, if it is not necessary (and I assume not since I have not been instructed to return) I would prefer to fulfil my obligation to the charity and review then..." (page 563).*

*Redundancy – allegations 4.1.13, 4.1.15 and 4.1.12*

100. Ms Anderton and other senior leaders were instructed that the savings recognised as part of the 15% reduction process needed to become permanent. In order to realise those savings, Ms Anderton undertook a full evaluation of the department's existing activities and assessed whether they could remain justified. She looked at short-term issues and measured them against long-term opportunities and requirements.
101. Even prior to the pandemic, the use of printed materials had been in decline for some time with a move to digital materials fuelled by concerns over sustainability and environmental impact. The 1st Respondent has not printed its prospectus or course brochures since February 2020.
102. The changing behavioural trends towards a greater use of digital channels had been accelerated by the pandemic. In addition, increased use of templated resources for internal and digital assets had also reduced demand for in-house design work. The change in behaviours, demand and design delivery offered the opportunity to restructure for *"a leaner and more efficient operating model for delivering [the 1st Respondent's] design needs"* (page 538).
103. Ms Anderton designed a restructure of the Design Team which recognised the reduced activity for print and, therefore, no requirement for specific management of the print function in the future. Ms Tolliday and Mr Green would report to Ms Potts in her role as Head of Digital and Content. As such, the Claimant's role was identified as at risk of redundancy.
104. Ms Anderton also proposed that the vacant role remain unfilled and produced a full business case setting out the rational explaining that:

*"This proposal seeks to address the declining need for in-house design resource to create printed materials. It will be the case that there will remain a requirement for some in-house design for print, but that this will (and already has begun) to significantly diminish. This is therefore proposed to create a smaller design team function that is better integrated with the wider digital and creative team where print is used in a smaller number of cases to support an increasingly digital approach to communication and marketing. A small function and one that is integrated more effectively in the larger digital and creative team requires fewer people in these design for print roles and does not require a specific management function for this reduced activity. It is*



*therefore proposed to make the following two roles redundant: Creative Manager APM for Creative Officer APM3 (currently vacant)” (pages 537-540).*

105. Ms Anderton’s proposal was signed off by the Director of HR.
106. Consideration was given to the pool for selection, but no other roles had the same or similar responsibilities as the Claimant. Accordingly, she was in a pool of one.
107. The first consultation meeting with the Claimant was scheduled to take place on 29 June 2020. However, when Ms Anderton e-mailed her on 18 June 2020 and asked her if she was available for a keeping in touch call on the 29<sup>th</sup>, the Claimant said she would not be available without providing any explanation (paragraph 97 above).
108. Ms Anderton took advice from HR and emailed the Claimant to say that if she was not available on 29 June 2020, she would assume she was taking it as leave (page 476). Subsequently, Ms Anderton accidentally copied the Claimant into her e-mail correspondence with HR thereby inadvertently alerting her to the fact that a redundancy consultation was about to commence (page 486). Ms Anderton quickly apologised for this error (page 478).
109. On 26 June 2020, the Claimant replied to Ms Anderton’s e-mail about taking leave, explaining that she could not attend the meeting on the 29<sup>th</sup> because she a hospital appointment and was unsure if it was going ahead or not (page 495).
110. Ultimately, the first consultation meeting took place on 9 July 2020 and Ms Anderton read from a script. Notes were taken (pages 517-518 and 457-460).
111. After the first consultation meeting, the Claimant emailed questions after having spoken with her Union rep which were duly answered (pages 544-545 and 543-545).
112. The Claimant’s primary concern was that she had been placed on furlough as a precursor to redundancy. She made a number of complaints about the furlough process, including the fact that she had not been told it was optional. It was her view that the decision to make her redundant was a foregone conclusion. She challenged the 15% reduction exercise in April 2020 and Ms Anderton confirmed that there had been no clear plans in place in terms of redundancies at that time as she had not worked on the business case at that stage (para 35 NA’s statement).
113. During the second consultation meeting on 11 August 2020, Ms Anderton apologised for not telling the Claimant that furlough was optional. She explained that she had not understood it to be optional, but that everybody was operating under immense pressure at the time. The meeting more generally was very difficult and made more difficult by extreme heat on the day. The Claimant refused to appear on camera which made Ms Anderton feel uncomfortable. At one point Ms Anderton laughed nervously at something that was said. It was simply a nervous

reaction to the situation and nothing more than that.

114. After a lot of to-ing and fro-ing, Ms Anderton carefully considered all matters raised by the Claimant and her representative but decided to implement her proposed structure. The Claimant's disability, and/or other impairments, played no part in the decision to make her redundant.
115. The final consultation meeting took place on 7 September 2020 and a script was prepared in advance (pages 588-589). The Claimant did not ask any questions during this meeting.
116. In the meantime, the Claimant was placed on the redeployment register in accordance with the 1st Respondent's Redundancy Policy and advised of the redeployment process (pages 551-552). She did not apply for any roles whilst on the register, even when Ms Anderton forwarded a suitable vacancy to her to ensure she had seen it.
117. The decision to make the Claimant redundant was confirmed to her by way of letter dated 7 September 2020 (pages 595-597). The Claimant was advised of her right to appeal which she duly exercised but her appeal was not upheld (pages 881-888). Her effective date of termination was 7 December 2020.

*The Claimant's grievances*

118. On 11 September 2020, a matter of days after her redundancy was confirmed, the Claimant lodged a grievance against Ms Anderton alleging matters which now form a part of these proceedings (pages 601 -608). Most of the allegations had not been raised earlier and appear to be retaliatory in nature after her selection for redundancy.
119. The Claimant's grievance was dealt with alongside her appeal against redundancy and fully investigated. It was upheld in part, but those elements are not advanced as allegations of discrimination in these proceedings (pages 881 – 888). The Claimant appealed the findings on 11 January 2021 (pages 917 – 943). Again, some elements were upheld but do not feature as allegations in these proceedings
120. The Claimant also submitted a grievance against Ms Potts on 9 November 2020 and the allegations were not upheld (pages 740-743, 1347 – 1363, 1383 & 1369 – 1370).

*Ms Anderton's first meeting with the Claimant – allegation 4.1.1*

121. When Ms Anderton met the Claimant for the first time, she asked about her professional background simply as a means to get to know her. Ms Anderton did not suggest that the Claimant was not qualified for her role either explicitly or impliedly. Furthermore, she did not say that she would expect someone in the Claimant's role to dress more creatively and have a more creative workspace.

122. Rather, it was the Claimant who raised her own sense of dress and compared herself unfavourably to Ms Anderton. Ms Anderton felt extremely uncomfortable and in reply commented on the Claimant's jewellery. Ms Anderton raised the issue of workspaces more generally in their conversation because she thought the whole Design team should have a better layout, something she duly implemented.
123. The Claimant told Mr Tomkinson her perception of the meeting in August 2017 and on 18 April 2018, namely that Ms Anderton felt that she was not qualified to do her role. However, she made no complaint relating to the Equality Act 2010.

*The e-mail dated 19 April 2019 – allegation 4.1.2*

124. On 18 April 2018, Mr Tomkinson conducted a formal attendance review meeting with the Claimant in the presence of ER. As above, the Claimant mentioned her first meeting with Ms Anderton but did not suggest any breach of the Equality Act.
125. Mr Tomkinson found the meeting somewhat difficult and reported the same to Ms Anderton. Accordingly, Ms Anderton sought advice from HR and described Mr Tomkinson's meeting with the Claimant as quite challenging and also explained that there was quite a history with Claimant. Ms Anderton later explained as part of the grievance process that:

*"I reported to Kerry that James was finding the return to work process with Karen difficult and that he wanted to be sure that relative HR newcomer [HH] was up to speed. I believe the reason Kerry asked me to seek more senior HR advice was because she had noticed Karen had a "history" of raising informal and formal grievances. In Karen's grievance against [NM], Karen dropped the grievance halfway through the mediation session citing that her problem was not in fact with [N] but with the Kerry (I do not know the substance of the grievance with [N] or what any issues with Kerry might have been). Kerry was therefore cautious and wanted to ensure that we followed our correct procedures in relation to Karen's return to work... As we remember the author John Le Carre his words capture well how I feel about this case "by repetition, each lie becomes irreversible fact upon which lies are construed." I feel that the legitimate actions taken by me (and colleagues) have somehow been twisted and distorted to appear more than they are. With this perspective, every word, remark or action is a perceived slight, whereas in fact I have very little interaction with Karen until recently and was simply setting up a meeting with HR as requested by my then line manager." (page 819).*

*Allegations 4.1.4 and 4.1.6*

126. Ms Anderton did not sit next to the Claimant in October 2019 and talk her through how to design her work and road map in front of her team, nor did she leave the Claimant to work on it on her own because she needed it the next day.
127. On 8 January 2020, Ms Anderton asked the Claimant to provide a very simple

PowerPoint presentation of twelve slides and the Claimant prepared drafts that were not what Ms Anderton was looking for. Accordingly, Ms Anderton went to speak to the Claimant directly and said, *“I am clearly not explaining myself very well”*. She knelt on the floor so they were at the same height and took the blame for not adequately articulating what she wanted. Thereafter, it took the Claimant several days to complete the task when it could have been done in much less time.

*The training course in November 2017 – allegation 4.1.5*

128. On 3 November 2017, Ms Anderton attended a training course with the Claimant called *“The Good, The Bad and The Ugly”*. She did not lose her temper or act in any way negatively at any point during the course.

*The keeping in touch call on 6 May 2020 – allegation 4.1.10*

129. The Claimant commenced a period of sickness absence on 4 May 2020. On 6 May 2020, the Claimant was still off sick and emailed Ms Anderton that morning to confirm the same. Ms Anderton replied to that email saying: *“I will give you a call later to check how you are and so you can handover any urgent projects”* (page 428).
130. Ms Anderton called the Claimant as promised and asked how she was, prompting the Claimant to over-share information about not only her mental health, but also other medical issues. She also talked about the death of friends of friends.
131. Ms Anderton was sympathetic and responded appropriately but did not grill the Claimant at all. The Claimant was not upset during the call, and they went on to discuss work related matters. Ms Anderton made brief notes of the meeting thereafter (page 446). The Claimant subsequently confirmed to Ms Anderton that she had a tendency to over-share. At their catch up the following week, the Claimant said that she was feeling better *“after last week’s wobble”* (page 430).

*Allegation 4.1.17*

132. Ms Anderton cannot recall if she sent an occupational health report to HR and there is no evidence to suggest she did. If she did, it was to seek their advice on its contents.

**Disability**

133. The Claimant had provided remarkably little medical information in support of her contention that her OCD and/or GAD amount to disabilities. She has provided one page from her medical records in which there is no reference to GAD at all. The only reference to OCD is that it is an *“active”* problem for which she has had CBT and prescribed clomipramine. Any reference to anxiety has been redacted.
134. On 23 April 2018, the Claimant attended an occupational health assessment in which the nurse set out in the history sheets that the Claimant:

*“had GAD and OCD – is being referred for reassessment. OCD in childhood – no routines etc necessary but states she has some quirks. No impact on usual life and states that friends/family don’t know in general. GAD thoughts about children, states no working impact”* (pages 248-249).

135. In her impact statement, the Claimant explains that she was officially diagnosed with GAD in 2003 and OCD in 2004. She describes how the impairments impact every single minute of every day from the minute she wakes up: *“Every interaction I have with people, every experience and situation, the clothes I wear, the cutlery and crockery I use, the food I eat, etc”*.

136. She also says that: *“every day is like entering battle with my own brain, with a running commentary/a monologue reminding me of what might happen if I dare skip or ignore one of my rules. It is absolutely exhausting. Sometime my head feels it is full of bees, of like the interference you get on old tv sets....”* (Page 396-401).

**The Law**

137. Section 6 EQA provides:

(1) A person (P) has a disability if—

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

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

.....”

138. Section 13 EQA provides:

“(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.

.....”

139. Section 23(1) EQA provides:

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

140. Section 27 EQA provides:

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

- (a) B does a protected act, or
  - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
- (a) bringing proceedings under this Act;
  - (b) giving evidence or information in connection with proceedings under this Act;
  - (c) doing any other thing for the purposes of or in connection with this Act;
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (2) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (3) This section applies only where the person subjected to a detriment is an individual.
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.”

141. Section 123 EQA provides:

- “1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
  - (b) such other period as the employment tribunal thinks just and equitable.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
- (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
  - (b) such other period as the employment tribunal thinks just and equitable.

(4) For the purposes of this section—

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

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

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

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

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

142. Section 136(2) Equality Act 2010 (“EQA”) provides:

(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.

143. Section 13 of the Employment Rights Act 1996 provides:

“(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

- (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

.....”

144. Section 98 of the Employment Rights Act 1996 (“ERA”) provides:

“(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) A reason falls within this subsection if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

.....

(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.

145. Section 139 ERA provides:

“(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—  
 (i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(c) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

.....”

146. We have been referred to the following cases:

- ***Taylor v Ladbrooks Betting and Gaming Ltd [2017] IRLR312:***
- ***Crewick Shank v VAW Motorcase Ltd [2002] IRLR204:***
- ***Aziz v Trinity Street Taxis Ltd & others [1988] ICR534, CA***
- ***Shamoon v Chief Constable of the RUC [2003] IRLR285:***
- ***Derbyshire and Ors v St Helens Metropolitan Borough Council & Ors [2007] ICR841, HL:***
- ***V Nagaragan v London Regional Transport [1999] ICR877, HL:***
- ***R (on the application of E) v Governing Body of JFS and the admissions appeal panel of JFS and ors [2010] IRLR136, SC:***
- ***Ayodle v City Link Ltd [2008] ICR748:***

- ***Commissioner of the Police of Metropolis v Hendricks [2003] ICR530:***
- ***Soujrin v Haringay Health Authority [1992] ICR650:***
- ***Barclays Bank v Kapur [1991] 2AC35,HL:***
- ***Robertson v Becksley Community Centre T/A Leisurelink [2003] IRLR434,CA:***
- ***Abertawe Bro Morgannwg University Local Health Board v Modgan [UKEAT/03/05/13/LA, 18 February 2014]:***
- ***Rathakrishnan v Pizza Express Ltd [2016] IRLR278.***

147. We have also been referred to the “*Guidance on matters to be taken into account in determining questions relating to the question of disability (2011)*”.

### **Submissions**

148. Both parties provided written submissions and supplemented them orally. They are not set out in full, but we have considered all of the points made and the authorities relied on even when no specific reference is made to them.

### **Conclusions**

#### **Disability**

149. Given our findings below, our deliberations on disability are academic but we document them for completeness.

150. There is no dispute that the Claimant’s fibromyalgia amounts to a disability, so it is only necessary for us to determine whether the Claimant was a disabled person by reason of OCD and GHD at the material time.

151. We have had regard to the medical evidence which is severely lacking. Indeed, the only reliable medical evidence we have is the occupation health report dated 23 April 2018 which, in essence, states that neither impairment has a substantial adverse effect on the Claimant’s ability to carry out normal day-to-day activities. Rather, it says the opposite.

152. The Claimant says otherwise in her impact statement, but we do not find her evidence in this regard credible. There is scant reference to OCD and GHD in the contemporaneous evidence in the bundle and we do not accept the Claimant’s evidence before us, given our concerns about her credibility more generally. We also formed the view throughout the course of the hearing that the Claimant relied on or used her impairments to suit.

153. Having considered the evidence before us, we do not accept that the Claimant was a disabled person by reason of GHD and OCD at the material time. It is for

the Claimant to prove that she is a disabled person, and she has not met the low threshold of establishing disability.

Unfair dismissal

154. We found Ms Anderton to be an entirely credible witness. We are satisfied with her evidence that the 1st Respondent was experiencing immediate losses and projected long-term losses in consequence of the pandemic which is evidenced in the bundle. This was on the back of already changing behaviour and greater use of digital platforms pre-pandemic.
155. We also accept Ms Anderton's explanation about the future of the Design Team given the move away from printed materials which had been accelerated by the pandemic. Given the i) reduced requirement for that work more generally and for a manager to oversee it and ii) the fact that the Claimant's management responsibilities could be absorbed by Ms Potts, we are satisfied that the requirements of the 1<sup>st</sup> Respondent for employees to carry out work of a particular kind had diminished or were expected to diminish in accordance with section 139(1)(b)(i) ERA.
156. In terms of the Claimant's selection for redundancy, we are satisfied that the decision to place her on furlough was not a precursor to her redundancy. Rather, Ms Anderton and Ms Potts made a rational and reasonable decision to keep Mr Green at work, being the only full-time employee to ensure that they had cover five days a week. At the time, the concept of flexi-furlough had not been introduced so this was the only way to ensure the required cover.
157. We are also satisfied that the decision to place the Claimant in a pool of one was reasonable. There were no other roles with the same/similar responsibilities and, as such, there was no one else appropriate to pool her with.
158. Whilst it is unfortunate that the Claimant was copied in on Ms Anderton's initial email by alerting her to a consultation meeting in advance, we do not find that this undermined the reasonableness of the procedure that followed thereafter. The Claimant was given the right to be accompanied at the various consultation meetings and there was a full and thorough consultation with her. No question went unanswered but, ultimately, Ms Anderton took the decision to implement her proposal and make the Claimant's role redundant. We are satisfied that the Claimant's disability and/or her other impairments played no part in Ms Anderton's decision to make her redundant, nor there was any other reason behind her decision.
159. The Claimant was placed on the redeployment register but made no effort to apply for alternative roles. Ms Anderton even forwarded an appropriate vacancy, but she chose not to apply.

160. We are satisfied that the decision to dismiss the Claimant by reason of redundancy fell within the range of reasonable responses of a reasonable employer. Accordingly, her claim of unfair dismissal fails and is dismissed.

Direct Discrimination

161. It is for the Claimant to prove on the balance of probabilities facts from which we could conclude, in the absence of any other explanation, that the Respondent/s committed an act or acts of discrimination. If the burden of proof shifts to the Respondent, it is required to prove, on the balance of probabilities, that the Claimant's treatment was in *no sense whatsoever* because of her disability.

162. An alternative approach is to consider the reason why the Claimant was treated as she was.

163. We are mindful that it is rare for employers to admit discrimination or for there to be overt evidence of the same and it is, therefore, appropriate to consider whether there is any element of unconscious bias in play. There must be "*something more*" that simply a difference in treatment within an appropriate comparator, which in this case is a hypothetical comparator.

164. The test for whether the treatment complained of amounts to less favourable treatment is objective although we must take into account the Claimant's perception of the effect of the treatment upon her.

165. Overall, we considered the Claimant's claims against the Respondents, more particularly the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, to be spurious. Ms Potts aptly describes the Claimant's perception on matters as a retrospective mischaracterisation of their relationship whereby she has twisted what were positive interactions and interpreted them negatively after the event.

166. We also agree with Ms Anderton that legitimate actions taken by her have been twisted and distorted by the Claimant and that every word, remark or action is a perceived slight. Ms Anderton also asserts that the Claimant has been harbouring a grudge against her. Based on the lack of evidence in respect of each allegation against both individual Respondents, this is a reasonable conclusion for her to reach.

167. We deal with each allegation in turn starting with the 3<sup>rd</sup> Respondent.

Allegation 4.1.19 - did Ms Potts fail to complete written briefs?

168. We agree with the Respondents' submission that there is no evidence of a single occasion where Ms Potts failed to complete a written brief. Rather, Ms Potts was fully supportive of the requirement for written briefs.

169. In any event, the Claimant e-mailed Ms Potts on 23 July 2019 explaining that written briefs were not always required when instructions were coming from within the design Team so, even if Ms Potts did not complete a written brief, it was because the Claimant told her that she did not need to.

170. Accordingly, we are satisfied that there is no evidence that Ms Potts failed to provide written briefs and the allegation fails.

171. Allegation 4.1.20 - did Ms Potts ask the Claimant's team to do things for her directly cutting the Claimant out of the loop?

172. We are satisfied that there is no evidence of Ms Potts cutting the Claimant out of the loop. On the contrary, when the Claimant raised with Ms Potts that she had been cut out of the loop by an individual outside the Design Team, Ms Potts ensured she was included (pages 1135-1136) and committed to pick up directly with a colleague who had bypassed the Claimant.

173. In the absence of any evidence that this allegation occurred, it must fail.

Allegations 4.1.21 and 4.1.22 - did Ms Potts asked the Claimant if she would like to be a copywriter and scrum master?

174. Ms Potts readily accepts that she asked the Claimant whether either role would be of interest to her. The reason why she asked was because the Claimant had told her that she was not enjoying her job and wanted to understand what other roles might be available to her. Ms Potts was simply being supportive and trying to assist the Claimant.

175. In any event, we are satisfied that this cannot amount to less favourable treatment given Ms Potts was responding to the Claimant's assertion that she was not enjoying her role.

Allegations 4.1.23, 4.1.32, 4.1.33 – did Ms Potts do the following things? Ignore the Claimant at the start and the end of the day; fail to acknowledge her on 6 February 2020; and, fail to arrange anything verbally with her

176. There is simply no evidence that Ms Potts failed to acknowledge the Claimant on any occasion or failed to arrange anything verbally with her. No evidence was found during the internal grievance process either.

177. The allegation that Ms Potts failed to arrange anything verbally with the Claimant is somewhat vague and confusing. On the one hand she says that she needed everything in writing (and indeed alleges Ms Potts discriminated against her by not completing written briefs) and yet alleges discrimination in saying Ms Potts did not arrange anything verbally with her. Furthermore, on the Claimant's own evidence she was avoiding Ms Potts towards the end of her line management thereby rendering verbal arrangements somewhat difficult. She also rejected or ignored meeting requests from Ms Potts. These opposing allegations cannot be reconciled.

178. In fact, it is evident that Ms Potts door was always open to the Claimant as per page 1076 (para 35 above).

179. We are entirely satisfied that there is no evidence to support these allegations and, as such, they must fail.

Allegation 4.1.24 - did the third Respondent plug in her laptop to block the Claimant?

180. Ms Potts readily accepts that she plugged her laptop in across the walkway because there were no other sockets available. This was not less favourable treatment because any inconvenience (which was at worst having to use an alternative door to enter the office) applied equally to everyone. The Claimant would deliberately enter the office to unnecessarily prove a point to Ms Potts when she could have used the other door like the rest of her team.

181. We are satisfied that this allegation does not amount to less favourable treatment and, even if it did, the reason for the 'treatment' was the lack of available sockets for Ms Potts to use and nothing to do with the Claimant's disability. Accordingly, the allegation fails.

Allegation 4.1.25 - did Ms Potts deny the Claimant the opportunity to attend a conference in London in October 2019?

182. We are satisfied that Ms Potts did not deny the Claimant the opportunity to attend the conference. The Claimant applied to attend the course late in the day by which time the places had already been allocated and trains booked.

183. The Claimant accepted in evidence that there was no requirement on Ms Potts to wait for the Claimant to reply. She was given the same opportunity to attend as those in her team. As such, there was no less favourable treatment. In any event, the reason why the Claimant could not attend the course was because she replied too late to Ms Potts' invite.

184. The Claimant has not produced any evidence that would lead us to believe that a delegate dropped out of the course or Ms Potts told the Claimant could not take their place. We prefer Ms Potts' account of this allegation in its entirety, namely that a delegate did not drop out or if they did, Ms Potts was not made aware of it by the Claimant or anyone else. Accordingly, the allegation fails.

Allegation 4.1.26 - did Ms Potts fail to acknowledge the Claimant on her return during an absence from November 2019 to December 2019?

185. We are satisfied on the evidence that Ms Potts did not fail to acknowledge the Claimant. Rather, on the Claimant's own documentary evidence, we are satisfied that Ms Potts was ill when the Claimant returned. As such, she could not fail to acknowledge the Claimant in the way she alleges, and the allegations fails.

Issue 4.1.27 – did Ms Potts speak to the Brand team about an instruction during the Claimant's sick leave in December 2019 and refuse to discuss this with the Claimant?

186. We have not made any findings of fact on this allegation simply because the Claimant failed to provide a coherent explanation of what the allegation is. Ms Motraghi was able to draw the basis of it from her through cross-examination which appears to be that on her return from sick leave, she learnt about an incident between the Design team and the Brand team regarding the use of the colour yellow as part of the brand.
187. The Claimant said that her team had given her some information about the incident but when she spoke to Ms Potts about it, Ms Potts said '*she had talked to Denise and sorted it and it doesn't need to be discussed*'. This caused the Claimant to go back to her team and tell them that she did not have the answers.
188. Whilst still not a particularly coherent allegation, we agree with Ms Motraghi that as understood, no-one in the Design team had any confirmation about the use of yellow in the brand so there cannot have been any less favourable treatment. As such, the allegation must fail.
189. Allegation 4.1.28 - did Ms Potts fail to include the Claimant in a working group to review the style guide?
190. We are satisfied that the Claimant was not excluded from a working group, rather there was no requirement for her to attend. The purpose of the workshop was to secure "*buy in*" from stakeholders who were not already "*brought into*" the concept of the style guide (and the Claimant was). As such, this cannot amount to less favourable treatment and, in any event, the reason for her 'exclusion' was not because of her disability and the allegation fails.
- Allegation 4.1.29 - was there a disagreement between the Claimant and Ms Potts in relation to the manuscripts and special collections?
191. We are satisfied that there was no disagreement between the Claimant and Ms Potts. Rather, the disagreement was between the Claimant and "Carla" who was the Claimant's peer in the Brand Team. The Claimant was unfairly critical of Carla and Ms Potts said that she would pick this up with the Claimant.
192. We are satisfied that there was no less favourable treatment of the Claimant and the allegation fails.
- Allegation 4.1.34 - did Ms Potts send an email to the Claimant in relation to the Claimant's working from home arrangements?
193. There is no dispute that the email was sent to the Claimant (pages 1163 – 1165). However, we agree with the Respondents' submission that it did not amount to less favourable treatment and nor was it because of the Claimant's disability.
194. Ms Potts found herself in a situation where the Claimant was infrequently in the office, not keeping her up to date on her movements, declining meetings and not responding to emails in a timely manner. In addition, on 25 February 2020, Ms

Potts had spoken to Mr Green and Ms Tolliday who were both unhappy with the Claimant's accessibility and performance and consequent impact on them.

195. Given the Claimant's repeated rejections of a catch-up meeting, Ms Potts e-mail advising that working from home needed to be arranged in advance was, in our view, perfectly reasonable. The Claimant's response was that she worked from home on a Tuesday or Wednesday but would often switch with her husband. Ms Potts reasonably pointed out that the Claimant's working pattern should not be dependent on her husband's.
196. The Claimant also explained that she may need additional time off when her fibromyalgia unpredictably prevented her from attending the office. Ms Potts confirmed she had taken advice from HR and was happy to make allowances as recommended in her latest Occupational Health Report and asked the Claimant to send a copy.
197. Furthermore, Ms Potts' was acting on advice and in accordance with the 1<sup>st</sup> Respondent's procedure/policy regarding reasonable adjustments which states: *"the manager should discuss with the employee the question of appropriate reasonable adjustments which should be reviewed by the employee and the manager regularly. It may be appropriate for the line manager to seek professional advice to help make an informed decision in relation to reasonable adjustment. Where the manager does need to seek advice, this should be facilitated in consultation with the HR Employment Relations Team..."* (Page 178).
198. Ms Potts' comments were perfectly reasonable and her request to review the Claimant's working arrangements and see the occupational health report were a supportive measure to ensure the adjustments already in place were still working given the Claimant's behaviour. However, the Claimant refused to send it.
199. We are satisfied that the e-mail was not less favourable treatment because a hypothetical comparator who was declining meetings, not advising their line manager of their whereabouts, not responding to emails and not supporting their team would have received an e-mail in the same terms. It was for these reasons that Ms Potts sent to the e-mail and not because of the Claimant's disability and the allegation fails.

Allegation 4.1.35 - did Ms Potts on 3 March 2020 ask if a colleague was in that day, or off, or working from home and saying, "okay never mind, I'll email him later"?

200. We accept Ms Potts' evidence that she simply did not know whether the colleague was present on campus but in another room/meeting or somewhere else. She was simply asking where he was. There was no long-standing issue with his lack of availability or responsiveness, so he is not an appropriate comparator. This allegation is a trivial incident which had nothing to do with the Claimant or her disability and, therefore, fails.



Allegation 4.1.36 - did the Claimant receive an email from Ms Potts in March 2020 in relation to her working from home patterns, attitude and email response?

201. The simple answer is yes. However, it was sent in the context of the Claimant cancelling or declining meetings, being unresponsive and not telling her line manager her whereabouts. We are satisfied that a hypothetical comparator who was also cancelling or declining meetings, being unresponsive and not telling their line manager their whereabouts would also have received such an e-mail. As such, the allegation fails.

Allegation 4.1.37 - did the 3rd Respondent tell the Claimant that she needed to print off and send sick notes?

202. The contemporaneous evidence shows that Ms Potts did not inform the Claimant she had to print off and send sick notes, rather to do it in whichever way she thought would get to payroll. As such, this allegation fails.

Issue 4.1.38 - was the Claimant's line management transferred from Ms Potts to Ms Anderton on 11 March 2020 with no explanation, and no telephone conversation in a manner akin to being put on a PIP?

203. Again, we address the context and reasons for this above but do not accept that the transfer of line manager was akin to being put on PIP. The context was the Claimant's repeated cancellation/declining of meetings and unresponsiveness to Ms Potts more generally.
204. The Claimant was advised of the change of line manager by email given that the Claimant was not responding to meeting invitations and wanted everything in writing in any event.
205. For these reasons, we are satisfied that, in all the circumstances, the manner in which the Claimant was advised of the transfer did not amount to less favourable treatment, nor was it in any way because of the Claimant's disability. The reason for the transfer was because the Claimant was in effect ignoring Ms Potts and therefore the allegation fails.

Allegation 4.1.39 (i) - did Ms Potts fail to give instructions in writing?

206. As above, Ms Potts is in a catch-22 with this allegation and but, in any event, there is no evidence that she failed to give instructions in writing. Furthermore, the Claimant told Ms Potts that she did not need written briefs when requests came from within the team.
207. We are satisfied that there is no evidence to support this allegation and it fails.

Allegation 4.1.39 (ii) - did the 1<sup>st</sup> Respondent fail to follow up a workplace assessment?

208. This allegation dates back to April 2018 and relates to a recommendation by Occupational Health for a workplace assessment. We are satisfied that Mr Tomkinson had sight of that Occupational Health Report but not until on or around 15 May 2018.

209. The evidence in the bundle indicates that the workplaces assessments were undertaken albeit late. However, the Claimant has not advanced any evidence to suggest that a hypothetical comparator would have been treated any differently or that it was in any way because of her disability. Accordingly, she has not discharged the burden of proof and the allegation fails.

Allegation 4.1.39 – (iii) did the 1<sup>st</sup> Respondent fail to provide equipment (second screen and arm rest)

210. The evidence in the bundle shows that the equipment was ordered and provided. As such, this allegation fails.

Allegation 4.1.39 – (iv) did the 1<sup>st</sup> Respondent fail to ask what adjustments the Claimant might need?

211. We are satisfied that the 1<sup>st</sup> Respondent did not fail to ask what adjustments she might need. This is abundantly clear from the numerous Occupational Health reports requested by it. Mr Tomkinson had sight of one report but only on a need-to-know basis. Thereafter, the Claimant refused to disclose a copy of the report to Ms Potts and Ms Anderton thereby depriving them of the opportunity to review adjustments any further.

212. Accordingly, we are satisfied that there was no failure by the Respondents in this regard. Rather the Claimant failed to engage with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and, as such, the allegation fails.

Allegation 4.1.39 – (v) was a joke about OCD sent to the Claimant shared team email by her former line manager?

213. The e-mail to which the Claimant refers was an e-mail sent by the Head of Corporate and Research Marketing within the context of what appears to be a barely visible update to one of the 1<sup>st</sup> Respondent's research icons.

214. The e-mail was not addressed to the Claimant, nor was she copied in. As such, she was not subject to any treatment at all.

215. Importantly, the Claimant does not suggest that those involved in the e-mail chain were aware of her OCD so, even if it did amount to a disability (and we have found it did not), the e-mail cannot be because of her disability.

Allegation 4.1.39 – vi did Mr Tomkinson fail to submit sicknotes?

216. The Claimant has not advanced a case on this point at all and, therefore, it fails.

Allegation 4.1.1 - did Ms Anderton tell the Claimant at an introductory meeting in August 2017 she was not qualified for her role/that she expected someone in the Claimant's role to dress more creatively/made a comment about the Claimant's workspace?

217. Quite simply, we accept Ms Anderton's evidence on this point that she did not say these things. We do not find the Claimant's evidence on this point credible, and the allegation must fail.

Allegation 4.1.2 - did Ms Anderton comment that James Tomkinson's return to work meeting with the Claimant was 'challenging' and saying that 'there is quite a history with this individual' in an email dated 19 April 2018?

218. Ms Anderton sent this email, and we accept her evidence that the reason why she described the meeting in those terms is because that is what had been relayed to her by Mr Tomkinson and her understanding that there was a history of grievances with the Claimant. It had nothing to do with the Claimant's disability. Accordingly, the allegation fails.

Allegation 4.1.4 - did Ms Anderton sit next to the Claimant in October 2019 and talk her through how to design her work and road map in front of her team in the office and leave the Claimant to work on this on her own after telling her she needed it for the next day?

219. We find as fact that this allegation did not happen so it must fail.

Allegation 4.1.5 - did Ms Anderton lose her temper during a training course on 3 November 2019?

220. We find as fact that this allegation did not happen so it must fail.

Allegation 4.1.6 - did Ms Anderton sit next to the Claimant in January 2020 to take her through how to design her PowerPoint presentation?

221. We accept Ms Anderton's evidence on this point that the Claimant's first attempt at the presentation was not what she wanted. Accordingly, Ms Anderton took responsibility for this and said, "*I am clearly not explaining myself very well*" and explained more specifically what she wanted.

222. This does not amount to less favourable treatment and the allegation fails.

Allegation 4.1.7 - did Ms Anderton threaten to remove the Claimant's reasonable adjustments and flexible working arrangements?

223. The email in question is also addressed above. In oral evidence, the Claimant agreed with Ms Motraghi that she was not subject to a threat to remove reasonable adjustments. Rather, Ms Anderton was trying to get across the importance of her having accurate and up to date information about the adjustments and, without

such up to date information, they would not necessarily remain in place. This was entirely in line with the 1<sup>st</sup> Respondent's policy and in our view does not amount to less favourable treatment. In any event, we are satisfied that a hypothetical comparator who was also being unresponsive and refusing to disclose their occupational health report would be treated in exactly the same way. Accordingly, the allegation fails.

Allegation 4.1.8 - did Ms Anderton tell the Claimant on 8 March 2020 that WhatsApp was not an appropriate channel to communicate with the team and to use MS Teams/Outlook?

224. Yes she did, because the first Respondent recommends MS Teams for work communications and such recommendation applied equally to all. Accordingly, it cannot amount to less favourable treatment and the allegation fails.

Allegation 4.1.9 - did Ms Anderton's "to do list" correspond with a phone call that she had with the Claimant on 2 April 2020?

225. The Claimant has not advanced a positive case on this point. Under cross examination, her key allegation appeared to be her reluctance to move from Trello to Office 365. Ms Anderton simply asked the Claimant to re-investigate the use of Office 365 and nothing more, but the Claimant took exception to this. It was her view that Trello was better.

226. We accept Ms Anderton's oral evidence that at no point did the Claimant raise her fibromyalgia during this call. The Claimant has not advanced any evidence that she was treated less favourably, and the allegation fails.

Allegation 4.1.10 - did Ms Anderton call the Claimant on 6 May 2020 "out of the blue" and "grill" her?

227. We prefer Ms Anderton's account of this conversation. Firstly, the call was not out of the blue because Ms Anderton notified her that morning that she would call (page 428)

228. Secondly, we accept Ms Anderton's evidence that she did not 'grill' the Claimant. Rather, the Claimant over-shared information in response to her asking how she was, something she readily accepts she does. It is telling that the Claimant did not complain about this call until after she was dismissed. Furthermore, if she was as upset as she now maintains, we do not accept she would have been able to properly discuss work matters as recorded by Ms Anderton in her note after the call. Accordingly, this allegation fails.

Allegation 4.1.11 - furlough

229. We are entirely satisfied that Ms Anderton followed the 1st Respondent's procedure that was in place at the time for furloughing employees. Ms Anderton readily acknowledges (and apologised) for not telling the Claimant that furlough

was '*optional*' and we accept her evidence that this was simply because (i) she did not know and (ii) the script that she was given did not say this.

230. In any event, we are not quite sure why the Claimant raises this as an allegation of discrimination when the reality was that she had no objection to being furloughed in the first place.
231. Ms Anderton did not fail to offer the Claimant the option to return, rather the Claimant's position was that she would prefer to remain on furlough (page 563).
232. Ms Anderton did not "*fail*" to inform the Claimant about pastoral/counselling for those who had been furloughed because there was nothing specific available. The Claimant was fully aware of, and had access to, the 1<sup>st</sup> Respondent's usual support services if she needed them. In any event Ms Anderton followed the same script with the Claimant and Ms Tolliday so there was no less favourable treatment.
233. Whilst on furlough, Ms Anderton did not instruct the Claimant to stay out of her work emails and Teams. Rather she simply suggested it might be better to avoid being sucked into a work "*vortex*" by accessing e-mails given that the Claimant, and all those on furlough, could not undertake work. However, she was encouraged to use the 1<sup>st</sup> Respondent's accounts to stay in touch with colleagues.
234. Further, Ms Anderton clearly encouraged the Claimant and Ms Tolliday to stay in touch and recommended ways to do this. Accordingly, we are satisfied that there was no instruction to the Claimant to stay out Teams and the '*instruction*' not to access e-mails was applicable to Ms Tolliday as well and was simply a means of avoiding work which was not permitted under the furlough rules. It cannot therefore amount to less favourable treatment.
235. In relation to the allegation that Ms Anderton failed to tell the Claimant that she had un-furloughed Ms Tolliday, we accept Ms Anderton's evidence entirely that she thought she had relayed this information at the time and apologised if she had not been clear. We are satisfied that this does not amount to less favourable treatment.
236. The Claimant also complained that she was not offered part-time furlough when it was permitted. Again, we accept Ms Anderton's evidence that there was simply no need for her to return on a part-time basis but, in any event, the Claimant did not want to return unless it was necessary to do so. As such, it is difficult to reconcile her position at the time to her allegation in these proceedings that there was less favourable treatment.
237. All allegations in relation to furlough fail.

Allegation 4.1.12 - did Ms Anderton insist that the Claimant take 29 June 2020 as leave because the Claimant was not available for a KIT call during furlough?

238. Ms Anderton did not insist that the Claimant took leave. Rather, she said that she would assume the Claimant intended to take the day as leave in light of her unavailability for a KIT call without explanation. Notably, it was only when the possibility of taking leave was raised that the Claimant that she explained about her hospital appointment. On receiving an explanation, Ms Anderton did not record the day as leave.

239. We are satisfied that this was not less favourable treatment and a hypothetical comparator who told their line manager that they were unavailable on a working day without explanation would be treated in the same way and the allegation fails.

Allegation 4.1.13 - was the Claimant unfairly selected for redundancy?

240. We have dealt with this more fully above in respect of our finding for unfair dismissal and have concluded that the Claimant was not unfairly selected for redundancy. We are also satisfied that the Claimant's disability (or her other impairments) was not a consideration in her selection, and it follows that it cannot be because of her disability. As such, the allegation fails.

Allegation 4.1.13 – did Ms Anderton fail to inform the Claimant of secondment opportunities, of the Covid 19 Secondment Scheme or invite her to volunteer for the clearing hotline of student enquiries centre?

241. Ms Anderton did not advise the Claimant of secondment opportunities because she was not eligible to work under the Scheme. It was a programme for clinicians and those with technical skills in health care in which the Claimant did not have. Accordingly, the allegation fails.

242. The Claimant has not explained why it was less favourable treatment that she was not invited to volunteer for the clearing hotline of student enquiries centre – more so given that said she did not want to be un-furloughed because she was doing charity work elsewhere. She has not identified anyone who was invited and as such, we are satisfied that there was no less favourable treatment, and the allegation fails.

Allegation 4.1.15 - did Ms Anderton laugh during a redundancy consultation meeting on 11 August 2020?

243. Ms Anderton accepts that she did and apologised to the Claimant. We accept her explanation that this was simply a nervous reaction under very stressful circumstances in the consultation meeting and not because of the Claimant's disability. Accordingly, the allegation fails.

Allegation 4.1.6 - was the Claimant asked to call in sick rather than work from home?

244. Ms Anderton gave the Claimant a reasonable management instruction not to work if she was too unwell to do so. This cannot amount to less favourable treatment and the allegation fails.

Allegation 4.1.17 - did Ms Anderton send an Occupational Health Report to HR?

245. Ms Anderton gave honest evidence that she could not recall if she did or not. There is no evidence to indicate that she did. Even if she did, we are satisfied that this was a perfectly reasonable step to take given HR's role to advise on adjustments and the Claimant's case more generally. As such, either way we do not accept that there was any less favourable treatment, and the allegation fails.

Allegation 4.1.18 - did Ms Anderton request that a particular email that the Claimant was due to send to facility colleagues be sent to her for approval?

246. Ms Anderton made the request, and we accept her evidence that this was simply because it was her usual practice to check any email that might be sensitive regardless of who was sending it. Accordingly, it cannot amount to less favourable treatment and the allegation fails.

**Victimisation**

247. The Claimant relies on two protected acts. The first is telling Mr Tomkinson on 18 April 2018 that Ms Anderton informed her that she was not qualified for her role in August 2017. We find as fact that the Claimant did not raise any breach of the EQA particularly given that she could not tell us in evidence what she said that amounted to a reference to it. Accordingly, we are satisfied she did not do a protected act in this regard.
248. The second protected act was the Claimant raising working excessive unpaid hours and that Mr Tomkinson had not progressed her flexible working request. However, neither complaint amounts to a complaint under the EQA and as such cannot amount to a protected act.
249. In any event and for completeness, we are satisfied that there is simply no connection between the matters complained of in these proceedings and her raising those issue more generally anyway.

**Limitation – the discrimination claims**

250. Given that all allegations of discrimination fail on their merits, limitation is academic, but we deal with it for completeness.
251. The allegations against Ms Potts end in February 2020 when her line management responsibilities for the Claimant were removed. The last act against Ms Anderton and the 1<sup>st</sup> Respondent was 7 September 2020. The Claimant contacted ACAS on 4 March 2021 over a year after the last allegation against Ms Potts and nearly

six months after the last allegations against Ms Anderton and the 1<sup>st</sup> Respondent. We are satisfied that the claims were presented out of time.

252. In considering whether it would be just and equitable to extend time, we have had regard to the Claimant's evidence in which she confirmed: that she was a member of the union and had access to union advice (also evidenced in the facts); she formed the view in 2018 that she was being subjected to discrimination; she received advice from a family friend who is a solicitor and; she consulted ACAS guidance when placed on furlough so was capable of researching time limits. She was also capable of submitting detailed grievances and appeals.
253. The Claimant has not provided a satisfactory explanation why the discrimination claims were not presented in time or earlier than 14 May 2021 and, given her access to advice and ability to undertake detailed research herself, we are satisfied that it would not be just and equitable to extend time.

**Holiday Pay**

254. The Claimant has failed to particularise her claim in this regard and, therefore, it must fail.

**Unauthorised Deductions**

255. Again, the Claimant' has failed to particularise her claim in this regard and, therefore, it must fail.

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Employment Judge Victoria Butler

Date: 10 May 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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