



EMPLOYMENT TRIBUNALS

Claimant: Mr M Parsons

Respondents: Thomson Reuters (Professional) UK Limited

Heard at: East London Hearing Centre

On: 25 to 27 October 2017
and in chambers on 7 November 2017

Before: Employment Judge Allen

Members: Miss S Campbell
Mrs SA Taylor

Representation

Claimant: in person assisted by Ms K Parsons

Respondent: Mr J Mitchell (counsel)

RESERVED JUDGMENT

- 1 The Claimant's claim for wrongful dismissal is dismissed.
- 2 The Claimant's claim for direct age discrimination is dismissed.
- 3 The Claimant's claim for indirect age discrimination is dismissed.
- 4 The Claimant's claim for unfair dismissal succeeds. The Tribunal considered that if a fair process had been followed, the Claimant's period of performance review would have been extended by 4 weeks and that at the conclusion of that 4 week period, there was a 50% chance that he would have been dismissed.
- 5 To be listed for a 1 day remedy hearing.

REASONS

1. By claim form presented on 14 March 2017, the Claimant brought claims of wrongful dismissal, unfair dismissal and age discrimination against the Respondent, his former employer.
2. The issues were identified at the outset as follows:
 - a. Wrongful dismissal:
 - i. given that the Claimant had 9 years of service as at the effective date of termination, was the Respondent in breach of contract when it initially informed the Claimant that his notice period was 1 month?
 - ii. has the Claimant suffered any loss given that the Respondent rectified its error with effect from 5 January 2017?
 - b. Unfair dismissal:
 - i. What was the reason for dismissal and was it a potentially fair reason – the Respondent asserts that the reason was capability (performance)?
 - ii. Was the dismissal fair in all the circumstances:
 1. Did a proper investigation into the problem take place?
 2. Was the employee made aware of the problem and was he given an opportunity to improve within a realistic timescale?
 3. Was the Claimant provided with appropriate support and possibly training;
 4. Was the Claimant's progress reviewed during the review period?
 5. Was dismissal within the band of reasonable responses?
 6. Was the Claimant offered a right of appeal against the decision to dismiss?
 - c. Direct age discrimination:
 - i. Did the Claimant's dismissal amount to less favourable treatment because of his age? The Claimant relied on the fact that he was over 40 and compared himself with a hypothetical comparator who was under 40 and otherwise in the same circumstances.

- d. Indirect age discrimination:
- i. Did the Respondent operate a provision, criterion or practice (PCP) targeting higher earners for dismissal in order to save costs – thereby placing older workers at a particular disadvantage – as they were more likely to be higher earners – and placing the Claimant at a particular disadvantage?
 - ii. The Respondent denied the operation of such a PCP but did not assert that such a PCP would be justifiable.
3. In the event that the Claimant is successful in his claim for unfair dismissal, the Tribunal was asked to go on to determine whether his basic or compensatory award should be reduced to reflect conduct or contribution on his behalf. In addition we were asked to address some elements of *Polkey* arising from section 123(1) ERA 1996 but not mitigation or the length of time for which the Claimant would remain employed.
4. The Tribunal heard evidence from the Claimant and were asked to read a statement by Stuart Moffatt dated 26 September 2017 and emails from Paul Carrie dated 6 September 2017 and Nikesh Gandhi dated 12 September 2017 in support of his claim. The Tribunal heard evidence called by the Respondent from: Sarah Robbins, Director, Head of Customer Operations, dismissing manager; Emi Itaya, Head of Contact Intelligence, appeal decision maker; and Nisha Chandarana, Senior HR Manager. The Tribunal were directed to some pages within a 730 page bundle. Additional documents were produced during the hearing. Both parties made written and oral closing submissions which the tribunal took into account.

Findings of Fact

5. The Claimant was employed by the Respondent from 2007 until his dismissal on notice. The Claimant was informed of his dismissal orally on 7 December 2016 – which was confirmed in writing on 9 December 2016. The notice given was initially incorrectly stated to be 4 weeks. After a number of challenges by the Claimant, this notice was extended to a total of 9 weeks to take effect on 9 Feb 2017 which was the effective date of termination.
6. The Claimant was a member of the London Support Team within the Tax and Accounting ('T & A') Division. In July 2016, the London Support Team comprised the Claimant, Matt Spring and Mark Webb who all reported to Tom Bruce, who reported initially to Laurence Kiddle, Managing Director of the T & A Accounting Business. After 1 July 2016, as part of a new structure, Mr Bruce reported to Sarah Robbins, Director, Head of Customer Operations, who in turn reported to Mr Kiddle.
7. In 2014 the Claimant was placed on a Performance Improvement Plan ('PiP') by Mr Bruce. The Claimant brought a grievance against this – which was in part upheld in relation to Mr Bruce's management style. At

year end 2014, the management view was that the Claimant had only partially achieved his goals.

8. In late 2014 to early 2015 the Claimant was on an informal PiP. This had evolved into a formal PiP by March 2015. On 26 May 2015, Mr Bruce wrote to the Claimant informing him that

“Having formally monitored your performance over the last 2 months I am pleased to advise that your performance has reached a standard that is acceptable to the company and the Performance Review will now be concluded. However, may I remind you that if in the future your performance declines to a level that is unacceptable whilst in the same role, the matter will be dealt with as a conduct issue under the disciplinary policy.”

9. In June 2016 the London Support Team were given a new support function dealing with the Corporate OneSource Account Production (OAP) queries in addition to the OneSource Corporation Tax queries that they already dealt with. The Exmouth Support Team (‘Digita’) had been dealing with both Professional and Corporate OAP – and a decision had been taken to move the Corporate queries to London as a result of an increase in the workload for Exmouth.

10. During the transition period, the London team were given the following guidance and support as set out in Ms Robbins’ unchallenged evidence in her witness statement at paragraph 10:

- (a) Classroom teaching by the Professional Services team on the Accounts Production product - the Professional Services team were responsible for implementing the product for customers;
- (b) a 215 page user guide on the Accounts Production product;
- (c) a number of online bitesize Accounts Production training videos covering key topics;
- (d) access to the Knowledgebase - an online portal containing articles and FAQs on the product;
- (e) we engaged an external company, Datel, to provide extra assistance. Where the London team were unable to deal with the query, they would first refer it to Datel and, if Datel could not deal with it, contact the Digita team in Exmouth. The Datel team had been tasked with dealing with the issues and to explain to the London team what they were doing so that the London team learnt about the Accounts Production product and how to handle queries on it. The response back to the customer would come from the London support team, not Datel;
- (f) support from Digita (i.e. the Exmouth support team) - where tickets were escalated to Digita, a response would be provided to the London support team (again with teaching back where possible), and the London team would respond to the customer; and
- (g) ad hoc support from the professional services team.

11. Matt Spring (one of the Claimant’s colleagues) was sent to Exmouth for 4 or 5 days – however Ms Robbins did not consider that this had significantly improved his knowledge of the product and she did not send the other team members including the Claimant.

12. Having been in post for nearly 3 months, Ms Robbins in late September 2016 decided to place all members of the London Support Team on an informal PiP as she had concerns about the performance of the team. Mr Bruce was also placed on a PiP in relation to his management abilities. In all relevant respects, all 3 members of the Claimant’s team were given the same objectives and all were required to take a test on Basic OAP Knowledge on 4 October – the results having been made available on 12 October 16.
13. Ms Robbins obtained her initial knowledge about the team members’ strengths and weaknesses from Mr Bruce.
14. Ms Robbins asked the Professional Services team to produce a test that the team could take to establish their level of understanding of the Basic User Level material. Without reference to the Professional Services team, Ms Robbins decided to set a pass mark of 80% - although she did not have detailed knowledge of the product herself. She told the tribunal that she had discussed the pass mark with her line manager, Mr Kiddle (the MD of T & A). The test was ‘open book’ however the team members were not allowed to use their laptops or the internet and when taking the test, the Claimant was unable to refer to a spread-sheet on his laptop where he had recorded solutions to issues that had previously arisen.
15. Ms Robbins informed the Claimant (and the other team members) at a meeting on 26 September 16 that he had been placed on an informal PiP.
16. On 26 September 2016, the Claimant was invited to a meeting on 29 September 2016. A copy of the capability policy was enclosed. At the meeting on 29 September 2016, the Claimant was informed of the objectives which SR considered needed to be addressed, the actions to take and the evidence of success. The objectives were set out in the following format:

Objective	Actions to Take	Evidence of Success	By when	Update as of: Date
Demonstrate a high standard of knowledge of ONESOURCE Accounts Production up to Basic User level. The next step will be to demonstrate a high standard of knowledge up to SuperUser level and beyond.	Examination	Pass rate 80% on examination		
Demonstrate regular use of own initiative to solve customer OAP ? problems – i.e. referring to answers in previous tickets/using Knowledgebase/FAQs	Use past tickets/knowledgebase/FAQs to find solutions -particularly if the issue in the ticket has presented itself previously	Provide evidence of tickets where this approach has been used and the learning achieved	Weekly	
Provide evidence of ownership and accountability for tickets for which you are	Provide daily report on any unresolved tickets and evidence of action taken to	Provide evidence that customer has been updated as to progress at	Weekly	

responsible by making sure all unresolved tickets are chased until an answer can be provided to the client	prompt resolution	least every morning and every evening until ticket resolved, paying particular attention to 'Priority' Customers		
Demonstrate thorough understanding of Support processes and have a level of knowledge compatible with time spent on the team	Ensure that tickets are dealt with in the most effective manner using knowledge of processes and products accurately	Elimination of basic errors due to not applying existing knowledge	Ongoing	

17. The team members were asked to produce end of week reports. After a period of confusion as to the format of these reports – which could have been reduced had the team members been given some form of template at the outset, the reports were produced and delivered in an acceptable format.
18. The first spreadsheet which each team member was required to produce detailed all OAP tickets that they had worked on and the actions taken to resolve them.
19. The second spreadsheet covered all outstanding tickets (regardless of product).
20. The Claimant did not challenge the Objectives at this or any subsequent meeting. The Claimant said in evidence that he was afraid to do so – as he felt intimidated by Ms Robbins. He also did not challenge the pass mark for the examination pointing out to the tribunal that prior to taking the test, he could not have commented on whether it was reasonable or not to have an 80% pass rate.
21. All 3 team members failed to achieve 80% in the examination. The Claimant got 37%, Mark Webb obtained 54% and Matt Spring 46%. Matt Spring resigned during this informal PiP period. Mark Webb was deemed to have met Objectives 2, 3 and 4. As a result, his informal PiP was paused. He was not required to take the test again and on 12 December 2016 (after the Claimant's dismissal) Ms Robbins told Mr Webb that his informal PiP had been concluded.
22. Informal review meetings with the Claimant took place on 7 October 2016; 10 October 2016; 14 October 2016 and 18 October 2016. These focused on the formatting of the reports. By 21 October 2016, SR was satisfied that the reports were in an acceptable format. On that day, the last informal review meeting took place at which the Claimant was informed that he was to be placed on a formal PiP beginning on 1 November 2016 focusing on the same four objectives. The Claimant received a letter dated 24 October 16 confirming this in writing and stating:

As you are aware from our informal discussions, below are the current performance areas which require improvement:

- evidence of steps taken to resolve tickets as part of producing clear reports
- elimination of basic errors
- overall improvement of knowledge on OAP

In the initial PiP meeting we will discuss:

1. the respects in which your performances falling short of the required standard;
2. your explanation of or comments on the outlined performance concerns
3. the performance objectives outlined in the PiP document;
4. the duration of the PiP in which your performance must improve;
5. the establishment of a program for performance improvement and timescale for regular review meetings to monitor your performance over the specified PiP period

At the end of the PiP Sarah Robbins will meet with you to discuss whether you have been successful. Below are the possible outcomes of the PiP:

- if you are meeting expectations the successful completion of the PiP will be noted in your employee file it is important to note, however, that you will be expected to consistently maintain an acceptable level of performance thereafter or you may be subject to disciplinary action.
- an extension of the PiP may be warranted in circumstances where there is a reasonable chance of improvement being made during the extended period.
- if there is insufficient improvement in performance by the end of the PiP, the likely outcome would be your dismissal from the Company

23. On 1 November 2016, the Claimant attended the initial formal performance review meeting and Ms Robbins went through the Objectives with him. He said that it was clear and he had no questions. He was told that he would need to achieve 80% at a re-test and that the process would last for 4 weeks.
24. At the next weekly review meeting on 8 November 2016, Objectives 2 and 3 were deemed to have been met. In relation to Objective 4, there was a detailed discussion of errors on a number of specific tickets.
25. At the next weekly review meeting on 15 November 2016 it was noted that the Claimant had spent 2.5 days training on OCT (a different product) that week but that of the 6 OAP tickets that he dealt with in the rest of the week, 3 were resolved using his knowledge and 3 were sent to Datel and then Digita. Objective 2 was partly met. Objective 3 was met. In relation to Objective 4, there was a discussion about a single ticket where the Claimant had initially made what Ms Robbins considered to be a basic error.
26. 18 November 2016 was the Claimant's last day before holiday and Mark Webb was on leave. Mr Bruce was working at home but provided the Claimant with some assistance throughout the day via Jabber (the Respondent's instant messaging system). At 16.10 that day, the Claimant informed Mr Bruce that: "It looks like there will be a bit left over today as I am not really keeping up". Mr Bruce told him to "review and pick up the oldest tickets first as a priority today" and that he should let Ms Robbins know before he left the office if he believed that he would need to leave tickets at the end of the day. The Claimant did contact Ms Robbins at the end of the day and she let him go at 17.30. There were 17 outstanding tickets at the end of the day.
27. On 21 November 2016, Ms Robbins sent an email to two managers.

These were not in the tribunal bundle at the outset having been disclosed very late to the Claimant on day 1 of the case. On the morning of day 3, these emails were produced and shown to the tribunal and Ms Robbins was re-called to deal with them. Ms Robbins said that they represented her informal investigation of the prospect of redeployment. However the emails make no express reference to redeployment stating:

I believe that Martin Parsons may have provided some testing for each of you at the beginning of the year.

Can you tell me what this was and how this was performed?

- 1) What were the tasks?
- 2)
- 3) Where they performed in a timely and effective manner and to a high standard?

- 4) Was the performance of a high enough standard that you would ask Martin to do this again?

I would really appreciate it if you could let me know and / or if I need to approach other managers.

28. The responses did not flatter the Claimant – in particular the response from Fiona Gooding who stated that “he did not pick up using the system as quickly as I expected” and “He seems to be overwhelmed by tasks”. The Claimant was not told about these exchanges and given no opportunity to comment on them.
29. In paragraph 54 of Ms Robbins’ witness statement, she stated that she had ‘formed a preliminary view’ in advance of the final meeting that the Claimant had not reached the required standard. In oral evidence she told us that this view had already been formed prior to sending these emails on 21 November 2016 and in closing submissions, counsel for the Respondent emphasised in this regard the importance of the Claimant having left a number of outstanding tickets at the end of the day on 18 November 2016. The Tribunal considered that it was quite early in a 4 week process to have formed such a preliminary view – given that only 2 of the weekly meetings had occurred at this point.
30. No subsequent attempt was made to look into the possibility of redeployment.
31. The Claimant was on holiday from 21 to 25 November 2016.
32. The next weekly review meeting was on 28 November 2016. The Claimant was informed that he would be required to sit a further test on OAP on 1 December 2016 to determine his level of basic knowledge. On Objective 2, the Claimant was informed that his 65% resolution rate represented a positive step forward but that further improvement was required. There was no benchmarked resolution rate against which the Claimant was being measured. In relation to Objective 3, Ms Robbins raised the number of outstanding tickets left on 18 November 2016 and that these were not included in handover notes. On Objective 4, the timing of the Claimant’s communication about the amount of outstanding work was raised with him.

33. The Claimant made the point that Mark Webb had been away on 18 November 2016 and that the Claimant was attempting to deal with Mr Webb's tickets as well as his own. In discussion of individual tickets, the Claimant pointed out that the HMRC gateway was down on a specific day but accepted that there were some errors which Ms Robbins considered were basic errors.
34. On 1 December 2016 the Claimant was re-tested on his basic knowledge of OAP. On 2 December 2016 his score of 44% was sent to Ms Robbins. The 2nd test was different to the first test – and the Claimant considered that it was harder – and that therefore he considered that his increase in score was significant. Ms Robbins did not agree. When the Claimant raised this at the next meeting, Ms Robbins went back to Professional Services who said that they did not consider it to have been a harder test.
35. On 5 December 2016 in an email to Ms Robbins, the Claimant emphasised that on 18 November 2016, he was dealing with tickets in the absence of Matt Spring (who had left by then) and Mark Webb (who was away). Ms Robbins responded on 6 December 2016 (after the meeting on 5 December 2016) making the points that the volume of calls was lower on 18 November 2016 than a typical Friday; that Mr Bruce had been able to assist the Claimant; and that some of the issues on which he sought assistance were, in her view, very basic.
36. On 5 December 2016, Ms Robbins held a review meeting with the Claimant at which on Objective 1, he raised his perspective on the difficulty of the 2nd test – and that he doubted that any member of the team would have scored 80%. He was told that he had not met this Objective. Objectives 2 and 3 were said to have been met that week but again on Objective 4, upon discussion of a specific ticket, Ms Robbins concluded that the Claimant had made what she considered to be a basic error.
37. On 5 December 2016, the Claimant was sent an invitation to a final performance review meeting on 7 December 16 [404] which stated: "This meeting will be to review your performance for a decision to be made. Please note that if you have not made the required standards, this meeting may result in your dismissal" but it gave no detail as to the specific performance concerns.
38. On 7 December 2016, Ms Robbins went through the objectives. In relation to Objective 1 she stated that she was looking for 80% at least and that with his recent score of 44%, the Claimant had failed to achieve this. She told him that the 2nd Objective had been met and that (although it had been recorded as met at the weekly meeting on 5 December 2016), the 3rd Objective had been only partially met – again referencing 18 November 2016. The 4th Objective was not met, Ms Robbins stating that basic information was not known and that processes were not followed. She stated that she required a higher degree of accuracy – however in evidence before us, it was clear that there was no objective level of errors benchmarked within the Respondent which was deemed unacceptable – and it was not clear what level of basic errors were being

made by other team members. The Claimant raised this point and was told that Ms Robbins was not looking for zero errors and that the Claimant had demonstrated movement in the right direction, but that the right aptitude was not present. When asked at this meeting by the Claimant's companion, Stuart Moffat, what was needed for the PiP to have been extended, he was told that the main factor would have been when the line manager sees an improvement during the PiP, which was not the case in this instance (which appears to contradict what the Claimant had been told about moving in the right direction).

39. The Claimant was informed at the meeting that he would be dismissed after a 1 month notice period on garden leave.
40. This was followed up by a dismissal letter on 9 December 2016 which does not set out any reason for dismissal. It repeated that the notice period was 1 month and gave the Claimant 5 working days to submit an appeal (expiring on 15 December 2016). On 12 December 2016 the Claimant was sent the notes of the meeting on 7 December 2016 which does set out the reasoning of Ms Robbins.
41. Ms Robbins advertised the Claimant's post on 12 December 2016, prior to the period for appeal having expired. A replacement was hired at a salary that was not lower than that of the Claimant.
42. The Claimant appealed on 12 December 2016 – complaining about his notice period; the testing process; that Objective 3 would have been met aside from one day on 18 November 2016; and that on Objective 4 that other colleagues also made basic errors but that there was no benchmarking. The Claimant told us in evidence that he knew that other colleagues had made basic errors because he had reviewed some of their work – but he had not told Ms Robbins this at the meetings because he did not want them to get into trouble.
43. There was an appeal hearing on 16 or 18 January 2017 (the paperwork is unclear but this detail is unimportant) conducted by Emi Itaya who reviewed the decision to dismiss. In the appeal outcome letter dated 7 February 2017, she rejected the grounds of appeal including allegations of bullying by Ms Robbins and age discrimination. During her appeal investigation, Ms Itaya spoke to Mr Bruce who said that the introduction of OAP was too quick a change; and that the workload was excessive. Mr Bruce described Ms Robbins' management style in unflattering terms as 'like a bull in a china shop'; and confirmed that the Claimant had been on two PiPs conducted by Mr Bruce prior to the most recent. Ms Itaya also spoke to Ms Robbins and to Mark Webb who stated that he thought that the PiP process was unfair and that all of his colleagues agreed but that the workload was not excessive.
44. Ms Itaya did not have the email from Ms Robbins to other managers on 21 November 2016 or their responses and was not told about that communication.
45. In the meantime, only after the matter had been escalated by the Claimant to the attention of the Respondent's Regional Head of HR in

Europe, the Respondent had accepted that the Claimant's correct notice period was in fact 9 weeks and in consequence he was informed on 5 January 2017 that his revised notice period would end on 9 February 2017.

46. As part of the ET process, the Respondent was directed to "attempt to compile statistical evidence over 4 years for those who were dismissed and / or accepted voluntary severance over a 4 year period in London Docklands, giving their ages and the ages of new recruits". Despite having to ask for an extension of time to produce this information, the information when produced was riddled with errors. The Tribunal was unimpressed to be confronted with last minute corrections to those statistics in the evidence of Ms Chandarana at the hearing including corrections to material that had already been corrected. Over the period of reference, a constant 25% of the workforce was aged over 40 – this was presented by the Respondent as indicating that there was no policy of reducing the average age of the workforce – however no cogent explanation was forthcoming from the Respondent in answer to why the figure was static and whether the Respondent had a retention problem when it came to those over 40. The tribunal were not satisfied that the conclusions that the Respondent sought to draw from this statistical evidence were justified – however the Tribunal also did not consider that the statistical evidence supported the age discrimination allegations actually made by the Claimant.

The Law

47. The relevant law on unfair dismissal is set out in the following parts of sections 94, 98, 122 and 123 of the Employment Rights Act 1996.

94 The right

- (1) *An employee has the right not to be unfairly dismissed by his employer.*
(2) *Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).*

98 General

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
(a) *the reason (or, if more than one, the principal reason) for the dismissal, and*
(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
(2) *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.

...

122 Basic award: reductions

...

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

...

123 Compensatory award

(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

...

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

...

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

...

48. The Tribunal were referred by the Respondent to the unreported EAT authority of *Awojobi v London Borough of Lewisham* UKEAT/0243/16/LA and the Tribunal accepted that there is no principle of law that an employer will necessarily be acting unreasonably if an employee is not given the opportunity of alternative employment in a less demanding role. However the issue of redeployment is a matter that can be taken into account when assessing the circumstances of the dismissal.

49. The following sections of the Equality Act are relevant to the age discrimination claims:

13 Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

...

19 Indirect discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are— age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation.

23 Comparison by reference to circumstances

- (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.
...

136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
...

Conclusions

Wrongful Dismissal

50. The Claimant was correct that his notice period should have been 9 weeks and not the 1 month initially notified to him. If the Respondent had only given him 1 month notice, he would have been able to recover his wages for the excess period by way of a breach of contract (wrongful dismissal) claim from the tribunal. However the Respondent eventually recognised its error and extended the notice period. Therefore the Claimant has suffered no loss as a result of the initial breach of contract and the tribunal cannot award any compensation. This claim fails and is dismissed.

Age Discrimination – direct

51. Despite the tribunal being unimpressed by the manner of delivery of statistical evidence by the Respondent, unreasonable behaviour is not of itself less favourable treatment because of age and whilst authoritative material showing that discriminatory conduct or attitudes were widespread in an institution might, depending on the case, make it more likely that the alleged conduct had occurred, or that the alleged motivations were operative, there was, however, no "doctrine of transferred malice", and such material had always to be used with care. The Tribunal decided that there was insufficient evidence from which it could conclude in the absence of an explanation from the Respondent that the Claimant's dismissal could be an act of direct age discrimination. There was no other evidence that pointed towards age being a factor in the dismissal and the

tribunal were satisfied that the reason for dismissal was capability – and that this was not tainted by age discrimination. This claim fails and is dismissed.

Age discrimination – indirect

52. There was no evidence before the Tribunal of a PCP that the Respondent targeted higher earners (who may have been older workers). There was no evidence that the Claimant was put under a particular disadvantage by such a PCP – given that he was replaced by an employee who was not paid less than he was. This claim fails and is dismissed.

Unfair Dismissal - reason

53. The reason for dismissal was clearly capability. The Respondent put the Claimant through a performance management process and the Tribunal accepted that this was the reason in the mind of Ms Robbins when she arrived at the decision to dismiss. There was insufficient evidence to support the Claimant's allegation that the real reason for his dismissal was age discrimination (see further above) and / or redundancy. There was no reduced need for staff doing the work done by the Claimant. The Claimant's post was re-advertised after his dismissal and filled by another employee.

Unfair Dismissal – fairness

54. The tribunal reminded itself that it was not for it to step into the shoes of the employer.

55. The Respondent's procedure followed was within the band of reasonable responses. The tribunal were troubled by a number of factors but ultimately felt that the process as a whole was capable of being fair:

- a. The invitation letter to the final performance review meeting did not set out the specific charges against the Claimant. However the tribunal felt that after numerous meetings addressing the same 4 Objectives, the Claimant was aware of the 'charges' against him when attending the final meeting. He did not complain to the tribunal that he was unaware;
- b. The outcome letter did not set out the reasons for dismissal. However the tribunal felt that informing him at the final meeting and by sending the Claimant the minutes of that final meeting shortly after the dismissal letter, the Respondent rectified this defect;
- c. The Respondent's policy suggested that where an employee had been on a PiP and had reached an acceptable standard of performance – but then in the future the performance of the employee (in the same job) again declines to a level that is unacceptable to the Company, the matter will normally be dealt with as a conduct issue under the Disciplinary Procedure. The tribunal did not consider that starting the PiP process again for the Claimant in September 2016 (although apparently a departure from the Capability Policy) was outside of the band of reasonable responses. It might even be seen as advantageous for an employee;

- d. The Respondent's Capability Policy permits the same person to conduct the investigation into the lack of capability and to be the ultimate decision maker. There are dangers in such an approach – and in certain circumstances, adherence to such a policy could render a decision unfair, however the Tribunal could not go so far as to say that no reasonable employer could operate such a policy and took account of the fact that Ms Robbins was relatively recently in post when this performance management process commenced.
56. The tribunal agreed that the Respondent had adequately identified the problems that it felt were occurring and had set them out in a list of objectives for improvement. It therefore had a structure in place which had the potential to fairly investigate the problem.
57. The Respondent had properly warned the Claimant of the consequences of failing to improve and had canvassed his views at a series of meetings.
58. However the Tribunal did not find that the Claimant was given an adequate chance to improve within a realistic timescale. As set out above, we found that Ms Robbins formed her view after 18 November 2016 – too early within what should have been a 4 week process. The absence of any benchmarking for Objectives 3 and 4; and the arbitrary nature of Ms Robbins choice of 80% as a pass mark for Objective 1 without discussion with the professional standards team were troubling. The 80% pass mark was not achieved by any team member and was not ultimately a barrier to continued employment for Mark Webb, but was described repeatedly by the Respondent to the Claimant as a necessary minimum – which it clearly was not. The contradictory message given to the Claimant on 7 December 2016 was that he had not improved but also that he was demonstrating movement in the right direction. He had been told on 28 November 2016 that he was taking positive steps forward. He had achieved Objective 2 and some of Objective 3 and his score in the examination had at least improved.
59. In relation to Objective 3 the Claimant had met it on 5 December 2016 – but on 7 December 2016 the events of 18 November 2016 were used to state that he had met it only in part. The tribunal did not see how an employee could be given a fair chance to improve when one event half way through a 4 week process could be used to deny the Claimant a status of having met an Objective at the end of the process, particularly when the Objective had been met at the end of the previous week – demonstrating that he was at least capable of meeting the Objective.
60. In relation to Objective 4 (elimination of basic errors), which appeared to the tribunal to have been an important consideration for Ms Robbins, her primary source of information at the outset of the process was Mr Bruce with whom the Claimant had had an unhappy recent history. There was no comparative assessment with the error rate of the Claimant's colleagues after the beginning of the formal process for the Claimant. The Claimant asserted in the internal process that everyone made errors – but there was no assessment of whether the Claimant's error rate was better or worse than average and whilst the Claimant admitted that he

had made some errors on a specific number of tickets examined at the performance review meetings, Ms Robbins had no detailed knowledge of the product which would have enabled her to make a fair assessment of his capability in that regard.

61. There was no effort to consider redeployment. The tribunal considered that Ms Robbins' email to other managers of 21 November 2016 was directed at bolstering her assessment of the Claimant's capability (or lack of it) and not at the possibility of redeployment. The Tribunal does not base its decision on this factor alone but it is a relevant matter in determining whether this was a fair dismissal. In addition it was unfair that the claimant was not given the opportunity to comment on the responses from the other managers.
62. The appeal process could not remedy these defects – particularly because Ms Itaya was unaware of the communications with the other managers by Ms Robbins or that Ms Robbins mind had been made up prior to 21 November 2016.
63. It follows that the Claimant was unfairly dismissed.

Polkey

64. The Tribunal then went on to consider whether even if a fair process had been observed, the chances that the Claimant would still have been dismissed as set out in the case of *Polkey v AE Dayton Services Ltd*.
65. The tribunal took into account that this was far from the first PiP that the Claimant had been placed under and although he had met in whole or part some of the Objectives, and his score had improved somewhat, the Claimant didn't score highly in the examinations when compared with his highest scoring colleague. He did make basic errors and the tribunal gives weight to Ms Robbins' assessment of those as errors that he should not have been making. The Respondent's products are expensive and it needs to provide a service to its clients which reflects that cost. The Claimant had been given assistance following the introduction of the OAP work and he appeared to be slow to adapt to that work. The tribunal did also take into account Mr Bruce's evidence about the OAP product being introduced for the London Team too quickly and also took into account the positive comments made about the Claimant by a number of people that he had approached as documented in the bundle before the Tribunal.
66. If a fair process had been followed, with a decision maker who had not effectively made up her mind before the end of the process, given the signs of improvement shown by the Claimant, the Tribunal considered that the performance review process would have been extended by another 4 week period.
67. At the end of that 4 week period there would have been a further assessment of the Claimant's progress and taking into account the factors listed above and adopting a broad brush approach, the tribunal considered that there was a 50% chance of the Claimant remaining in employment after that point. The Tribunal have insufficient information to

determine how long the Claimant might have remained in employment after that point – which is a live issue for the remedy hearing.

Conduct / Contribution

68. We did not consider that the Claimant conduct was such that it was just and equitable to reduce his basic award. We did not consider that there was any contribution to the dismissal which required us to reduce the compensatory award by any figure greater than that already taken into account in the matters leading to the *Polkey* reduction referred to above.

ACAS

69. The tribunal were not satisfied that there was any breach of the ACAS Code of Practice that would result in an alteration of the compensatory award.

Further Directions

70. Other remedy issues will require a further hearing. The matter will be listed for 1 day. By 8 January 2018 The Claimant is directed to produce and send to the Respondent a witness statement setting out his efforts to find alternative employment and setting out his losses accompanied by a revised Schedule of Loss solely on the issue of losses flowing from unfair dismissal and applying the parameters of:

- a. A 4 week period of compensatory loss at 100% of salary;
- b. A further period of compensatory loss at 50% of salary.

71. The Respondent is to produce and send to the Claimant a statement in reply accompanied by a Counter Schedule of Loss by 22 January 2018.

72. The parties are directed to bring 5 copies of those witness statements and schedules to the remedy hearing.

73. The Respondent is directed to prepare a remedy bundle of additional documents for the remedy hearing. The tribunal will retain the original bundles.

Employment Judge Allen

4 December 2017