Case Number: 2404148/2017
1402252/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms Keisha Daniels**

Respondent: **British Telecommunications plc**

Heard at: **Cardiff** **On: 5, 6 7 August 2019 and 11 November 2019 (in chambers)**

Before: **Employment Judge S Moore**
Members:
Mr M Pearson
Mrs J Kiely

Representation:
Claimant: Mr Cooper, union representative
Respondent: Ms Gardiner, Counsel

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal does not succeed and is dismissed.

2. The Claimant's claims of disability discrimination do not succeed and are dismissed.

3. The Claimant's claim for unpaid overtime does not succeed and is dismissed.

4. The Claimant's claim for breach of contract does not succeed and is dismissed.

5. The Claimant's claims of direct discrimination because of her sex and race succeeds.

REASONS

Introduction

1. The Claimant presented claims of race and sex discrimination and breach of contract in an ET1 ("the first claim") on 25 August 2017. This followed a period of ACAS Early Conciliation with Day A being 4 July 2017 and Day B being 31 July 2017. A further claim was presented in an ET1 ("the second claim") dated 22 June 2018 claiming unfair dismissal, race and disability discrimination and failure to make overtime payments. The Claimant had been dismissed on 9 March 2018.

2. There had been two previous Preliminary Hearings ("PH") before the substantive Full Hearing, the first on 20 February 2018 before Employment Judge Whitcombe (this was during the Claimant's notice period but prior to her effective date of termination) and the second before Employment Judge Havard on 21 February 2019. After the first PH the Claimant was ordered to prepare a Scott Schedule.

3. The full merits hearing was heard at Cardiff Employment Tribunal sitting at Cardiff on 5, 6 and 7 August 2019. The hearing went part heard with a chambers day on 11 November 2019.

4. In the second PH on 21 February 2019, EJ Havard reviewed the Scott Schedules the Claimant had produced but took the view that there was still a lack of specificity with the Claimant's claims. He directed that in view of the age of the claim the parties should prepare an agreed list of issues to bring to the Tribunal.

5. The parties had been able to agree a list of issues. Mr Cooper clarified to us that the Claimant's S13 (race and sex) EQA claims were based on the withdrawal of the two job offers. This appeared to be well understood by both parties.

6. Unfortunately the same could not be said for the S19 (indirect) disability discrimination claim. Mr Cooper was asked to explain the indirect discrimination as we were not clear what this claim was about. It was not apparent there even was an indirect discrimination claim from the ET1. We did not receive any further explanation from Mr Cooper and have therefore determined the S19 claim on the basis of what was set out in the list of issues.

7. The S15 claim was set out in the list of issues. The unfavourable treatment cited was a requirement to deliver courses and putting the Claimant on a plan to change skills from being a system and planning trainer to an engineering trainer.

8. The second claim had advanced a claim for overtime payments. This was not in the list of issues.

9. In respect of the unfair dismissal claim, the Respondent's contended this was out of time. The Claimant asserts it was not reasonably practicable to have presented her claim in time. The Claimant was recalled to give evidence on this point prior to submissions.

10. The Claimant and her representative had attended a preliminary hearing on 20 February 2018 before Employment Judge Whitcombe. At this point the Claimant had been dismissed and was during her notice period. Mr Cooper told the Tribunal that the Claimant had tried to bring the claim at the hearing but Judge Whitcombe would not accept it. Subsequently, Mr Cooper relied upon confusion arising from correspondence from the Tribunal as the Claimant had thought her claim had been accepted. We set out our findings of fact on this issue below.

11. We heard witness evidence from the Claimant and on behalf of the Respondent the following; Mr Mark Rainbow, Mr Dave Lynch, Mr Marc Hughes, Mr Richard May, Mr Kevin Gaughan and Ms Amanda Kirtley. There was a bundle of 688 pages with a number of additions to the bundle throughout the hearing and the Claimant had produced a separate bundle as there had been removal of a number of documents from an earlier draft she wished to rely upon. There was a draft list of issues at pages 39H – 39L of the bundle which sets out the issues the Tribunal had to determine, save for the breach of contract claim and overtime claim. The Claimant's claims in summary were:

- Disability Discrimination (direct, discrimination arising from disability);
- Race discrimination (direct and indirect);
- Sex discrimination (direct and indirect);
- Unfair dismissal (S98 Employment Rights Act 1996 "ERA 1996")
- Unpaid overtime
- Breach of contract.

Findings of fact

12. We made the following findings of fact on the balance of probabilities.

13. The Claimant commenced employment with the Respondent on 3 January 2006 as a BT Corporate Account Manager. She joined OpenReach in June

2010 as a Network Planner (C3 role) and then Learning and Development ("L&D") as a trainer in June 2013. The Claimant's day to day responsibilities involved delivering and facilitating training at all national sites for OpenReach employees.

14. The Respondent had an Improving Performance Policy and Procedure. This had four stages, first of which was an informal stage then 3 stages under the formal stage. If an employee was within the procedure and secured a new role they would no longer be within that process. We also were referred to the Diversity and Inclusion Policy.

15. When the Claimant was recruited into her L&D role she attended and passed a five-day training course called Key Trainer Skills and then went on to do the Enhanced Trainer Skills course which was a one-day workshop which she also passed. She also undertook training on a new course introduced called Facilitraining that she attended on two occasions.

16. In April 2014 the Claimant had received a performance rating of DN (Development Needed). The Claimant was placed on a coaching plan by her then Line Manager, Mr Rathbone. We did not see any documents in relation to this coaching plan, but we heard evidence from Mr Rainbow about what it involved. The Claimant was tasked with achieving MTM (Metrics That Matter) scores of 9.0 above. The MTM scores were feedback scores from delegates on courses attended by the trainers. By September 2014 the Claimant's Line Manager, Mr Rathbone was of the view that she was not meeting the required standard and invited her to a meeting to discuss whether an initial formal warning ("IFW") should be issued under the Respondent's performance procedure. We were referred to Mr Rathbone's outcome letter on 9 September 2014 which set out the rationale for the decision making that he had collated. At the point of issuing the warning the requirement to gain two additional licences (for delivering new training courses) had been removed. The key standard set by Mr Rathbone was about quality of delivery, the evidence for which would be attained from the MTM scores.

17. Within OpenReach there was a standard of 9.5 and the Claimant was required to achieve a standard of 9 each month. In the period leading up to the IFW the Claimant had received 6.2 in April, 9 in May, 5.4 in June against team averages between 9.6 and 9.8. The rationale document records comments in relation to discussions about the Claimant's persona (sic). Mr Rathbone records that he discussed this many times with the Claimant during this period and records that he believed that the Claimant "lacked compassion" and often allowed external factors to inhibit her ability to maintain professional support as a role and he believed this to have been more about her personality.

18. The Claimant appealed against this IFW and this was heard by Mr Rainbow who was Mr Rathbone's Line Manager and Senior Management, Learning and Development. An appeal meeting took place on 7 October 2014 and the Claimant was accompanied by her CWU Trade Union Representative, Dickie Waters. Mr Rainbow concluded that the decision to issue an IFW was fair and reasonable and therefore her appeal was not upheld and the Claimant was informed of this by letter of 15 October 2014 which attached the rationale for Mr Rainbow's decision. Mr Rainbow had reviewed a recording of the meeting between Mr Rathbone and the Claimant where the IFW was discussed. One of the grounds of the appeal was that in Mr Rathbone's written summary he had referred to the Claimant having a "hard exterior" which the Claimant disputed had been discussed at the meeting.

19. Mr Rainbow agreed that these words had not been used, but considered could be explained by Mr Rathbone's reliance on a statement made by the Claimant during that meeting as follows: "(Claimant): *I do tend to get people's backs up, I am quite direct and I do not tend to mince my words. I have to change my personality, but I do not know why I have to suck up to people.*" There was no substantive challenge to the basis for the warning which was the Claimant's MTM scores. Mr Rainbow concluded that the procedure had been correctly managed and that performance remained below expected standards following consecutive poor MTM scores in particular in comparison with her peers and colleagues.

20. We were taken to a number of observations that had been completed about the Claimant at around this time, in particular one completed by Mr Norley on 13 October 2014. We note some of the suggestions Mr Norley made as follows; under "performance" Mr Norley recorded *"Keisha needs to be aware of her voice tone. Outside of the classroom Keisha is warm and welcoming but portrays a very different personality in class and is quite abrupt and dictatorial. There is not a lot of warm in her delivery and she needs to soften her approach"* and then under behaviour, "*as mentioned, Keisha is quite formal and directive in her approach and this makes her seem unapproachable"*. In summary Mr Norley repeats that when speaking to the Claimant she was *"warm and friendly"* but in the classroom she was *"quite brusque and directional"*.

21. The Claimant was then off sick for a period between 21 October 2014 and 5 January 2015. During this period her Line Manager changed to Mr Ian Hopkins. The Claimant had been placed on a formal performance improvement procedure following the issuing of IFW which was intended to run between 30 September 2014 and 31 October 2014 however this was put on hold due to the Claimant's sickness absence.

<u>Expenses Disciplinary</u>

22. On 17 October 2014 the Claimant was sent a letter requiring her to attend a fact-finding interview with Mr Rathbone concerning an allegation she had failed to provide VAT receipts for expenses. She was informed this had initially been considered as a potential gross misconduct offence by Mr Rathbone, but Mr Rainbow directed that it be dealt with as a serious misconduct offence. The specific nature of the allegations were that the Claimant had failed to follow correct company procedures on 27 July 2014 by submitting an expense claim covering a period 19 June to 17 July but failed to provide VAT receipts.

23. Prior to this on 13 October 2014 the Claimant sent an email to Mr Rainbow subject matter *Re: Change of job role* and advised that she had reflected and thought about her current position of trainer, accepting she may not be best suited to the role. She also informed Mr Rainbow that she had been stressed and had recently completed a stream test which came back red and had spoken to her GP who had recommended her taking time out as stress was taking a physical form. It should be noted in this email there is no reference to the Claimant's condition she subsequently relies on as amounting to a disability namely benign tremors. The Claimant also raised issues about the travel which she was undertaking and acknowledged that she was not best suited to the role of Trainer pointing out that she had been in BT for nine years and spent just over a year of that as a Trainer and whether her time and skills could be better utilised elsewhere. Mr Rainbow replied advising that he would need to reflect on her skill set and experience amongst other things in order to ascertain what type of role would be best for her and offered advice with her CV and job applications.

24. As the Claimant was off sick the disciplinary into her expenses was put on hold at the Claimant's request.

25. During her sickness absence the Claimant complained about a home visit undertaken by Mr Hopkins. The Claimant was off sick for a period of almost 3 weeks with no contact with the Respondent and the Respondent began to have concerns for the Claimant's wellbeing. Mr Hopkins telephoned the Claimant on her personal mobile and the Claimant alleged in her witness statement (paragraph 14) that this amounted to harassment as Mr Hopkins showed up at her home unannounced. The Claimant believed this was deliberate manipulation of the situation and harassment orchestrated by the Respondent to intimidate her and described how she was at home but refused to answer the door. In relation to this incident we find that the Claimant was not harassed on the grounds of her race or sex or disability. Whilst Mr Hopkins could potentially have used the Claimant's emergency contact number, we find that the home visit was done with the best of intentions particularly in light of the fact the Respondents concern over the Claimant's absence and having had no contact from the Claimant.

Occupational Health Report – 5 December 2014

26. During the Claimant's sickness absence the Respondent referred her to Occupational Health. The Tribunal had sight of the Occupational Health Report at pages 140 – 142 and nowhere in this report does it refer to the Claimant having the condition she subsequently relies upon for her disability discrimination claim. The report focusses solely on the Claimant's period of sickness absence attributed to stress and anxiety. That condition was reported to be unlikely to fall under the remit of the disability provision of the Equality Act 2010.

27. The Claimant had previously been made aware of the EAP programme by Mr Rainbow in October and this was reiterated in the Occupational Health Report which records that she would be attending private counselling. The report recommended a return to work on a four week phased return which was implemented as of the 5 January 2015 when the Claimant returned to work.

28. On 20 January 2015 the Claimant attended a disciplinary hearing in relation to the expenses issue, this was subsequently not upheld by Mr Rainbow and no sanction was issued to the Claimant.

29. On 26 January 2015 a new Performance Improvement Plan was put in place by Mr Hopkins. This issue had not gone away for the Claimant and she was still in the position of having received the IFW in October previously, further action having been put on hold during the Claimant's sickness absence. This was therefore re-visited and Mr Hopkins implemented a different PIP which was designated to take place during 27 January 2015 and 27 February 2015. The standards expected were as follows; the Claimant was expected to change her behaviours in front of delegates and towards the agreed actions, to meet set business targets and work towards the job description that had been outlined to her. Mr Hopkins set up a requirement to have daily check in calls with the Claimant to understand she ensures the importance of communication, regular feedback and where she was.

30. It was recorded that the Claimant would only receive MTM feedback on the last three courses as other courses had been assigned to other trainers during her phased return to work. The Claimant was unhappy that she was subsequently recorded as not meeting the objectives of this PIP and subsequently raised a grievance.

Grievance against Ian Hopkins

31. The Claimant raised a grievance against Ian Hopkins by an email of 15 April 2015 to Mr Mark Rainbow. In relation to the January 2015 PIP we note that it is recorded as the Claimant failing to achieve the progress necessary and

that it would move to the next stage. It is not clear what happened between February and July 2015 when it was resurrected (see below). Going back to the grievance, there were four grounds cited in the grievance as follows; firstly that the Claimant had been required to travel to drive back from Norwich to Bristol following completion of a course that ended at 5.00pm and started at 9.00am which was causing the Claimant further stress and she had been refused permission to travel by train. Secondly that the Claimant did not want to continue to have responsibility for the company van. Thirdly that Mr Hopkins was biased in respect of her feedbacks and the Claimant felt there was a question of bias and discrimination from Mr Hopkins and fourthly that Mr Hopkins had withdrawn the Claimant from her enrolled NVQ.

Second misconduct investigation

32. On 10 April 2015 Mr Hopkins compiled an investigation report into the Claimant. This arose from allegations that on 27 March 2015 the Claimant had allegedly not complied with company policy in relation to vehicle log sheets, entry of weekly submission of overtime and had failed to maintain contact on a working day. She had been asked to attend a fact-finding interview with Mr Hopkins on 8 April 2015. In respect of the overtime the Claimant had built up 50 hours and had not submitted a claim, Mr Hopkins decided not to progress this but to have a "local discussion" with her to remind her of the importance of completing claims on a weekly basis. In respect of failures to make contact Mr Hopkins was concerned that the Claimant had been uncontactable on 23 March 2015 and had been reminded about the importance of keeping in contact but notwithstanding this reminder on 31 March she failed to make contact again. It later transpired Mr Hopkins had been using an incorrect telephone number when trying to contact the Claimant. In relation to the company vehicle sheets that the Claimant had been reminded of the importance of completing these by Mr Hopkins on 20 March 2015, but despite these reminders she had continued not to complete them on a daily basis as instructed which Mr Hopkins believed highlighted a lack of responsibility on her part in relation to her job description. Mr Hopkins also confirmed that his Safety Lead had gone over the process when exchanging the van with the Claimant and she had been carrying out these checks without any difficulty, therefore recommended that it was passed to management for consideration under serious misconduct procedure.

33. This was passed to Mr Rainbow and he invited the Claimant to attend a disciplinary hearing for two allegations as follows; (1) failure to follow correct company procedures (the vehicle log sheets on three separate occasions) and (2) failure to comply with reasonable request on 31 March in failing to contact Mr Hopkins to let him know she had arrived at site despite reminders to do so.

34. Other than some internal emails regarding the Claimant's NVQ it is not clear what happened in respect of the April 2015 grievance. We note in a later grievance in 2016 there was reference in the outcome to a Mr Bill Gunn having investigated this grievance in June 2015, but there were no documents before us to assist us with understanding what had happened to this grievance, nor was it dealt with in the Claimant's witness statement other than the Claimant's evidence (which was very limited) was as follows. Her grievance was treated with contempt and barely actioned upon which forced her to raise the further grievance and that Mr Hopkins and Mr Rainbow colluded to stunt her progression and actively withdrew her from the NVQ programme.

35. A conclusion in a later 2016 grievance confirmed that the Claimant was withdrawn from the NVQ programme but found that this was not an unreasonable course of action to have taken given that the NVQ subject matter did not assist the Claimant with her role and furthermore that she was under performing and therefore it was felt that she should concentrate on her performance in her job role rather than the NVQ. There was also evidence from the NVQ Assessor that the Claimant had not been actively progressing her NVQ in any event.

<u>Aldershot training complaint</u>

36. On 25 April 2015 a complaint was made against the Claimant by Ms E Karpathakis who was a General Manager within OpenReach. The complaint was forwarded to Mr McGaughran who was a Senior Learning Pathways and Training Lead who in turn sent it on to Mr Mark Rainbow. Ms Karpathakis's complaint was in summary concerning some training that the Claimant had delivered in Aldershot on Thursday 23 April 2015. She described that she met one of the teams attending the training whilst on a break and they were all extremely concerned about the quality of the trainer (the Claimant) and stated they had been unable to ask her questions as she was unable to answer and also made them feel they were slowing her down and cut people off, she was unfamiliar with what she was training and stuck rigidly to a script. She also advised it was the entire group raising the concerns and they were anxious about it. She was of the view that the trainer needed to be removed immediately from the teaching planners until some sort of remedial training had been given. There was also comment that she should treat people with dignity and respect and not leave the entire group feeling like naughty school children being told off by their teacher as this is what the group had expressed how they felt. It was accepted that Ms Karpathakis did not know the Claimant and had had no previous dealings or contact with her prior to raising this complaint.

<u>Disciplinary hearing – Dave Lynch</u>

37. Mr Lynch met with the Claimant and her Union Representative on 5 May 2015 in respect of the disciplinary allegations outlined in paragraphs 32 and 33 above. Following this meeting he concluded that it was not appropriate to take any disciplinary action against the Claimant and the case was dropped. He considered that whilst she had failed to comply with a number of role requirements it was a matter more appropriately should be dealt with through coaching conversation with her manager. The Claimant was confirmed of this decision in a letter of 22 May 2015. Mr Lynch's conclusions in respect of the vehicle log sheets were unsurprising. He reached the conclusion there was no case to answer. The circumstances surrounding the Claimant failing to complete the vehicle log sheets were as follows; in relation to the alleged contravention on 23 March the Claimant's explanation was, and she accepted she failed to click "submit" on the final screen. In relation to 26 and 27 March on 26 March 2015 the Claimant had been delivering training in Norwich between 9.00am and 5.00pm and then had to drive home and did not arrive back until 10.00pm which meant she was being disciplined for failing to log on to the system and complete the vehicle log sheet after arriving home very late after a full day training and travel from Norwich to Bristol. The next day was a Saturday and on 30 March, which was the next working day, she was absent from work for a funeral and the next time she was then in the office was 31 March.

<u>Events from May 2015</u>

38. For reasons that were unclear around the period May, June 2015 Ian Hopkins no longer line managed the Claimant and she was moved to a new Line Manager called Dave Broomfield. According to Mr Rainbow's evidence Mr Broomfield concluded that although the performance plan had ended the standards had not been met. Mr Rainbow accepts there were delays with the plan and attributes this partly due to the phased return to work from the Claimant's absence. However, the Claimant had returned to work in January 2015 on a four week phased return to work and the PIP Mr Hopkins had written was due to end on 27 February 2015. As we have stated above it is therefore unclear why the performance plan had not been reviewed at the end of the set period, or what happened to it during the period of February 2015 and July 2015.

39. In a letter from Mr Broomfield to the Claimant dated 22 July 2015 he referred to a meeting between the Claimant and Mr Hopkins on 2 April 2015, but we heard no evidence about this. Mr Broomfield said that having reviewed the Claimant's performance he was concerned that insufficient improvement had been made and was therefore considering progressing to the next step in the process which is a final formal warning under the Respondents Managing Under Performance Procedure. Before making that decision the Claimant was invited to meet with him to discuss her performance on 29 July 2015. It should be noted that Mr Hopkins had recorded in the February PIP document

we saw that it would progress to the next stage which, in accordance with the Respondents Managing Performance Policy, was a final formal warning. It is not clear what formed Mr Broomfield's assessment of her performance. Enclosed with the letter from Mr Broomfield of 22 July 2015 was the January 2015 PIP and also information about the complaint that had been received in respect of the Aldershot training.

40. Mr Broomfield met with the Claimant on 30 July 2015 to discuss an alleged driving misconduct and review her performance for progression to a final written warning. Mr Broomfield had been instructed to postpone the performance case pending the Claimants April 2015 grievance.

Driving complaint

41. In July 2015 a complaint had been received from a member of the public about the Claimant's driving. An email had been sent from a member of the public which Mr Broomfield followed up by speaking to the driver who had made the complaint. The complaint was in summary that the Claimant had pulled out onto the main road causing the member of the public to swerve drastically onto the other side of the road. It alleged that the Claimant was coming over the bridge to a T-junction and driving way too fast hence not stopping. The complaint went on to say that the employee in question continued to tailgate the member of the public most of the way to the M6 junction 14 and the number plate was taken which identified it had been the Claimant driving. This was also corroborated by the fact that it was same the location from which the Claimant was returning home from a training course in Yarnfield. The Claimant was unable to recall anything on that journey that stood out for her. The complaint had come in via the contact form on the OpenReach portal.

42. Mr Broomfield conducted an investigatory meeting with the Claimant concerning this complaint on 30 July 2015. Mr Broomfield's investigation report stated that he had spoken to the driver who made the complaint and that she was an "*intelligent, sensible person*" who had no other reason to report such an incident other than genuine concern. Mr Broomfield's fact finding pack also included reference to a previous driving complaint that had been raised against the Claimant in 2014, this had been reported via the 'contact us' form on the OpenReach portal and it stated as follows, *"I want to report dangerous driving by an OpenReach employee," and went on to say as follows, "message: undercutting on motorway on M5 black woman car reg WR58 EOJ Vauxhall"*.

43. Mr Broomfield passed this matter to Mr Rainbow as a potential offence of serious misconduct and Mr Rainbow then wrote to the Claimant on 17 August 2015 and invited her to a further disciplinary hearing.

44. The Claimant was issued a written warning by Mr Rainbow in a letter of 30 September 2015, the Claimant appealed this decision and that was heard by Duncan Grey who upheld the decision.

SI – Training complaint

45. On the 5 August 2015 the Respondent received a complaint from someone called Sarah Dolby who was a DSO and Senior Escalations Job Control Manager for OpenReach regarding some training delivered by the Claimant. The email from Ms Dolby was a highly critical email of the Claimant; the Claimant's training had been delivered the previous day (4 August 2015). In the email Ms Dolby described the feedback she had had as follows, in summary the trainer arriving late, the worst training ever had in BT career, trainer not being familiar with the tool, trainers notes jumbled, trainer reading from the screen, trainer not having the right profile, trainer not sure she had the right training pack, at lunch the trainer advising she had finished her training and wasn't sure how she was going to stretch it out, no quiz, training not relevant to the attendees, kept calling the manager for support. Ms Dolby describes that the team felt sorry for the trainer and got the impression she had been *"dumped on"*.

46. Following this complaint some emails passed between Mr Dave Broomfield and Mr Mark Rainbow. Mr Broomfield confirmed that the Claimant had been given six days as opposed to the one day that he considered would be necessary to prepare for the course.

Final formal warning meeting – 7 September 2015

47. Mr Broomfield invited the Claimant to a meeting to discuss the next stage of the performance process, as we have identified above there appears to have been various delays in progressing this due to the Claimant's grievance and also Mr Hopkins no longer being her Line Manager. Present at the meeting was Mr Broomfield, the Claimant and the Claimant's Union Representative, Claire Wright. Mr Broomfield discussed the plan that had been implemented by Mr Hopkins in January 2015. The Claimant had attended the Facilitraining in May 2015. The Aldershot complaint was also discussed. The Claimant explained that the compliant had arisen because of her interaction with two difficult delegates who were challenging her over the content of the event. The Claimant said that she had to assert herself and Mr Broomfield commented that what the Claimant described as assertive is being received as aggressive and said he had also had the same feedback from another group that she had delivered to and that the problem in his view with aggression is it is met with aggression in return. The Claimant's Union Representative referred to this as the elephant in the room and is recorded as pointing out to the Claimant that this aggressive and direct style could be

the route of a number of problems connected with her. It was agreed the Claimant could be coached on this behaviour.

48. Mr Broomfield decided to issue the Claimant with a final formal warning and committed to prepare a coaching plan to address the areas of the Claimant's training development and aggressive behaviour described above.

49. Mr Broomfield continued with the performance management procedure by issuing a further PIP to take place between 19 October 2015 and 27 November 2015. Mr Broomfield set out a number of improvement actions to delivery excellent training events in summary by achieving 80% feedback or higher, and to attend, prepare and be licensed to deliver two different courses (Your Visit Counts and Mindset Matters). Mr Broomfield records that the Claimant had an aggressive manner during a telephone call during week one. The Claimant reported that she was having difficulty in accessing some of the courses she had been requested to become ready to licence to deliver in the six week period. She also recorded in her comments to Mr Broomfield that on reflection she believed that to improve standards (presumably existing) and then also become able to licence and deliver two new courses and six weeks was *"a big ask"*. At the end of the performance improvement plan Mr Broomfield concluded that the Claimant had not successfully achieved the required outcome, which was to become licensed to deliver two new courses. As a result he referred the case to Mr Rainbow for a decision on the next stage. This decision was pending the outcome of the Claimant's appeal against her final formal warning.

50. This appeal meeting was arranged by Mark Rainbow on 22 October 2015 which subsequently had to be rearranged a number of times and eventually took place on 7 December 2015.

51. In January 2016, the Claimant went off sick and remained so until returning on 18 April 2016. On 4 May 2016 the Claimant submitted a formal grievance. We did not have sight of the Claimant's original grievance letter. As she subsequently went off sick again from 4 May 2016 to 3 August 2016, the grievance was put on hold. The Claimant had been invited to attend a meeting to consider her long-term absence on 28 July 2016. This was dealt with by a different manager called Jerry Comber. Mr Comber decided to move the Claimant to a new line manager called Darren Cail as the Claimant believed her relationship with Mr Broomfield had broken down. Mr Cail worked to agree a return to work plan with the Claimant with a phased return.

52. The PIP was reinstated as the Claimant remained on a final formal warning predating her long-term sickness absence during 2016. She was invited to attend a formal meeting to discuss her ongoing performance plan.

53. Mr Lynch was appointed to hear the Claimant's grievance she had lodged on 4 May 2016. A grievance hearing took place on 11 October 2016. We had sight of the grievance outcome letter dated 16 December 2016 in which Mr Lynch decided that the grievance was not upheld. We also had sight of the grievance rationale document which outlines the details of the Claimant's grievance. The key areas investigated were as follows;

- Harassment/discrimination race/gender. The Claimant had alleged the perception that she was aggressive was a cultural difference/language could be perceived as aggressive
- driving allegations
- disciplinary regarding no contact
- vehicle log sheets
- expenses
- liveried vehicle
- red stream stress test
- phased return to work
- denied access to information
- NVQ
- rating history
- search the lower grade
- site strategy

54. In the grievance rationale document under this section 2 heading background it stated as follows;

"Keisha's ethnicity and background
Keisha is of Jamaican descent and lived in Jamaica when she was an infant prior to relocating with her father (Rastafarian) to Tanzania. Keisha's L1 was formed of mixed languages during her informative (sic) years, Patois (English Creole), English (Jamaican dialect and intonation) and Swahili (Tanzanian, lingua franca East Africa). These languages what influences until the age of 14 with Swahili her L1 until relocation to be with her mother in the UK. Swahili is a Bantu language from the Niger-Congo macro family, Swahili has agglutinative grammatical structure and an elaborated system of noun classes, there is no grammatical gender comparison to most Bantu languages, Swahili is not tonal, and word stress regularly falls on the pre-final syllable.

55. Mr Lynch then posed the question: was the Claimant discriminated against because of the perception, by her manager and peers, that she is aggressive when in fact she was communicating in a way that reflects her L1 heritage, indicating a lack of appreciation of diversity by other members of the team. The Claimant had cited a number of examples she relied upon to demonstrate that there was perceived aggression due to her race. Mr Lynch's grievance rationale recorded he had investigated all of the allegations the Claimant raised and drew conclusions on each one individually. Where there were tangible reasons for events that had happened Mr Lynch drew reasonable conclusions. For example, Mr Lynch concluded that the home visit by Mr Hopkins was not harassment based on race but out of concern as

the Claimant was effectively AWOL and had been for some time. We find that Mr Lynch conducted a thorough and fair investigation and drew appropriate conclusions in respect of the matters raised, based on the evidence before him and found there was no case to answer. However there was no direct evaluation as to whether or not the Claimant's ethnicity or background (in particular the way the Claimant spoke) could have affected the perception of the Claimant. Further, the Claimant's concerns that her race was affecting manager's perceptions were not passed on by Mr Lynch to anyone.

56. The Claimant appealed the outcome of the grievance on 21 December 2016. An appeal hearing was arranged for 28 February 2017 and was to be conducted by Mr Mark Hughes who was a senior manager. The Claimant was accompanied at the appeal hearing by her union representative. On 11 May 2017 Mr Hughes wrote to the Claimant advising that he did not uphold her appeal against the grievance decision by Mr Lynch. Mr Hughes however did make some recommendations in relation to the Claimant's travel arrangements and feedback on coaching in respect of emails to prevent disputes arising out of email exchanges.

57. Following the appeal outcome, the Claimant was contacted by Mr Beautyman who was the Claimant's new line manager tasked with continuing the performance management process against the Claimant. Mr Beautyman wrote to the Claimant on 16 May 2017 advising that the case had been passed to him to consider whether she should be moved to an alternative role at the lower rate of pay or her employment should be terminated on the grounds of unsatisfactory performance. Mr Beautyman arranged to meet with the Claimant on 16 June 2017.

Withdrawal of two job offers

Network Planning Role – offer made on 28 March 2017

58. The Claimant had decided to apply for internal vacancies and was being supported during the early part of 2017 with job searches by Darren Cail. She applied for the above role and was successful at interview. She was informed by the relevant manager, Mark Cotton, that he would be offering her a role. She informed Darren Cail, who was the manager assisting her with job search and a note of this is recorded in Darren Cail's job search record that we saw in the bundle at page 441. Mr Cail also records that on 29 March 2017 Mark Cotton called Mr Cail and informed him also of the job offer and agree a release date. Mr Cail records that he asked Mr Cotton if he would send the formal offer via email so that he could agree a date.

59. On 5 April 2017 the Claimant received an email from Mr Cotton advising that the post had been withdrawn. The email gives very limited details and did not

give any reasons for the withdrawal of the job. It stated that Mr Cotton was sorry to let the Claimant know that the planning role for the Bristol site was going to be withdrawn and therefore he was not going to make a formal job offer to the Claimant.

60. There was no evidence that this role was subsequently given to a white male. It was however stated in the list of issues which was agreed by both parties.

Second role – Network Planning and Design and Commissioning Manager (Bristol)

61. The Claimant attended an interview for the above role and on this occasion she received a formal offer letter which was undated but was from Jacqueline Vigne of the Recruitment Team. The letter confirmed that she was successful at the interview and extended the job offer to the Claimant. She was instructed to let her current Line Manager know the news as soon as possible and agree a release date with them. It referred to her new line manager arrangements and asked her to check with him to confirm the start date. The Claimant informed Mr Rainbow on 3 May 2017 she had been offered this job and needed to provide the hiring manager with a new start date as instructed. Mr Rainbow replied two days later and informed the Claimant that he had forwarded the email to the Business Unit HR Business Partner and Line Manager requesting a suitable date. He promised to chase up the situation as the Claimant was concerned it had been outstanding for a week.

62. It was unclear when and how the Claimant was informed that the second job had been withdrawn, but we had sight of an email between Ali Williams (Infrastructure Delivery/General Manager) and the Claimant on 8 May 2017. It was evident from the email that Ms Williams and the Claimant had had a telephone conversation as Ms William refers to it in the subject matter and thanks her for her time earlier, so we surmise from that that the conversation took place on 8 May 2017. In the email Ms Williams sets out the reasons why the job offer had been withdrawn, these were as follows.

63. Ms Williams acknowledged the Claimant had been offered the role of the planning role within the Commissioning Team and stated she became involved when the Claimant's start date was being discussed. Ms Williams expressed that she was surprised to find this given the *"considerable transformation planning"* that was going on at the moment and informed the Claimant that she was in the process of agreeing and releasing a substantial number of employees from the organisation as a result of the paid leaver scheme. When these people had left, which was likely to be at the end of May, they would need to *"rebalance / collapse"* some teams, meaning that the team the Claimant had moved to could quite possibly quickly have become surplus. Ms Williams said she was unwilling to put someone through and because of this she had no choice but to withdraw the offer. Ms Williams

acknowledged why the Claimant was keen to understand why this had only just come to light when they had been recruiting the role for some time. Her explanation was that the team was not under her remit for much of the recruitment and also there had been an increased number of leavers which they were not expecting and that had changed her view on the OM vacancies. Ms Williams advised the Claimant to pick this up with her current HR Business Partners or HR Services. She concluded by saying she was genuinely trying to do the right thing for the Claimant and did not believe that bringing her into a team going through such large-scale transformation was the right thing for her now.

64. In September 2017 the Claimant become aware that contrary to what she had been told by Ms Williams, the second role had not been withdrawn and had been "given" to an individual called Kristopher Vincent. We are unsure how the Claimant became aware of this but the Claimant's concern was such that she sent an email to the CEO of the Respondent, Mr Clive Selley on 6 September 2017. In that email the Claimant says that she had raised the issue with Amanda Kirtley but had not had a response and specifically cited that she wished to raise issues around equal opportunities, breach of contract and unfair treatment. In the email the Claimant explained she had applied for two posts which both subsequently had offers withdrawn and attached the email from Mr Cotton and the email from Ms Williams that we referred to above. The Claimant informed Mr Selley that some weeks/months later a fellow team member Kristopher Vincent was brought across as Acting Network Planning and Design Commissioning Manager (second job) and he had been appointed as a substantive manager six months since the offer was made to the Claimant. She complained that the job has not been re-advertised but someone had been appointed to the role and that she had not yet been found an alternative role and asked for an investigation.

65. The investigation was duly passed to Amanda Kirtley, HR Director for Central Functions and Headquarters for OpenReach.

66. Ms Kirtley was asked to investigate this matter and set out her findings in an email of 8 September 2017. Ms Kirtley advised she had investigated the Claimant's complaint and asked the Infrastructure Planning Team to provide the rationale and facts in relation to the appointment of Kristopher Vincent.

67. There were no notes of any investigation or who Ms Kirtley had spoken to in respect of the Claimant's complaint, all we have is the email of 8 September 2017. Ms Kirtley explained to the Claimant that a number of things had happened since she had received the email from Ali Williams to explain why the offer had been withdrawn largely due to an extensive transformation programme that was ongoing in that unit. She described that as a consequence, or part of the transformation, there would have been a surplus of operational managers in the Claimant's region. These were essentially the

same reasons Ms Williams had given for reasons why the job offer to the Claimant was withdrawn. In addition people were leaving the planning team through the paid leaver process and as a result of this constantly changing and producing workforce the team had to regularly review the team spans and layers (collapsing and consolidating teams and re-deploying managers).

68. Ms Kirtley goes on to describe that there had been a plan to move an OM from Cardiff to the Bristol office however a key change was that one of the OM's had left the Planning Team for a different role within OpenReach and this left Cardiff covered but did not give the team the cover that was required in Bristol. Prior to this Kristopher Vincent had been Acting Manager for another planning team, the ID Team collapsed and consolidated the team that Kristopher was managing and moved him across to the role in Bristol until they could further see how they could balance/move teams. Kristopher was appointed as a talent move given he had been in an acting role for an extended period (nearly 12 months) and was part of the Future Leaders talent programme. Ms Kirtley said she appreciated it had caused frustration for the Claimant but the appointment had been made with the best intentions for the individual who had been covering the role as above and the ID business.

69. The Claimant disputed that the Future leaders programme ensured that participants would gain preferential treatment in vacant roles. We agree that the Respondent had not adduced any evidence of this effect. We had sight of a document called "Future Leaders overview 2018-19". This stated it was a leadership programme for non-managers who have the potential to become leaders. Ms Kirtley explained it was a talent programme in use when an employee was spotted to have clear capability and aspirations to become a manager. She accepted it did not guarantee a management role. Ms Kirtley told the Tribunal that Ali Williams had decided to give Mr Vincent the role

70. The Claimant replied to Ms Kirtley on 11 September 2017 and pointed out (with a degree of irony) that she felt it was good to know that management/HR acted with Mr Vincent's best intentions in mind. She advises she still wanted to re-visit her points regarding the breaches including breach of contract, equal opportunities and inclusion and highlights that her disappointment in the way she has been treated none of which had been done with the best intention of the Claimant in mind. She asked whether HR had any intention of rectifying the matter and honouring her promotion.

71. The Tribunal heard evidence from Ms Kirtley. Ms Kirtley's witness statement on the reasons for withdrawing the first job was incorrect and she agreed whilst giving her evidence it was wrong. The first factor to identify in this regard is that in paragraph 4 of Ms Kirtley's evidence she had got the reasons for withdrawing the first job offer and the second job offer mixed up and had referred to the reasons for the second job offer being withdrawn as the same reasons as the first job offer. It became apparent when Ms Kirtley was giving

her evidence, that paragraph 4 of her statement was incorrect where she stated that Mr Cotton had replied to the Claimant on 21 April 2017 explaining the reasons for the first job offer had been withdrawn. Ms Kirtley agreed that this was incorrect and that she had muddled this, as her statement set out reasons why the second job had been withdrawn. Mr Cotton's email, as we observed above, recorded that the role was being withdrawn but gave no reasons as to why. Ms Kirtley told the Tribunal she had spoken to the relevant HR person, a Theresa Hyde about why the role had been withdrawn. She did not keep any record of the discussion. Ms Hyde had told her that they had made some changes from the time the role was advertised and the unit was downsizing roles. A paid leaver scheme had been opened to reduce headcount. Ms Kirtley also told the Tribunal such schemes are approved by the Area Human Resources Director and senior leadership teams. She accepted there were no documents in the bundle relating to the actual schemes said to have been the reason the first job offer was withdrawn. None of this evidence was in her witness statement.

72. The other issue with Ms Kirtley's statement is that she said in her statement (at paragraph 11) that she took time to consider each of the points the Claimant had raised and provided a response by email on 11 October 2017 but we were not taken to this email and it was not in the bundle. Ms Kirtley acknowledged that the Claimant had raised "a large number of issues and concerns with me by phone and followed up by email". Many of these were said to relate to her concerns about driving a van for work. Ms Kirtley also acknowledged that the Claimant was extremely unhappy with the situation and felt she had been treated unfairly.

73. Therefore, as the Respondent's evidence stood, we had a very limited hearsay explanation for the withdrawal of the job offers and no documentary evidence. There also appeared to be missing an important document namely the email of 11 October 2017.

74. Ms Kirtley had forwarded the Claimant's email of 11 September 2017 to two individuals called Padmini Patel and Dianne Simpson asking if they could agree a response as below, this was at 17:16 on 11 September 2017. She commented that in a further email at 17:36 *"if we could please, complaint chain enclosed - if I could have a response to send tomorrow that would be great"*.

75. We find that there was an inadequate investigation into the Claimant's complaints. The Claimant's complaint was in our view quite clear. She specifically cited a breach of equal opportunities and asked why, when she had been advised a job role was withdrawn as the reason an offer to her was withdrawn, it had subsequently been given to someone else. She did not directly cite race or sex discrimination. Ms Kirtley said in cross examination that she had not understood her complaint to be about the Claimant's

ethnicity and she was not even aware of the Claimant's ethnicity. Whilst this may have been the case for Ms Kirtley it does not explain why Ms Kirtley, who presumably is an experienced HR individual, would not understand that a reference to breach of equal opportunities could amount to a complaint about discrimination. Even if she was not aware of her ethnicity, Ms Kirtley in our view should have asked why the Claimant was complaining of a breach of equal opportunities. Ms Kirtley accepted she did not ask the Claimant what she had meant by breach of equal opportunities. We also were not told why the Claimant's complaints were not treated as a formal grievance.

76. At this point the Claimant had been invited to a meeting by Richard May to consider whether her employment could be continued in view of the ongoing performance issues. Ms Kirtley suggested that the best approach would be for her to raise anything she considered still outstanding at the meeting with Richard May. We considered Mr May's evidence and he does not deal at all with the points about the two jobs being withdrawn. Mr May had been asked to look at the Claimant's case from the perspective of the performance management procedure and was the individual who dismissed the Claimant after the Claimant failed to attend a final meeting to discuss her performance review.

<u>Continuation of the PIP</u>

77. After the brief involvement of Mr Beautyman, the Claimant was assigned a further line manager, Tony Deadfield.

78. Mr Deadfield met with the Claimant on 24 August 2017 and wrote a further formal action plan which was to last eight weeks. There were five designated actions that the Claimant was required to complete and these were as follows;

- reskill on facilitator training
- up skill on MDF frame skills course
- up skill on universal clip closures course
- an ongoing review to assess capabilities and ability to deliver/facilitate innovates, interactive, impactful and customer centric quality training. This was dependent on the Claimant achieving her licences to deliver the two courses above and would involve a four-week period of assessment.
- Familiarise with the course materials as preparation

79. This formal action plan was emailed to the Claimant on 25 August 2017. He had chosen two new courses for the Claimant to learn and then achieve a licence to deliver those courses. Both were engineering type courses. The MDF frame skills course required the Claimant to demonstrate stripping soldering termination skills on copper wiring. There were four stages – stage

1, sit in as a delegate, stage 2, to sit in observe trainer, stage 3, co-present with licenced trainer and stage 4 to present course with licenced trainer in attendance to observe. There were usually three stages and therefore Mr Deadfield had built in an additional stage to assist the Claimant.

80. On 5 September 2017 the Claimant emailed Mr Deadfield indicating she would sign off the plan. However her view of the plan changed after attending the first stage (sitting as a delegate) of the MDF frame skills course on 6 and 7 September 2017 at the Respondent's regional training hub in Forest Farm, near Cardiff. The Claimant met with Mr Deadfield on 7 September 2017 and became upset. She had also raised travel times to Forest Farm and overtime when travelling. She described herself as overwhelmed. She was also due to attend the re-skilling facilitator training in Leeds on 8 September 2017 in Leeds.

81. The Claimant did not achieve the first action of re-skilling on the facilitator training as she did not attend the course on 8 September 2017. She informed Mr Deadfield on 7 September 2017 by text later that evening to say she could not attend as she had a migraine. It later transpired she had attended the Bristol office and spent the day with her union representative. As she missed the first date she was unable to attend the second session. This ultimately led to her failing the first action plan of the PIP.

<u>MDF Frame course</u>

82. On 8 September 2017 the Claimant raised concerns about the formal action plan with Mr Deadfield by email. Specifically that the trainer guide for the MDF course indicated that it was expected the trainer already has knowledge and experience of MDF, and for these reasons she would not sign the plan off. Mr Deadfield replied to the effect that the plan stood and maintained it was achievable.

83. At the second stage (sit in) on 22 September 2017 the Claimant had feedback from Mr Chapman. He observed that the Claimant did not appear confident with aspects of soldering and recommended she spent time practicing stripping, soldering and termination skills.

84. At stage 4 on 4 and 5 October 2017 the Claimant was observed by Mr Deadfield and a Mr B Jones. The feedback documentation identified the Claimant had forgotten course content requiring intervention from the observer and had a knowledge gap with the course materials and had failed to mention the customer or promote the Respondent or its values. Mr Deadfield also observed as follows:

> **"the demonstration on the MDF within the classroom was far from acceptable. Keisha took too long with the elements of the demo, clearly nervous, hands were shaking and**

she struggled stripping the cable and struggled to terminate the cable using the inserter. Overall a very poor demo…"

85. The Claimant was informed at the end of the first day by Mr Deadfield that she would not achieve her licence for the course and this was supported by Mr Jones who observed he considered the Claimant's performance would need significant improvement (3-4 more sit ins) before she could be considered as licenced. Mr Jones' feedback was that the Claimant lacked the knowledge and confidence to be able to deliver the course. He did not mention anything related to her demonstration.

86. On the second day Mr Deadfield's report stated that Mr Jones had had to intervene as a diagram drawn by the Claimant had confused delegates.

87. The documented action plan did not record anywhere that the Claimant had raised an issue of her benign tremor, or that there was a medical reason for her shaky hands.

<u>Clip Closure Course</u>

88. This course also involved some practical demonstrations including stripping cables. Mr Deadfield observed that he and the delegates had observed how nervous the Claimant appeared to be and commented on her shaky hands. This was a very minor element of the overall feedback. Mr Deadfield's key concern was the Claimant's inability to control the group. He described the session at one point as chaos, with delegates taking over and multiple conversations. The Claimant was informed that she would not be receiving her licence to deliver this course. Mr Deadfield's feedback was supported by the other trainer present Mr Hawksworth.

89. During the period there also was a dispute concerning the Claimant's travel time as she had been allocated a new starting hub which was used to calculate the total onwards to delivering training and courses. We return to this in paragraph 103 below.

90. It was evident from the second formal action plan that the Claimant struggled significantly with upskilling to learn the two new courses and had lost her confidence.

91. On 18 October 2017 Mr Deadfield met with the Claimant to go through her performance against the action plan. The meeting was recorded. It was also followed up in an email of the same date and Mr Deadfield records that the Claimant had failed to achieve all five actions that had been designated. In relation to the upskilling to deliver two new courses, there was a conclusion that the Claimant's performance was significantly below the standard required to achieve the licences for the course. There was also criticism of the Claimant's inability to control delegates consistently and significantly

below standard. Mr Deadfield concluded that the Claimant had substantial capability gaps which prevented her from meeting the standards required for her trainer role and would be passing her case to Mr May for a decision on the continuation of the Claimant's employment. Arrangements were put in place to support the Claimant with a job search.

92. A formal decision meeting in accordance with Stage 2 of the performance management procedure was convened on 15 November 2017. The Claimant chose not to attend that meeting. Mr May gave the Claimant the opportunity to provide a written submission by 22 November 2017 of any facts that she wanted him to consider when making his decision on her performance plan. The Claimant did not provide written submissions.

93. Mr May wrote to the Claimant on 14 December 2017 advising that she would be dismissed for failing to improve her performance notwithstanding the coaching plan and support she had been given. The Claimant was given notice with her last day employment being 9 March 2018 and was informed that she would not be expected to attend work during her notice period.

94. Mr May's rationale for dismissing the Claimant was set out in his letter and explained in his witness statement. He concluded that it was appropriate to dismiss as a result of her continued and unsustainably poor performance and the Respondent could not continue to support the time and level of management the Claimant required. Mr May’s witness statement gave some statistics on her performance. The Respondent expects a trainer to deliver in the region of 950 learner days per year. In the Claimant's case she had only been able to deliver less than 100 days. When he gave his evidence (which was unchallenged) he expanded on this and told the Tribunal that since 2016 the Claimant had completed 24 learning days since April 2016. This was made up of delivering 2 courses of 3 days training with 8 delegates.

95. Mr May also investigated the Claimant’s complaint that she was had been unreasonably required to deliver engineering courses despite not having an engineering background. He established that the other trainers were all required to deliver engineering-based courses and cited 5 other non-engineering trainers who had achieved 19 licences between them in engineering topics. As such he concluded that the Claimant was not disadvantaged by her background.

96. The Claimant appealed the decision to dismiss and this was dealt with by Mr Kevin Gaughan at an appeal hearing on 8 February 2018 which the Claimant attended. Mr Gaughan was familiar with the Claimant's role as he was member of the senior management team in learning and development. He was of the view that the final action plan put together by Mr Deadfield was fair and should have been achievable. His evidence, which we accepted, was that all of the trainers were required to deliver training courses with an

element of engineering and an engineering background was not required. Mr Gaughan rejected any suggestion that the Claimant's treatment was connected to her race or sex.

97. In relation to the two jobs that had been withdrawn Mr Gaughan's evidence was that he was satisfied with the investigation conducted by Ms Kirtley.

98. One of the grounds of appeal was that the courses the Claimant had been required to learn under the formal action plan had contained physical elements that she had difficulty with due to her knee and tremors. This related to a requirement to move a heavy ladder and the soldering skills requiring fine motor skills. Mr Gaughan's evidence was that Mr Deadfield had been previously been aware of the knee issue but not the tremors, until after the PIP. He had listened to the recordings of the meeting between Mr Deadfield and the Claimant. The Claimant had not raised an issue with her shaky hands prior to the plan but had raised it at the final meeting with Mr Deadfield. Mr Gaughan concluded that the practical elements had not impacted on her performance. His finding was the Claimant was failing to perform as a trainer rather than any practical matters.

99. Mr Gaughan upheld the decision to dismiss the Claimant for reasons of capability. Mr Deadfield assisted the Claimant with searching for alternative employment during her notice period.

100. It was suggested to Mr May in cross examination that the Claimant should have been placed into the transition centre. The Respondent has a transition centre where employees are placed if their roles are surplus. Mr Gaughan also dealt with this in his oral evidence. He explained that employees who are on disciplinary or performances procedures are not placed within the centre.

101. We accepted Mr May and Mr Gaughan's evidence that the Claimant should not have been placed in the transition centre is in place to assist displaced employees rather than employees under performing.

<u>Overtime claim</u>

102. The Claimant has a claim for overtime which she submitted to Mr Deadfield. This was related to a period of time during the Claimant's PIP in September and October 2017 where she was travelling from her home in Bristol to Forest Farm Training Hub in Cardiff by public transport. This arose from the Claimant's refusal to use the Respondent's supplied liveried vehicle for historical reasons relating to the two different complaints that were made against the Claimant and her written warning. Since then she had used public transport to travel to her training commitments. The Claimant was offered a

van at the start of the PIP but refused and the Respondent agreed with the Claimant's union representative to pay public transport costs.

103. During the Claimant's sick leave in 2016 there had been a transformation programme which created regional training hubs for all L&D trainers and the regional training hubs were designated as the L&D trainers primary place of work. We saw reference to a BAV training delivery team transformation travel guidance document in Mr Deadfield's response to the Claimant's email of 11 October 2017 although we did not see the actual document itself. This provided as follows; that daily travel be kept at 90 minutes in total for the whole day, and if the trainer had to exceed 45 minutes each way then they would bank the time which could be claimed for overtime. Mr Deadfield subsequently refused to pay the Claimant or to authorise the Claimant's claim for overtime for her travel between Forest Farm in Cardiff and her home address in Bristol as he calculated it on the basis of time it would have taken her to travel in her liveried van rather than the time it took her to travel on public transport. He calculated that it should take her between 49 and 52 minutes driving using the van and therefore noted that if it took between 49 and 52 minutes each way this would only result in between 8 and 14 minutes maximum that could be classed as overtime. For these reasons the majority of the overtime payments were not made to the Claimant as she had submitted claims well in excess of these times.

104. Mr Deadfield had calculated the travel time using google maps. We have not been taken to any contractual arrangement or agreement between the Claimant and Respondent which could corroborate or validate the Claimant's claim that she should receive overtime for her travel time on public transport. It was the Claimant's choice not to use the company van provided to all trainers.

<u>Disability – Findings of Fact</u>

105. The evidence before us regarding the Claimant's disability was as follows.

106. There was no impact statement or any medical information other than a print-out from the Claimant's GP. The date of the letter was not clear as to whether it was 2016 or 2018 as it was a poor photocopy, however it confirmed that the Claimant has the condition of Benign Essential Tremor which was a lifelong resting tremor worse on action. It goes on to say that this would make an engineering role difficult due to fine hand co-ordination required. The examination is recorded as having a fine rest tremor prominent on movement co-ordination/power/sensation normal. Under "comment" the doctor has said that an essential tremor may mean that certain tasks are difficult and suggests occupational health appointment at work (BT) for further

assessment). The note also states *"Pt not worried about (indecipherable word), otherwise manages fine with this outside of specific fiddly work."*

107. The other evidence that we had from the Claimant was in paragraphs 37 and 38 of her witness statement.

108. The Claimant says at paragraph 37 of her witness statement the Respondent were aware of longstanding problems with her knees and feet evidence was as follows:

"it affects my ability to climb a ladder or kneel"

109. She referred to pages 468 and 469 of the bundle in support of this evidence. However, when we went to page 468 there was nothing on that page regarding reference to a problem with the Claimant's knees and the only occupational health report we saw from 2014 was in relation to stress and anxiety and made no mention of problems with her knees or a benign tremor.

110. Turning to the benign tremor, which was the condition relied upon as a disability. The GP letter confirms this is a diagnosed medical condition the Claimant has had all of her life. The only evidence we have about how it affects her ability to carry out day to day activities is that there is very limited evidence at paragraph 38 of her witness statement as follows:

"My hands constantly shake, it is exacerbated when I'm being watched, self conscious about it and / or when nervous. It affected my ability to carry out fiddly tasks such as wrapping copper or splitting fibres which is a requirement for delivery requirement.

111. There has been no challenge to the medical information provided by the Claimant about her condition. The Claimant's evidence does not limit her difficulties to engineering tasks, she states that it affects her ability to carry out fiddly tasks and this is backed by the GP record which discusses difficulties with fine hand co-ordination and essential tremor meaning certain tasks are difficult.

Knowledge

112. In relation to the knee condition, there was evidence in the return to work notes of 28 July 2016 that an Occupational Health report from 2012 had ruled the Claimant out of an engineering role due to health issues but no other detail.

113. By the time of the appeal hearing the Respondent was aware of the Claimant's tremor in her hands. She had handed a copy of the GP letter to

Mr Deadfield. The Claimant accepted she had not told the Respondent about the benign tremor until during the final PIP process, when she says she informed Mr Deadfield although it remained unclear when the Claimant says she informed him. The reason the Claimant had never raised it previously was that it had not been relevant as she had not been required to deliver training previously where this would have been an issue. It was not referred to in any of the PIP documentation which was very thorough and recorded each interaction with the Claimant during the procedure. It recorded other matters of concern raised by the Claimant such as the overtime issue and van issue and we find it would be implausible given the detailed content that Mr Deadfield would have left this out, which would have involved a degree of deliberate behaviour to do so. The Claimant's evidence was that she informed Mr Deadfield of this due to the criticism she had been given in the feedback from the trainers observing her. We find that the Claimant did not inform Mr Deadfield until the final meeting on 18 October 2017 of her benign tremor. This was the meeting where she gave him a printout of the GP letter we referred to above at paragraph 106. This meeting had been recorded.

114. Mr Gaughan referred to this in is appeal rational. He had investigated the knee issue and been advised that Mr Deadfield had been aware and a trainer had advised the Claimant could ask for help from a delegate to move a ladder. As regards the Claimant's shaky hands Mr Gaughan's note stated that Mr Deadfield and the other managers had not been aware of the situation with her hands as it had never been previously raised. Mr Gaughan concluded that the Claimant's failure to complete the licences was not related to any physical issue rather was founded on a lack of fundamental training delivery capability.

115. Mr Gaughan's witness statement stated that the Claimant had become quite distressed when describing demonstrating the clip joint closures and how embarrassed she had found this. He looked into it after the meeting and asked Mr Deadfield about it but Mr Deadfield explained he had known nothing about the tremor as the Claimant had never mentioned it. He had put it down to nerves. Had she done so there were plenty of options such as delegates stepping in. Mr Gaughan told the Tribunal that the Claimant had raised it with Mr Deadfield as he had heard her do so on the recording of the meeting at the conclusion of the plan.

<u>Submission of Second claim</u>

116. In relation to why the Claimant had not presented a claim for unfair dismissal until 22 June 2018 we make the following findings from the Tribunal file correspondence (seen by the Respondent and discussed at the hearing), emails between the Claimant and Mr Cooper and the Claimant's witness evidence.

a. Paragraph 11 of the order dated 21 February 2018 acknowledged the potential unfair dismissal claim had been discussed at the first PH and made it clear that the Claimant would need to lodge a fresh ET1 or apply to amend her claim in writing.

b. A further preliminary hearing was listed for 12 April 2018.

c. The Claimant wrote to the Tribunal dated 22 March 2018 requesting that a claim for unfair dismissal be attached to her existing case and requested advice on the procedure. The Claimant attached a document to the email, but it was not downloaded or referred to the Judge. This later transpired to be the Scott Schedule and referenced a claim of unfair dismissal. The Tribunal copied the request to the Respondent and advised it would be discussed at the forthcoming preliminary hearing on 12 April 2018.

d. The Respondent applied for a postponement of the hearing for 12 April 2018 and it subsequently transpired that Judge Whitcombe's order dated 21 February 2018 had been sent to the wrong parties. Neither representative had received the order. That preliminary hearing was postponed.

e. On 4 April 2018 the Claimant chased the Tribunal for a response to her email dated 22 March 2018 in which she made a request to attach a claim for unfair dismissal.

f. On 10 May 2018 the Respondent raised concerns about the Scott Schedule and noted that it referenced a claim for unfair dismissal, but stated they were unaware that any such claim had been submitted nor had there been an amendment.

g. On 10 June 2018 the Tribunal wrote to the parties and advised as follows:

"On 22 March 2018 the Claimant asked about adding a claim for Unfair Dismissal but was told to wait for the preliminary hearing which has not taken place. As EJ Whitcombe explained if the Claimants wants to apply to amend, a copy of the proposed amendment and explanation for the delay in required. In the alternative a new claim can be presented. The Claimant is being represented so they should advise. The Claimant has until 24 June 2018 to make the application or issue a new claim failing which a preliminary hearing will be arranged to make case management orders."

h. The Claimant subsequently submitted the second ET1 on 22 June 2018, explaining she had not been able to seek advice as her union representative was away (the email from the Tribunal dated 10 June 2018 had been copied to her and her union representative). The Claimant had understood from the

email section we have quoted above that she had until 24 June 2018 to issue a new claim.

i. For unknown reasons, the Claimant's second ET1 was not then served on the Respondent. This became apparent in October 2018 and EJ Cadney ordered it be served on the Respondent.

The Law

Unfair dismissal

117. The Respondent relied upon capability as the reason for dismissal which is a potentially fair reason for dismissal under Section 98 (2) of the Employment Rights Act 1996 ("ERA 1996"). Under S98 (4), in a capability case it is necessary to consider whether a fair procedure has been followed. "An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance." **(James v Waltham Holy Cross UDC [1973] IRLR 202).**

Breach of contract

118. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that proceedings may be brought before an employment tribunal in respect of a claim for the recovery of damages provided the claim is one is within the jurisdiction and the claim arises or is outstanding on the termination of the employee's employment.

Discrimination

119. The Claimant brought claims for direct race, disability and sex discrimination pursuant to Section 13, discrimination arising from disability (Section 15) and indirect discrimination (Section 19) of the Equality Act 2010 ("EA 2010") on the grounds race.

120. **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** held that the Tribunal must consider the reason why the less favourable treatment has occurred. Or, in every case of direct discrimination the crucial question is why the Claimant received less favourable treatment.

121. The key to identifying the appropriate comparator is establishing the relevant "circumstances". In **Shamoon v Chief Constable of the Royal Ulster**

Constabulary [2003] IRLR 285 this was expressed as follows by Lord Scott of Foscote:

"...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

122. On the burden of proof Section 136 EA 2010 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.

123. In **Igen v Wong [2005] IRLR 258 (CA)** the guidance issued by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd** was approved in amended form. The Tribunal must approach the question of burden of proof in two stages.

"The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld." (paragraph 17, per Gibson LJ)

124. **Hewage v Grampian Heath Board [2012] IRLR 870 (SC)** endorsed the guidelines in **Madarassy v Nomura International [2007] IRLR 246 (CA)** concerning what evidence is required to shift the burden of proof. Facts of a difference in treatment in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination; there must be other evidence.

<u>Indirect Discrimination</u>

125. Section 19 of the Equality Act 2010 provides:

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

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

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

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

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

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

126. The EHRC Code of Practice on Employment provides that the phrase ‘provision criterion or practice’ should be construed widely so as to include for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.

127. The PCP must be of neutral application. A PCP can be a one-off decision **(British Airways Plc v Starmer [2005] IRLR 862).** A liberal rather than overly technical approach should be adopted when considering PCP’s. However a one off flawed disciplinary procedure will not satisfy the low threshold **(Nottingham City Council v Harvey EAT 0032/12).**

128. In **Essop & Ors v Home Office (UK Border Agency) & another [2017] ICR 640** the Supreme Court identified six salient features of the definition of indirect discrimination: First, there was no express requirement for an explanation of the reasons *why* a particular PCP put one group at a disadvantage when compared with others. Second, whilst direct discrimination expressly required a causal link between the less favourable treatment and the protected characteristic, indirect discrimination did not. Instead, it required a causal link between the PCP and the particular disadvantage suffered by the group and the individual. Third, the reasons why one group might find it harder to comply with the PCP than others were many and various. The reason for the disadvantage did not need to be unlawful in itself or be under the control of the employer or provider. Both the PCP and the reason for the disadvantage were 'but for' causes of the disadvantage: removing one or the other would solve the problem. Fourth, there was no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. Fifth, it was commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. Sixth, it was always open to the respondent to show that his PCP was justified. There was no finding of unlawful discrimination until all four elements of the definition in s 19(2) were met. The essential element

was a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual.

<u>Disability</u>

129. The issues before the Tribunal were to determine whether the Claimant was a disabled person for the purposes of the Equality Act 2010 as defined in Section 6. The burden of proof lies with the Claimant.

130. The steps that the Tribunal are required to examine in such matters are whether the Claimant has a physical or mental impairment that has a substantial adverse effect and a long-term adverse effect on the Claimant's ability to carry out day to day activities.

131. The substantial adverse effect is one that is more than minor or trivial and a long-term effect is one that has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of the life of the person. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities it is treated as having continued to have that effect if the effect is likely to recur.

132. <u>Section 6 of the Equality Act provides:</u>

6 Disability

(1) A person (P) has a disability if—

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

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

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

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

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

133. In determining whether a Claimant is disabled the Tribunal must take into account of the statutory guidance on the meaning of disability as it thinks relevant (2011 Guidance on Meaning of Disability).

<u>Conclusions – Disability</u>

134. The burden of proof in establishing a disability lies with the Claimant. We had the GP letter and the Claimant's witness statement at paragraphs 38 and 39. Ms Gardiner submitted the evidence was completely inadequate and insufficient. We accept that we had limited evidence but we concluded it was sufficient. The GP letter confirmed the Claimant has a lifelong condition of a resting tremor. The impairment is long term. It causes her hands to shake. This impacts on her ability to perform any actions with her hands that require fine motor skills. The GP letter stated that the tremor may mean certain tasks are difficult. The Claimant is recorded in the letter as saying she manages fine outside of fiddly tasks.

135. We are satisfied that the impairment has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities. Although the Claimant cited engineering tasks she did not stop there as she went on to say it affected her ability to carry out fiddly tasks. This, along with the Claimant's evidence that her hands constantly shake showed that the impairment has more than minor or trivial effect on normal day to day activities where fine coordination is required. It was not, in our judgment, fatal to the Claimant's claim that she had not listed other examples of substantial and adverse effects on tasks requiring fine motor skills.

136. We also concluded that the Respondent was aware of this impairment prior to the Claimant's dismissal. Mr Deadfield was aware, as the Claimant informed him and provided a letter from her GP but only after the PIP had come to an end. The Claimant accepted she had not told Mr Deadfield at the start of the plan but had done so "during". Mr May and Mr Gaughan were also both aware of this condition. They did not seek any medical advice on whether the condition could have impacted on the Claimant's ability to pass the action plan.

<u>S13 – direct disability discrimination</u>

137. Less favourable treatment:

a. <u>Making the Claimant do the plan when they knew about her condition.</u>

This claim fails as we found that at the time the Claimant was put on the plan the Respondent did not know about her condition. Therefore, the alleged less favourable treatment was not because of her condition. We find that the reason the Claimant was put on the plan was due to genuine concerns about the Claimant's performance.

<u>b. Requiring her to deliver courses</u>

This claim also must fail. The Claimant was required to deliver courses as this was her job and was in no way whatsoever required to deliver courses because of her disability.

c. Putting her on a plan to change skills from being a system and planning trainer to being an engineering trainer.

We heard no evidence that supported the Claimant's case that her role of trainer was limited to delivering system and planning courses. Mr May's evidence, which we accepted was that other trainers were required to deliver engineering courses. There was also no evidence that the Claimant was required to deliver engineering-based courses because of her disability. This claim also fails.

S15 – Discrimination arising from disability

138. The list of issues specified the unfavourable treatment was the requirement to deliver courses and putting her on a plan to change skills from being a system and planning trainer to an engineering trainer.

139. Firstly, as we have set out above, there was no evidence that the requirement to deliver training in engineering courses was a change in skills. The Claimant was employed as a trainer and other trainers also delivered engineering courses. There were 5 other trainers delivering a total of 19 courses based in engineering.

140. Secondly, if we take the S15 claim as advanced in the list of issues, the unfavourable treatment did not arise in consequence of the Claimant's disability but in consequence of the Claimant being employed as a trainer. The claim, as set out in the list of issues, must therefore fail.

141. We are of the view that the Claimant's claim had not actually been put in the way it was intended in the list of issues. It was quite clear in our view that the unfavourable treatment alleged was that the Claimant was ultimately dismissed for failing to pass her PIP. Two of the five action plans under the PIP required the Claimant deliver courses involving practical demonstrations such as stripping copper wiring and soldering. The "something arising" in consequence of the Claimant's disability was her inability to perform these tasks either at all or to a satisfactory standard as her tremor put her at a disadvantage. The Claimant's shaking hands were clearly identified and commented on in the PIP outcome (see paragraph 84 above).

142. However where the Claimant's claim fails, in our judgment is where we come to consider whether the unfavourable treatment was because of

her inability to perform the fine motor skills tasks required under the PIP. This is because the Claimant was not dismissed for her failures in the physical tasks. Whilst we accept they were a factor, as they were commented on in the PIP, Mr May and Mr Gaughan's evidence was quite clear in this regard (see paragraph 84 and 98 above). There were five action steps in total. The physical elements were part of two of them but we do not think it can be said that the inability caused all of the failures to achieve the five steps. There were other elements. The Claimant did not pass the first action plan which was to re-skill on facilitator training. Both Mr Jones and Mr Deadfield's feedback was that the Claimant had knowledge gap with the materials for the MDF frame course. This had nothing to do with her disability. There was also concern about inability to control the group. For these reasons the Claimant's claim under S15 does not succeed.

143. Had the physical tasks requiring fine motor skills been more than an insignificant factor in deciding to dismiss the Claimant, thereby causing the disadvantage, the Respondent may have been in some difficulty as they were on notice by the end of the PIP of these issues and did not take any steps to revisit those sections of the action plan.

<u>Conclusions – Unfair Dismissal</u>

144. The Claimant was dismissed with notice. Her effective date of termination was 9 March 2018. The ET1 was presented on 22 June 2018. This was out of time. We have set out what happened in terms of process at paragraph 116 above.

145. We have concluded it was not reasonably practicable for the claim to be lodged in time and that it was lodged within a reasonable further period. If we are wrong about that we would have treated the Claimant's email dated 22 March 2018 and attachment as an application to amend her existing claim which would have been granted. There was a degree of confusion between the Claimant, the Tribunal and the representatives. The Claimant made a written request to add a claim of unfair dismissal on 22 March 2018 and attached a Scott Schedule and was told this would be dealt with at a hearing which was then postponed. The case management order dated 21 February 2018 was not sent to the parties until much later. The Claimant then reasonably took from the email dated 10 June 2018 that she had until 24 June 2018 to lodge a new claim, which she then did on 22 June 2018.

146. The Respondent has, in our judgment, shown the reason for dismissal was capability. There was sufficient evidence to show that there were genuine concerns about the Claimant's ability to perform her role to the required

standard. The Claimant herself accepted that she may not have been right for the role of trainer. Capability is a potentially fair reason for dismissal.

147. Turning now to whether the Respondent acted reasonably in accordance with S98 (4) ERA 1996.

148. The Respondent commenced managing the Claimant's performance in April 2014 and she was eventually dismissed in November 2017. Whilst sections of this period were in respect of sickness absence and put on hold to deal with the Claimant's grievances, there were considerable periods of time where the Claimant was on PIP's and she proceeded through the various stages. The PIP's were documented and we were able to understand what the Respondent was requiring the Claimant to achieve. There was evidence that impartial external factors were indicating there were problems with the Claimant's performance. In particular her MTM scores and the complaints that were received from individuals with no ulterior motive other than to express genuine concerns about the training the Claimant was delivering.

149. We had some reservations as to whether the final action plan was genuinely achievable, namely, to require the Claimant to upskill on two entirely new courses. However we accepted the Respondent's evidence that many courses had an element of engineering requirements and that the action plan was achievable given the time frame and the number of stages. A trainer is not necessarily required to be an expert in every subject. We saw that facilitation was an important element of the Claimant's role and this was also not being performed to a satisfactory standard. Also the Claimant was struggling with other skills necessary for the role of trainer for example control of the group. There was evidence of issues with the Claimant's performance throughout the relevant period of time from April 2014.

150. The Claimant must have been removed from the usual delivery schedule as she had delivered significantly less learning days than average. This may be partly explained by her sickness absence and we did not have any specific breakdown but we did accept Mr May's evidence that the comparison was 950 to 100. Most telling were the statistics that in a two-year period the Claimant had delivered 24 learning days in between April 2016 and the time of Mr May's deliberations.

151. The Claimant herself accepted that she was not best suited to the role of trainer.

152. The Claimant was given training and time to improve. She received an action plan. The PIP's were put on hold during the grievance procedure. The process took 2.5 years. At the end of the formal action plan, the Claimant was invited to attend a final meeting where dismissal was being considered but chose not to attend or make written representations. The Claimant was given

the opportunity to take part in an appeal which she did so and we are satisfied that the appeal process was conducted fairly and considered all the points raised.

153. For these reasons the unfair dismissal claim does not succeed.

<u>S13 – direct discrimination (sex and race)</u>

154. We have concluded that this claim succeeds.

155. A detriment will exist if by reason of the act or acts complained of a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he thereafter had to work. An unjustified sense of grievance cannot amount to a detriment but it is not necessary to demonstrate some physical or economic consequence **(Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).** The act of withdrawing a job offer amounted to a detriment in our judgment. The Claimant was disadvantaged by the withdrawal. Had the offer not been withdrawn, she would have changed jobs and no longer been on a PIP which ultimately led to her dismissal. We do not make any finding at this stage about the extent of that disadvantage as we did not have the evidence before us and this would be a remedy matter.

156. It was not in dispute that the Respondent had withdrawn two job offers from the Claimant (see paragraphs 58-76 above). In respect of the second role, which the Claimant had been informed was withdrawn as it was likely to have become surplus, it transpired this was not the case, but instead of re-opening a selection process, a white male had been given the role. We considered that the Claimant had proved facts from which the Tribunal could conclude in the absence of an adequate explanation the Respondent had withdrawn the roles because of the Claimant's sex and race and had established a prima facie case, shifting the burden of proof.

157. It was for the Respondent to show that the treatment was in no sense whatsoever on the grounds of the Claimant's sex and race. In our judgment, the Respondent failed to do this. In respect of the first withdrawal for the Network Planning role, there was no explanation given at the time, only that the role was being withdrawn. Ms Kirtley dealt with this in her evidence, but her evidence proved to be factually incorrect and therefore unreliable. In respect of the second role, the Claimant had been made a formal offer of employment only for it to be withdrawn. We considered both the contemporaneous explanation from Ms William's email and Ms Kirtley's evidence.

158. The explanation given by Ms Williams is set out in paragraph 63. Essentially, it was explained that the role the Claimant had been offered could quickly become surplus. Ms Williams implied that it was in the best interest of the Claimant to have withdrawn the offer. We find it remained unexplained how Ms Williams, a general manager could be unaware of recruitment within her area of responsibility. It was in our view implausible that an employer would go to the expense and time of recruiting a role, going through interview process and making a job offer for it all to be a mistake that had no authority to have been recruited for.

159. Even if we accept this was the case, what was of more concern was how the role then ended up being given to Mr Vincent. Ms Kirtley's evidence was that this was Ms William's decision. Ms Williams was aware that the role had been formally offered to the Claimant and how disappointed the Claimant was with the withdrawal of the offer but still decided to give the role to another employee without putting that vacancy back through a recruitment process. There was no evidence before us to satisfactorily explain that decision. At paragraph 68 we set out the explanation given by Ms Kirtley. It appears that the team Mr Vincent had been acting up as manager collapsed and so they moved Mr Vincent across to Bristol. There was reference to him being appointed as a "talent move" and was part of the future leader programme but no explanation as to why this should circumvent transparent recruitment practices. The Claimant had been through a recruitment exercise for this very role only a few months previously. The Claimant had previously had management experience having been a grade C3 prior to joining OpenReach and was already based in Bristol. There was no consideration of the Claimant's position and suitability over that of Mr Vincent. Ms Kirtley even said in her email that his appointment had been made with the best of intentions for Mr Vincent but Ms Williams does not appear to have also considered what was best for the Claimant or why Mr Vincent's interests were deemed to be more important than the Claimant's.

160. There was a wholescale lack of documentation was implausible and lacked credibility. If two jobs had been withdrawn we would have expected to have seen some documents confirming this process. They cannot all have been dealt with by conversation. We heard that these matters are usually dealt with at a senior level. We also concluded that there was a poor and inadequate investigation into the Claimant's concerns when she raised this with Mr Selley and it was not treated with sufficient concern given that the Claimant had cited breach of equal opportunities. Ms Kirtley's investigation took 2 days and there were no notes to support any of her conclusions. In addition, her evidence lacked credibility as it was in respect of the reasoning for the withdrawal of the first job offer, wrong. We also take into account that Ms Kirtley said she responded in detail to the Claimant's concerns in an email dated 11 October 2017 but this was not presented in evidence. In these

circumstances we have drawn the inference that discrimination on sex and racial grounds had occurred.

161. Taking all of this into account, we find that the Claimant's claim of direct discrimination on the grounds of sex and race is well founded and succeeds.

162. The list of issues, as confirmed by Mr Cooper confirmed that direct race and sex discrimination claim was based on the withdrawal of the two job offers. There was no evidence whatsoever that these events were connected to the Claimant's other complaints she had raised regarding her perceived aggressiveness or that the Claimant's line managers, specifically Mr Rainbow had intervened to prevent her from securing the roles because of her sex and / or race. The Claimant complained about some of the language used to evaluate the Claimant's performance. She had been criticised by a number of male managers for not being "warm" in her delivery and needing to "soften her approach"." We note that this occurred in October 2014 (paragraph 20). The description of the Claimant as aggressive was a specific issue later raised by the Claimant and her union as part of her grievance (attributed to Mr Broomfield in September 2015). Mr Lynch did not make any specific finding on whether this perception of the Claimant was affected by gender or her ethnicity despite being given information about how her heritage could have affected her language style and tone. He did not pass this information onto any of the managers dealing with the Claimant which may have raised awareness of the Claimant's explanations for how she was being perceived. We have not considered this as part of the S13 claim as this was confirmed by Mr Cooper to be "background" and it was not in the list of issues. For the sake of completeness, if we had done so, these events were not presented in time and there was no evidence of conduct extending over a period of time in accordance with Section 123 (3) (a) EQA 2010.

<u>Section 19 Indirect Discrimination claim</u>

163. This claim was simply not pursued. We heard no evidence of the PCP. The PCP cited in the list of issues was not a valid PCP. It was said to be "the job was advertised to all". It was clear that the indirect discrimination claim was the same as the direct discrimination claim. The matters complained of was the withdrawal of the jobs from the Claimant. For these reasons this claim fails.

<u>Breach of contract claim</u>

164. The Claimant's breach of contract claim was explained by Mr Cooper to be related to the withdrawal of the two job offers. It was advanced as a breach of contract claim as well as direct discrimination. At the time this was

presented, in her first ET1 it pre-dated her dismissal. Accordingly the Tribunal does not have jurisdiction to hear this claim as the Tribunal cannot hear contract claims whilst someone is still employed in accordance with the Employment Tribunal Extension of Jurisdiction Order 1994. The breach of contract claim is therefore dismissed.

Overtime Claim

165. Our findings of fact in respect of the overtime claim are above at paragraphs 102 to 104. We conclude that this claim does not succeed as we had no evidence that there was a contractual term that the Respondent would pay the Claimant overtime for all travel on public transport. The Claimant's evidence did not explain on what basis she maintained there was any such contractual term.

Employment Judge S Moore
Dated: 5 February 2020

JUDGMENT SENT TO THE PARTIES ON

10 February 2020

……………………………………………….
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS