



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Parkinson

Respondent: Training 2000 Limited

HELD AT: Manchester

ON: 20, 21, 22 and 23
February 2017
13 March 2017
(in Chambers)
18 April 2017
(in Chambers)

BEFORE: Employment Judge Feeney
Mr G Skilling
Ms B Hillon

REPRESENTATION:

Claimant: Mr R Carter, Counsel
Respondent: Ms L Amartey, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The claimant's claim of unfair dismissal succeeds.
2. The claimant's claim of sex discrimination fails and is dismissed.

REASONS

1. The claimant brings claims of unfair dismissal in respect of redundancy and sex discrimination on the basis that her selection for redundancy was influenced by the fact that she had recently had a miscarriage and intimated that she might get pregnant again.
2. The issues were agreed at the beginning of the case as follows.

Unfair Dismissal

3. Was the claimant dismissed for a potentially fair reason pursuant to Section 98(2)(b) of the Employment Rights Act 1996 namely redundancy?
4. (1) Did the respondents act reasonably in treating redundancy as a sufficient reason for dismissing the claimant in that:
 - (a) Did the respondent carry out a meaningful consultation process with the claimant, in that in particular did they consider the issues raised by the claimant regarding the fact that she had been absent for a pregnancy related reason for four weeks?
 - (b) Did the respondent fairly select the claimant for redundancy in that the scoring was not fair or objective?
 - (c) Did the respondent consider alternative employment for the claimant regarding:
 - (1) Two tutor roles in Blackpool and Blackburn, one of the tutor roles being filled on 13th August three days after the claimant's first consultation?
- (2) Was the dismissal of the claimant fair in all the circumstances in particular the dismissal within Section 98(4) and 99(6) Act and the band of reasonable responses available to the respondent?
- (3) Did the respondent follow a fair procedure when dismissing the claimant?
- (4) If the claimant's dismissal is found to be unfair, did the claimant's conduct cause or substantially contribute to her dismissal, if so by what proportion would it be just and equitable to reduce the compensatory award?
- (5) If the respondent fails to follow a fair procedure, can the respondents show that following a fair procedure would have made no difference to the decision to dismiss, if so by what proportion would it be just and equitable to reduce any compensatory award?
- (6) To what extent if any has the claimant mitigated her losses?
- (7) To what if any compensation is the claimant entitled?

Direct sex discrimination

- (1) Who is the comparator for the process of the claimant's claim of direct discrimination?
- (2) Did the respondent treat the claimant less favourably than it treated or would treat the relevant comparator (or as the treatment otherwise capable of amounting to direct discrimination in relation to:

- (a) the decision to dismiss the claimant ,and/or
 - (b) the decision to arrange her third consultation meeting on the same day as her interview for an alternative role?
- (3) If so was the less favourable treatment because of or on the grounds of the claimant's sex contrary to the Equality Act 2010?

Witnesses and Bundle

5. We heard for the respondent from John Westhead, a Business Manager in the Study Programme, Stephen Whitehead, Director of Education and Skills, and Sharon Williams, Engagement Advisor and on behalf of the claimant the claimant herself and a written statement from Andrew Emmett. There were supplemental statements from Mr Westhead and Mr Whitehead and Mr Westhead's statement included further documentation, the bundle had been agreed and during the course of the Tribunal there were additional documents were added namely the assessments with indicated scores of the other engagement advisers who were in the original pool for selection. We also had a witness statement from Craig Hayden Engagement Advisor regarding the military tutor role but it was accepted by the claimant that this role was withdrawn and therefore genuinely not available.

Observations on documents and credibility of witnesses

6. There were difficulties with some of the documents in the bundle in relation to the notes of the consultation hearings which have been described in the index as the claimant's notes however it appeared from comparison of the handwriting that the notes in the bundle were Tenasha Brennan's, a Human Resources Assistant. Further that notes which were described as relating to the second consultation meeting were actually for the first consultation meeting, they had a somewhat cryptic note on top written "snow drop" which enabled us to identify which notes related to which consultation meeting. There were also other handwritten notes which we were uncertain as to their provenance but they were not the claimant's.

7. In relation to credibility we found Mr Westhead a not very convincing witness and whilst giving evidence to the Tribunal is not a memory test there were some issues which we would have expected him to remember. We were concerned when he did not recall certain key matters, that there was some evasiveness here, for example the fact that he said he didn't know whether Mr McKie was in the Blackburn office on 17th August when it became clear that Mr McKie had signed as a witness to a statement also signed by Mr Westhead himself, it seemed highly improbable that he would have forgotten that. There was also the issue regarding personal and work targets in that in reviewing his appraisal of the claimant he sought to persuade us that one comment related to the claimant's failure to meet her own targets whereas his own evidence and that of Mr Whitehead was that there were only departmental targets and whilst there was an aspiration to move to individual targets they were not set at the time in question.

8. In addition whilst the respondents argued that a lot of the documentation was unavailable because the claimant had been allowed to bring a claim late and the

documentation had been destroyed Mr Whitehead was still able to say in evidence that following his observation and discussion regarding some of the figures and statistics he was "mystified".

9. We found the claimant a straightforward witness. She candidly agreed some of the matters she contended for were assumptions. Therefore we have preferred her evidence where it was firsthand.

Findings of Fact

The Tribunal's findings of facts are as follows:

10. The claimant began working for the respondent in November 2006, she had a number of periods of employment with them and throughout her employment had received positive performance reviews, she took a period of maternity leave in 2013 and submitted a grievance in 2014 regarding not being informed of job vacancies whilst on maternity leave, a satisfactory outcome was agreed. She returned from maternity leave on 30th June 2014 and believed that she had worked very hard to build up her contacts and improve her figures for recruiting and retaining of students which she believed had dipped whilst she was on maternity leave. Her last period of employment with the respondents had started on 2nd April 2012.

11. The claimant's assessment for 2014 to 2015 was completed on 30th January by Mr Westhead, relatively recently appointed to his management role, this stated that "Louise displays all of the company core values on a regular basis, she is passionate and driven to make sure that Training 2000 is a success. I have never met someone with such passion, drive and determination to succeed. She is constantly looking for commercial and other opportunities to build relationships that will benefit the organisation".

12. Under Overall Effectiveness "Louise is extremely effective, she has exceeded all targets asked of her and continues to do so. She is a driving force within the office and always demands the best from herself and the rest of the team. I have relied on Louise greatly in my start at the organisation and I found her to be one of the most accommodating member of staff I have had the pleasure to manage. It is fair to say that the department would not be moving forward in the way it is without the help and support of Louise. My aim now is to try and help Louise develop into a management role and beyond".

13. There were some objectives set out:-

- (i) to ensure we recruit 10 new learners per months;
- (ii) to work with the Tutors on your own case load to ensure a success rate of 80%;
- (iii) regarding retention work with the Tutors and your case load to ensure a retention rate of 82%;
- (iv) progression rate ensure adequate system for capturing progressions and work towards a target of 80%.

- (v) audit compliance. Work with the whole team to ensure we have a 100% audit compliance.
- (vi) Grade one observation. Work with the observation time, line manager and wider organisation to ensure you receive a grade one observation.

14. He recommended that she be sponsored on the management qualification ideally ILM 3 within the next 12 months. He noted that she had career development aspirations to have a management role. The claimant commented "I am as stated incredibly passionate about Training 2000 and the learners and staff I work with. I am keen to progress within the company and feel that I have had an opportunity shine and been noticed since the arrival of my new manager who I feel is as passionate and driven as myself. I look forward to working with him and supporting him and the company in any way I can. I have no doubt I will meet the targets set and look forward to the future training opportunities I have been offered".

15. The claimant refers to these appraisals in particular to support her contention that her eventual redundancy assessment was exaggerated given the positive nature of these appraisals which were from Mr Westhead himself who would be responsible for the redundancy assessment.

16. In November 2014 the claimant said a colleague Mudassa Iqbal left and it was her case throughout the redundancy process that her caseload doubled at this point. She stated at various times her case load was 73 increasing to 86 in January 2015. The respondent always maintained it was between 30 and 40, they argued that Sonya Colley, a new member of staff had been given 50% of Mr Iqbal's case load the claimant disputed this saying that Sonya Colley had had to cover to Adult Engagement Advisor role at the time and therefore did not take over the 50% of her case load. She also believed that selected evidence was used to establish her case load as figures for November and December were not included. The documentation to show the number of cases the claimants had was very unclear.

17. We had a report called 'Diary Report reviews' expected between 1st August 2014 and 31st March 2015 which showed 15 cases of Mr Iqbal's but did not necessarily show where those cases had gone and the purpose was for late reviews rather than for identifying numbers of students, there was a note saying 43 and a note on a similar list and a note on this list crossing out 47 and putting 38 which suggests that these pages were used to assess a number of cases the claimant had as they accord with the respondent's view that she had between 30 and 40. However it was difficult to make sense of these as there were multiple entries from what were clearly the same students, presumably relating to different modules or different periods of time and therefore it was not possible, even with the respondent's evidence to match up the documents to the number of students.

18. The claimant believed she had secured good contacts with businesses, schools and client's parents and secured millions in funding via employability and NEET programmes. She had created a special relationship with a provider of supported accommodation for young people aged 16 to 24 which helped support the learners on the respondent's programmes. She applied in November 2014 for the position of Business Lead when her manager Andrew Emmett was leaving the

position. She believed she had finished runner up to the position to an external candidate, this candidate was Mr Westhead who became the claimant's manager. The claimant bore no resentment towards Mr Westhead for obtaining this post as can be seen from her appraisals, Mr Westhead indeed recommended her for a management course with a view to her moving into a management position.

19. The claimant also said in January 2015 there was an OFSTED inspection and that she worked extremely hard, late nights etc to ensure that all learners were registered for Maths and English and that she was observed during this process doing a review and was told there was nothing to be improved, she said she worked evenings and weekends and had come to the inspectors relaying information to senior management staff as required. The respondents in evidence could not remember when this OFSTED inspection took place and had nothing to say anything about it. Again in February she worked evenings recruiting for the programme at open events, attending school open evenings, organising school tours and taster days and always received excellent feedback.

20. Mr Westhead nominated her for the Extra Mile Award in (February 2015), Mr Westhead said this was because the claimant had supported one particular user who had gone "AWOL", she discovered he was "couch surfing" and arranged to sort out his accommodation situation and got him back on the course and signposted to the relevant agencies.

21. In February the claimant was taking one week's time off in lieu plus a holiday, (this was from the 15th February,) the claimant discovered during this time that she was pregnant but also that she was miscarrying twins. She was then off work sick returning on 20th March 2015, the claimant's perception was that over the coming weeks she was asked on numerous occasions by Sharon Williams (Site Lead for Nelson) if she intended to try and get pregnant again, the claimant now believes that Sharon was trying to find out what the position was and that she informed John Westhead that the claimant was intending if it did happen to get pregnant. The claimant agrees this was an assumption on her part. There was no evidence of this and Sharon Williams vehemently denied in evidence that she had passed the information on to anyone else, she felt she was being supportive to the claimant.

22. The claimant also believed that after she returned to work files had gone missing and she found it difficult to update files although she did not complain about this at the time.

23. On 16th March Steve Whitehead had sent an email round to staff Dawn Taylor, Louise Parkinson, Sharon Williams and Sonya Colley reminding them that they had late/outstanding reviews which he was concerned about, he noted that Dawn Taylor had 17, the claimant 51, Sharon Williams 11 and Sonya Colley 24. Mr Westhead contacted the claimant by email that day as she was off sick and told her that it was sent to her in error and they were managing the reviews for her so 'not to worry'.

24. The claimant returned to work on 20th March, she accepted in evidence to the tribunal that Mr Westhead had given her a hug on her return.

25. There was a return to work interview on 23rd March 2015 following the claimant's return to work which stated " - work load - return to work - time if needed LP to ask - offer of support from Pam - opportunity to be flexible with working hours if needed - air of requiring action - flexibility around on going hospital appointments and option to talk at any stage needed". The claimant denied that there was any discussion around her working flexible hours after her return to work however she had signed this and therefore we accept the respondent's evidence in respect of the content of that return to work interview.

When the claimant returned to work she also re-engaged learners who had fallen off her courses, the nature of the respondent's business is that they provide training for 16 to 24 year olds that they received funding from central government in order to do this, that if students leave within the first six weeks of starting their course the funding is clawed back and that there are various other claw backs if the learners don't progress as expected but the main one is the six weeks one, therefore the organisation was particularly keen to retain learners in the first six weeks, the organisation is a charity. The claimant was working mainly from Blackpool in May and did not see Mr Westhead.

26. She was then off sick with a chest infection in May 2015, she believed that she was more susceptible to viruses as a result of returning to work too early after her miscarriage. The claimant also said that when she returned to work after the chest infection she was greeted by John Westhead who said "alright sick note good to see you". Mr Westhead in evidence said "no this is the sort of thing the claimant said" however we believe the claimant, although the claimant was prone to make assumptions about various things she readily admitted that they were assumptions and there was nothing in her evidence which was evasive. Also she had recorded this conversation in her claim form to the Tribunal as well as in her witness statement therefore we accept her evidence that Mr Westhead said this to her and in retrospect she believed this evidence that he had concerns about the fact that she was becoming unreliable due to sickness absence.

27. In June the respondent announced that they would need to make redundancies, Mr Westhead was privy to the financial developments which he discussed with Steve Whitehead and Nigel Rowlands, (the respondent's HR Director). They decided that they would have to end the contracts of three members of staff on fixed term contracts, Chris McKie, a Tutor, Kara Shakulat, a Tutor and John Waterworth an Engagement Advisor and that they would need to make one Engagement Advisor position redundant for the remaining pool.

28. On 22nd July Mr Westhead gave a presentation to staff explaining that they were at risk of redundancy and explaining the background to this. On 22nd July the claimant and the other Engagement Advisors were given a letter outlining the process and dates of the consultation meeting. The first formal consultation meeting which was scheduled for 27th July. The claimant received a letter on 23rd July advising her of her scores i.e. that it was 18 which was the lowest of all the Engagement Advisors and advising her that the next closest scored advisor had received a 20 points therefore she was at risk of redundancy. The letter set out the details of the process and when all the consultation meetings would be held, it

included a list of the claimant's absences from 1st July 2013 to 1st July 2015, a list of her qualifications, corporate values and behaviour proformas and the scoring matrix

29. On 28th July she was sent a further letter because the meeting had been re-scheduled to begin on 10th August, in this letter her attention was drawn to two tutor roles available in the Study Programmes Department, in particular and the current vacancy list of 28th July was included.

30. There was a list of eleven other documents which evidenced the respondent's scoring of the claimant. These included performance reviews conducted by Andrew Emmett and by Mr Westhead, case load reviews conducted by Sharon Williams on 11th March 2015, 21st May 2015, 15th June 2015, 16th July 2015. An observation report from Ian Kimberley, a PICS error report (PICS is a computer programme identifying administrative and other errors in the process of recruiting and processing students) from 28th January 2015 to 30th June 2015, completed review reports from 1st August 2014 to 31st July 2015, a pre-six week leavers report taken from all leavers report on PICS and emails A to F relating to what would later become criticisms of the claimant in the scoring exercise. These emails included emails from 24th February to 9th April relating to:-

- (1) learners put on bursary spreadsheet without a PICS episode open;
- (2) 11th June 2015 highlighting general file issue and induction paperwork missing;
- (3) 3rd July 2015 leaving without permission;
- (4) 7th July 2015 highlights major condition of funding error that had not been rectified and had to be completed by another member of staff despite urgent request.
- (5) 10th July 2015 relates to a learner where the respondent would have had the grant they received from central government clawed back.
- (6) 21st July 2015 learner put in placement without placement documentation including health and safety risk assessment completed and finally
- (7) placement record highlights some missing information from placements, some dating back to January 2015 such as no health and safety induction.

Leaving without permission

31. This was evidenced by an email of 3rd July 2015 when Mr Westhead said to the claimant "I was a little disturbed by the fact that you have left without approval. You told Craig that you were going to take time back from working late last night, that you left at approximately 12 and you only worked about an hour last night. Please can you list your TOIL for me that you are using for this bearing in mind you left early last week as well. I need a list of all TOIL you accumulate and also any that you feel you are owed at present so we can work out a plan of when you will be taking it etc.

I have no problem at all with people taking time back that is owed due to the needs of the business but need to ensure there is an accurate record of what you have worked, when you worked and then when you have taken it back. I do however have an issue with you leaving without permission, you need to ask me before you leave for any future instances, I had no idea you were leaving and in your absence something has cropped up around one of your old learners with no Maths and English aims open which puts us at serious risk of funding being clawed back and you are not here to rectify it meaning that another member of staff is having to pick this up, can we have a further chat about this when I am back in on Monday". The claimant replied almost immediately "I left last night at 6.30, I left today at twenty to one to get my lunch and take back the hour and a half I worked last night, in future I will work and leave when asked, I did try to see you Craig said he didn't think you would be back, have a good weekend see you Monday". The claimant normally worked until 3.30 so in leaving early (taking into account her lunch hour) she was taking back the same time or less than she had worked in overtime. Mr Westhead did not reply to the claimant's email so understandably she felt he was satisfied with her answer.

Maths and English not open

32. This issue had been flagged up to Sharon Williams initially on the 26th June when she was asked to speak to 'Matt' about a learner's functional skills. Matt said he had not heard anything by 3rd July and therefore Sharon Williams sent the claimant an email which asked her to action it as this learner had been on her caseload before transferring to Engineering, funding was at risk as he had never had Maths and English opened on PICs although class management showed he was attending L1 classes for both and they would be entitled to the funding. Therefore she was asked to open this. However this was the day the claimant left early and she did not deal with it before she left.

33. On 7th July Sharon Williams emailed John Westwood "have checked PICs this hadn't been done, good job that I am here I guess". Therefore it did appear the claimant still had not dealt with it.

File Throwing

34. Sharon Williams had sent an email to John Westhead stating, "As discussed this morning when I spoke to Louise and Sonya about discussing potential leavers with me Louise threw a file at me and said I have just taken her off". Sharon Williams confirmed that the claimant had physically thrown a file at her but pushed it across the desk in an irritated or angry way.

Other criticisms

35. Sharon Williams also complained to Mr Westhead as follows, "There was a mention of Louise's case load review on 10th June, she had done the action given at the last review to open Maths and English, she didn't give me any inclination at that point that she wasn't attending and foolishly I didn't check class management for every single one. I will do on her next review even though it makes the review one to two hours. This is further evidence as well as conversations this week that Louise doesn't know who is on her case load and where they are at. "

36. . On 21st July Sharon Williams had emailed John Westwood to say that she had picked up from Sonya's case load review that a learner was put in a work placement by the claimant in January but there was no record of this in her file, the placement agreement H and S appraisal and visits etc seemed to be missing.

Redundancy process

37. The respondents witness confirmed in evidence that the consultation process only took place with the claimant as she was the only one at risk as only one redundancy needed to be made.

38. The selection criteria were team working, adapting to change, professional conduct and professional working relationships, capability, sickness absence and qualifications. The sickness absence and qualifications was an objective scoring criteria with ten points for a low absence records which the claimant ultimately obtained the maximum points for this as her absence in February and March were discounted because they were related to her miscarriage.

39. The scoring was 1, 3 and 5, 5 being outstanding, 3 being good and 1 being requires improvement and 0 was unsatisfactory.

40. The claimant's assessment was signed by Mr Westhead and by Phil Anderson, a HR advisor, none of the other assessments which we received disclosure of during the hearing were so signed.

41. The evidence regarding the assessments was contradictory from Mr Westhead. In his witness statement he said that he went through the scoring with Phil Anderson for all seven individuals whereas in evidence he said that he only went to HR for the qualifications and absence records scoring. We find that he did not consider the other assessments with HR at the time.

42. It is also relevant to note that initially in respect of absence the claimant's pregnancy related absence was taken into account but when she queried it, it was removed.

43. The claimant had not asked for the assessments of any other individuals as she was not legally represented either through the redundancy process or during the Tribunal preparation process and really did not have an informed view of how sex discrimination or redundancy/unfair dismissal could be established. The respondent provided in the course of the Tribunal the other Engagement Advisors assessments. The other assessments were useful although the evidence behind them was not available and would have been unreasonable to ask the respondents to provide this once the Tribunal had started but the assessments provided did show the contrast between how the other workers had been scored and the claimant.

44. The claimant received 3 for team working, 3 for adapting to change but for professional conduct and working relationships and capability she only received 1. Mr Westhead recorded the following in these categories. In respect of professional conduct and professional working relationships the claimant's assessment said:-

- * Louise has demonstrated good external conduct when attending meetings and events and we have received good feedback which is recorded on the system.
- * There are examples of good relationships with learners where Louise has supported their learning but the lack of application of set procedures and routine requires improvement.
- * Inside the organisation Louise displays behaviours that do not meet with the company's core behaviour and values.
- * Louise uses inappropriate language on a regular basis in earshot of learners which has been addressed with Louise on more than one occasion by myself.
- * I have also witnessed the multiple use of inappropriate language happening in front of a learner which has also been verbally addressed with Louise.
- * Louise has not set effective professional boundaries with learners.
- * Louise has frequently failed to follow the departmental structure of the carousel programme specifically around timetabling requirements, attendance, non-attendance reasons and the sanctioning of bursary payments.
- * Louise recently left earlier than her contracted working hours without prior arrangement, when challenged by myself Louise confirmed she had taken accrued TOIL (email attached).
- * Louise does go out of her way to support learners with specific needs such as housing and care but this can overlap with the requirements of the role resulting in Louise becoming too involved in a learner's personal situation that then impacts on her ability to support other learners on the programme.

Capability

- * The recruitment of learners onto the programme has been good and has in some cases exceeded the required target however the lack of structure applied to them (induction, reviews, explanation and full programmes etc) meant that retention of those learners dropped (evidence on score card and within case load reviews). Analysis of this (then) shows that Louise has a drop out rate of 46% in the first six weeks in comparison the next nearest person is at 21%.
- * This demonstrates lack of structure applied in the qualifying period and the financial impact of this means we have missed out on potential income of approximately £160,000.

- * Louise has to constantly be managed to work in line with company procedures and needs micro management to ensure she maintains compliance.
- * The case load reviews demonstrate that she has the same recurring issues throughout such as not opening Maths and English aims (condition of funding), closing people down in time (pre six weeks so we don't get clawed back) and general errors.
- * There does not seem to be any improvement for each case load review despite coaching being in place.
- * There is an ungraded observation that records actions for Louise to implement but the case load review shows that this is not happening.
- * There are also references within the emails attached to show learners attracting bursary payments that should have been removed from PICS, learners without correct inductions, incomplete documentation and learners not taken off the system which can result in funding being withdrawn.
- * In the performance reviews there are references to good performance and target achievement in terms of recruitment but then also elements for improvement.
- * We have had a list of learners that have had to be cleansed from the system due to not marking them as leavers which resulted in significant claw back from the department, £8,000.
- * Louise also has a higher late returns (late review report) than others and also more PICS error (PICS error report). In relation to the late reviews PICS errors and pre-six weeks leavers the levels are higher than other EA's.

45. The criteria were described for each of these. Team working - how well they work with others and build effective working relationships. Adapt to change - how well they continuously adapt to change in their departments and role and work flexibly. Professional conduct and professional working relationships - capability - how well they demonstrate professional standards in their working with others and at all times display professional conduct. Capability, to recruit and retain learners and employers through high quality customer focussed engagement strategies to achieve pre-apprenticeship department objectives.

46. There are criticisms in respect of the claimant's assessment in sections where she got a 3, in respect of team working it was noted there had been specific issues with Ayeh Rakshana and under adaptation to change there was no criticism but the claimant only got a 3. The claimant got 1 for professional conduct and for capability. Overall then the claimant got 8 marks for her assessment under these heads and because she got full marks under qualifications and absence she ended up with 18 marks overall.

47. The first consultation was held on 10th August. In this meeting in respect of team working the claimant agreed with an overall score of 3 for team working but she disagreed with Mr Westhead's comments and was disappointed that he had raised issues which had not been raised with her at the time. In relation to adaptation to change she said that her case load was greater than others within her team increasing from 76 learners to 83 and was often no support despite having more learners than her colleagues. She believed that she adapted extremely well to change, changing from tutor engagement advisor and project manager, her effectiveness had been referenced throughout her performance reviews she was concerned that some of her performance reviews had not been considered. She believed that this score should be a 5 rather than a 3. In addition issues had been raised regarding Iya Rakshani and Sonya Colley, i.e. that her relationships with them were not good, as the claimant did not challenge these issues at the time and she agreed with the scoring we have not explored the evidence in relation to these any further. All of the other Engagement Advisors received a 3 for team working and for adapt to change save for Sonya Colley who got 5 probably reflecting the fact that she had in fact had to take on initially a different job to that which she had applied for.

Professional Conduct

48. The claimant raised in the meeting that she had been told that learners had been told by Ayeh Rakshana, Sharon Williams and Sonya Colley that the claimant 'is on annual leave for two weeks and will then not be returning to the office'. Evidencing that a decision had already been made.

49. The claimant felt that the scoring was contradictory given she had recently received an Extra Mile Award and received positive comments from parents and learners and from management throughout her performance reviews.

50. She believed she should have received 3 for this section. Regarding the allegation regarding her taking unapproved TOIL she said that she had had several conversations with Sharon Williams and Mr Westhead regarding taking accrued TOIL as quickly as possible and in particular in the week that it was accrued and this is therefore what she was attempting to do, she had explained in her response at the time that she understood Mr Westhead was not available and was not coming back to work and therefore she felt that she had obtained Craig's approval and therefore thought on that particular occasion this had been acceptable.

51. In relation to the swearing the claimant said she had been advised about her swearing about Mr Westhead on only one occasion and she was consistent in relation to that throughout her pleadings and her witness statement. Mr Westhead's witness statement said it had been on several occasions however he was unable to provide detail regarding this in cross examination and we were unconvinced that this had happened on more than one occasion.

52. In relation to the file throwing incident Mr Westhead had confirmed he had taken this into account as the claimant was provided with the relevant email although it is not mentioned in the assessment and in evidence to the Tribunal Sharon

Williams said it was not a physical throwing of it but just a somewhat aggressive pushing the file across the desk. There was no evidence that this was discussed in the consultation meetings.

53. Regarding the being too close to learners again there was no definitive evidence in relation to the minutes of the meetings regarding any discussion about this, the claimant accepted that she had used her mobile phone to communicate with learners but so had all the other Engagement Advisors, they then got new mobile phones which she had found difficult to work but when she had been told that she had to use that she had done so. She denied in evidence at the Tribunal that she had ever had learners at her home, it was impossible to discern from the consultation minutes whether there had been any discussion regarding this in the consultation process.

54. Regarding carousels which we understand to be a overall term relating to the way in which a student progresses through the different modules they have to undertake which were captured in a computer format, the claimant accepted that this was not always up to date but she did not think this was "set in stone".

Capability

55. In relation to capability she totally disagreed with the score of 1, she produced notes on capability and pointed out she was absent from work in February and March and Mr Westhead agreed to review the evidence to make sure that her absence was not taken into consideration. She re-iterated that she had 76 to 83 learners with no support. She also said that anything for improvement raised with herself has been addressed. She had received no training or development in respect of the concerns that Mr Westhead now raised. She said changes had occurred during her absence recently and had not been properly communicated or consistently applied throughout the department. She thought on that particular occasion it was OK regarding a particular learner who was not closed down she had been told by Sharon Williams not to but to try and re-engage her.

56. The claimant confirmed she was not interested in the two Tutor vacancies but in the functional skills role which she would be applying for. It should be noted that the vacancy list in respect of the 10th August showed two Tutors job, one in Blackpool and one in Blackburn this was of significance in some respects for the claimant as because of her childcare responsibilities she could not work in Blackpool.

57. In considering the scores of the next lowest scoring employees of which there were two who had 20 they had received a total of 20 points but in respect of core behaviours and values they had received overall 14 points but both these employees had only received 1 in respect for attendance whereas the claimant had received 5 points.

58. On 11th August she received a letter confirming that the first consultation had taken place and stating that her effective date of redundancy would be 21st August, the second consultation took place on 17th August. The claimant had originally complained that her interview for the functional skills post also took place on that day and she felt that this had been engineered however this claim was withdrawn when it

was confirmed that Mr Westhead had no involvement in the arrangements for the interview for the functional skills post.

59. At the second consultation meeting the claimant brought observation documents and staff performance reviews from 2007 to 2011. There was a discussion about her absence as Mr Westhead said that the period 23rd February to 20th March was discounted but the claimant pointed out she had a week of TOIL before that. He said he would look at that as he was unaware.

60. In respect of 'PICs' the claimant was provided with a detailed PIC report which showed the breakdown of the full case load over the year showing what learner numbers were on the programme at each point each month and took into account learner numbers previously registered to Mr Iqbal. The claimant asked how many learners were on the programme at Blackburn between November 2014 and January 2015 (this was because was when she said she had responsibility for Mr Iqbal's learners).

61. Regarding late reviews Mr Westhead said that he had been unable to check these. Regarding the case load review dated 11th March that would be discounted, pre six week leaver report, Mr Westhead said that this reflected re-recruited learners where funding was received (the respondent would receive no funding where a student left before the end of six weeks) She asked him to check the status of one learner as she believed they were still on the programme. Mr Westhead also clarified that on 17th October 2014 was when it was established that Maths and English aims must be open for all students which the claimant had disputed.

62. Regarding placements the correct documentation was not in place for one of the learners and in relation to two nursery placements. The claimant said she was unsure why it was not in the folders.

63. The PIC error report included detailed reasons behind the errors and that any errors occurring between 16th February and 20th March would be discounted.

64. He said he had also spoken to Jessica Wynn following the claimant's concerns that learners had been informed she was not coming back .He said "although Jessica Wynn had not confirmed that she was aware of the process that LP was currently undergoing JW reaffirmed that they took this matter very seriously and should LP become aware of any further conversations, that she should inform him". This was significant to the claimant as in her mind it was evidence that staff and pupils had discussed the fact that she was not coming back and therefore that her case had been prejudged.

65. There was a signed statement from Mr Westhead dated 17th August, it says "I asked Jess what her understanding was of where Louise Parkinson is at the moment - she said at home as far as I know. I explained there had been an allegation that someone may have told her that Louise Parkinson does not work for the company anymore, she answered "no not at all". I asked if she had spoken to any members of staff about Louise Parkinson and her current status at Training 2000 and she said no. It was signed by Mr Westhead and by Mr Chris McKie.

66. The claimant at the time felt this was an inadequate investigation and that other people should have been interviewed who were more likely to be truthful and not pressurised. Mr Westhead explained that Mr Mackie was there as Miss Wynne was a student. We note that Mr McKie was present as later Mr Westhead denied he had any knowledge of Mr McKie being in the office on 17th August.

67. The claimant then asked a number of questions, what would happen if the scoring changed? Mr Westhead confirmed that nobody else had been given the scoring and we note that he did not answer the question about what would happen if the scoring changed. She asked whether she had to attend the final consultation, he said in effect yes because he needed to come back to her on the points of clarification. She asked about an engagement advisor role advertised within MPP following herself being put at risk and she was not given the opportunity of applying for that, he said he would look into that. She stated there were no internal vacancies she was interested in applying for apart from the functional skills role which she had been interviewed for that day.

68. After the adjournment there were notes regarding a number of issues including the claimant's persistent claim that it was not necessary to sign pupils up for English and Maths but one or the other and the claimant seems to re-iterate this in the notes as she says that the minutes Mr Westhead had provided to her to prove that it was English and Maths did not actually substantiate this however this point was never developed any further.

69. The claimant also volunteered in evidence that her laptop had been wiped as of 17th August which was another reason why she believed that a decision had already been made that she would be the one being dismissed. The claimant however had failed to mention this in her witness statement (we are sorry to say her witness statement was deficient in a number of ways, probably due to the lack of legal representation during the preparation process) and the respondents were therefore unable to put this point to their own witnesses or allow their own witnesses to be cross examined as that process had already taken place. Accordingly we could not accept this contention.

70. On 20th August the claimant discovered that she had been unsuccessful in her application for Functional Skills.

71. The third consultation meeting took place on 21st August. There were no minutes only a list of points on the pro forma "addressing the issues the claimant had raised and some standard proformas ones". The particular issues the claimant raised were confirmed as follows that the learner raised was still on the programme, that Mr Westhead had reviewed late reviews and PIC reports and it was confirmed that all the questions she had raised were answered. He had reviewed the capability scoring and he reviewed the two current Tutor Study Programme vacancy and they said that the MPP role required the person to have strong experience working with military personnel and organisations and that the claimant confirmed she was not interested in that role of Tutor. The claimant signed these notes.

72. The claimant was therefore terminated with effect from 21st August and she advised on 25th August that she intended to appeal the decision "on the grounds that past performance has been totally overlooked and I find it difficult to understand how

I have come to need so much improvement in an areas where I have previously and consistently been praised for being outstanding".

Appeal

73. The claimant wrote out a long statement for use in her appeal which was four pages long, summarising the issues as follows:

- (i) That she was not represented at the hearing. Although the minutes state she refused the right to be represented it was not quite true, she tried to arrange for Andrew Emmett to be present but the request was not acknowledged, when she wanted somebody else she was told she would have to make her own arrangements, given that she was off work and feeling stressed and anxious she felt that was unrealistic, also she felt it would be compromising a colleague if they attended with her.
- (ii) That the process felt like a disciplinary, she felt like investigations into her performance or lack of it had started on 11th March whilst she was on sick leave (reference to the case load review). She did not receive the original notes taken at any of the meetings and only a typed edited version after the events. Evidence was presented by JW which she disputed and she provided lots of evidence demonstrating that her performance, commitment and passion, none of which was mentioned let alone discussed.
- (iii) At the second meeting more evidence supporting JW's accusations were presented on the day which she had not seen or been given access to prior to the meeting. She said she was "shell shocked" and that her input had just given rise to a further investigation to prove JW's point. She did not feel supported or that anything she said was going to be considered relevant, that much of the evidence she questioned at the first meeting was overlooked, issues that didn't match JW's point of view were not present, for example issues over email he raised pointing out that she had had issues with AR - JW has a personal relationship with this member of staff outside work and despite having no recorded examples of any issues with this member of staff he insists he overheard conversations. Regarding SW and the mention that she had thrown a file, this was not questioned. The issue with SC whose probationary period had been extended by a further six months, she expressed concerns about paper work and recruitment given that following MI's exit and a 0% audit she had taken home all the learner files and requested an audit. She was working overtime to recruit.
- (iv) Despite knowing for a fact she was responsible for 73 learner files at this time it was suggested that she had never had to deal with more than 40 (still an extreme case load for one individual). Despite knowing she had very few errors on PICs and despite stating that learners with three months of outstanding reviews were added to my caseload in my absence the reports she suggested JW access to confirm this were not the reports he used.

- (v) Issues with staff telling my learners she would not be back was ineffectually dealt with. JW chose to speak to J Wynn who he claimed had no knowledge of this, she has a copy of the message Jess sent to me stating that JW had accused her of telling everyone she had been sacked; a claim which she obviously denied. Secondly he did not speak to Adayaji as she was apparently no longer a learner she felt he did not approach her as he knew she would substantiate what was a very serious claim.
- (vi) Regarding current vacancies JW thought she would be good in a Tutor role. She applied for a position that was similar but was unsuccessful and had received no feedback despite she had two grade one observations in the past and she then raised the military employment engagement role.
- (vii) In terms of retention and progressions she said during her ten years all previous staff reviewed stated she was an over achiever across all sites. She said in January she recruited 30 learners, 22 who were lost while she was absent, she re-engaged 20 on her return. JW had said she was not following procedures but the procedures changed on a daily basis and she had been told to learners on PICs even though they hadn't attended classes. She was told recruitment was a priority and we would have inductions every day but we had no facilities for this and that she had been made to recruit for a non-existent summer programme which made her unpopular with parents and learners and she was asked to put bursary payments through as travel.
- (viii) According to JW she had not improved following an observation of one of my reviews. This was not a formal observation but a training exercise after my long absence on maternity leave. Despite there being no areas for improvement and several examples of good practice she was also observed doing a review by the OFSTED Inspector who when giving feedback stated there was very little to be needed to improve.
- (ix) My third meeting lasted twenty minutes, at this point she felt any input she had made during the previous meeting had been pointless and accepted that this may well have not been a disciplinary but it was definitely an assassination of my character, professionalism and performance. She summed it up as "she finds it difficult to stomach that for ten years she had been regarded as an asset to the company but now she required a dramatic amount of improvement particularly given she received an award in February 2015 and she was unaware of 95% of the issues raised in the grading process If there were issues with her performance, behaviour or any other thing these should have been addressed with her as an individual and should have been given the opportunity to improve if that was what was required". She said she hadn't included any evidence because she presumed he would get everything and that she had copies of all the compliments she had received as a member of staff from parents, schools,

companies which do not reflect JW's opinion of my professionalism, ability to work as part of a team or inability to demonstrate company core values. She then went through her achievements in the past ten years.

74. At the end of the appeal letter the claimant went through her achievements of the past ten years.

75. The first appeal meeting took place on 7th September. The claimant read out this document following which Mr Whitehead commented, "there is obviously a lot of points that need to be covered and I will have a look at them in conjunction with the evidence. I do have a couple of questions I would like to cover at this point. You have stated you have been consistently praised for your performance and conduct, can you confirm if this has been formally or informally acknowledged". She said both through her performance review with John Westhead, Andrew Emmett and informally through Lisa Bloomfield, Richard Crabtree, Marilyn Pilkington and Alex O'Connor. He then asked regarding that there had been no inkling that there were any issues with your performance or capability have there been any informal discussions with you prior to the process. The claimant responded "No I had a conversation with John Westhead about my language and about it not being in the earshot of learners and that was it". Mr Whitehead said that he would go away and make further investigation before he could consider the case further so he adjourned the meeting.

76. The meeting was then re-convened on 1st October but there was no further discussion, Mr Whitehead just transmitted his findings. He had some handwritten notes which were referred to in the typed version of the meeting and which set out several points which were incorporated in the outcome letter of 9th October. He responded to the points in her appeal letter as follows, and referring to the appeal letter, paragraph numbers so:

- (1) Regarding your representation (your paragraph 1) he was satisfied that she had had sufficient time to source a representative prior to each consultation meeting and that she had been given the opportunity to adjourn it on the basis of having no representative.
- (2) Regarding the selection criteria (your paragraph 2) criticism about the notes, he said that they captured the key points that she had the opportunity to take notes herself and she had not questioned the contents of any of those notes provided to her.
- (3) Response to appeal letter paragraph 3. This is regarding not feeling supported, she said she did have the right to have somebody with her if she wanted and that Mr Westwood had listened to what she said and looked into matters including discounting some of her absences, they believes she had been provided with answers to her key points at the second consultation meeting. He also said he was satisfied a number of conversations had taken place with the claimant regarding her relationships with other members of staff and her ability to accept different ways of working with other staff, this was from a conversation with Mr Westhead. We understand this was a reference to Iya

Rokshani and Sonya Colley, the claimant had alleged that Mr Westhead knew Ms Rokshani personally however he denied this in evidence to us however it is not clear that anything really turns on this other than the quality of the evidence Mr Westhead relied on to make his assessment of the claimant.

77. Paragraph 4 stated that the records demonstrated that from August 2014 to July 2015 her case load never exceeded more than 40 learners averaging 30. He said that the report showed that 36 of the overall department's late reviews (151) were the claimant's responsibility and that percentage was more than double that of any other Engagement Advisor at risk of redundancy. He confirmed that late reviews occurring in a period of absence had been discounted.

78. Paragraph 5. Mr Whitehead said that Sharon Williams and Sonya Colley had also been spoken to and they denied that anything had been said to learners and the statement from Jessica Wynn was produced.

79. Paragraph 6. Regarding feedback for the functional skills tutor role she needed to ask for feedback herself. Regarding the military preparation job at that point in time the respondent was saying military preparation had to be experienced in working with military personnel and military organisations, something that you were unable to demonstrate your experience of and confirmed that there was a potentially suitable tutor vacancy in the studies programme but you had verbally confirmed that you did not wish to work for Mr Westhead and would not be interested in applying for the Tutor vacancy.

80. Paragraph 7. He believed that the more recent performance reviews were a better barometer of performance. He acknowledged she had re-engaged a number of learners but his investigation agreed with the original findings that show in comparison with other Engagement Advisors at risk you had a significantly higher proportion of learners who left the programme before their qualifying period for funding and regarding the specific allegations he had spoken to Mr Westhead and found no evidence to support these.

81. Point 8. Regarding your observation - he was satisfied it was consistently applied in the consultation process along with all other employees who were at risk. He said there were eight verbal recommendations documented, he was satisfied that performance issues had been raised verbally by the manager and from his investigation he understood that the criteria were consistently and fairly applied and they were not disparaging or undermining any of her achievements or success and they understood that how difficult she had found the experience.

82. Mr Whitehead in his evidence to the Tribunal stated that he had had documentary evidence available at the time which had confirmed the statements in his appeal letter but the respondent no longer had it. He told us that he had interviewed Mr Kimberley who had conducted the observation and also had spoken to Sonya Colley and Sharon Williams. He had no notes of these discussions. The claimant would have been unaware of what was said in those discussions or even that they had taken place. Regarding some of the figures which had been discussed in Tribunal the previous day – in particular the late reviews – he was “mystified”.

Consideration of documentary evidence

83. Both parties brought evidence to the Tribunal which we considered as follows.

Under ungraded observation

84. The observation was relied on by Mr Westhead to mark the claimant down under capability however the claimant's case was that the observation was marked as developmental and then nothing was marked as requiring action although there were eight verbal recommendations. There were nine "as expected" and three strengths. There was a back page about action required which stated "more open questions needed, how, what, where, when, give learner time to respond and think in order to gain a better pace, more balanced review and touched on questions but needed more questioning or suggest learner gives examples, possible use of visual handouts". This observation was conducted by Mr Stephen Kimberley and the claimant understood it was developmental taking place in October 2014 as she had only just returned from maternity leave. In Tribunal however Mr Whitehead claimed that it was developmental in fact because it was so bad and it was intended it had to be a graded observation, however it was clearly ticked as developmental on the front of the observation and we accept the claimant's evidence that she always understood it would be developmental as it would have been unfair within her first few months back from maternity leave to have expected her to do a graded assessment and therefore we prefer the claimant's evidence on this.

Performance Review

85. The claimant's mid-year performance review on 23rd April with Mr Westhead stated the following "EFA recruitment. Recruitment currently stands at 214 against a target of 265. However we have had 42 that have not qualified so the actual number is 172 against the target of 265 or 65%. We have three more recruiting months so we will be pushing for this figure to increase, Louise herself has been responsible for over 65 of the learners recruited (obviously team targets) (also what percentage is that of the 172 it is virtually a third). Success rate. Overall success rates stands at 62%, there is a blockage on the IVE process with the BTEC unit that is affecting this and I am hopeful this will move more towards the expected 80% by the end of the year. Retention rate. Retention rate is currently at 76 against the target of 82 and I am confident recent actions that have been implemented will ensure that we are close to this figure at the year end (no comments about the claimant's retention). Progression rates. Progression rates are running at 90% plus percent we have implemented a more robust system of recording and also tracking learners when they leave the programme. Audit Compliance. We are yet to have a full audit but are running at about 85% based on our previous audits this year. Grade one observation. Louise will be having a graded observation in the next few months so I am hopeful that she will achieve this. In relation to the last graded observation there has been a concerted effort to take on board the feedback and implement it with learners. There is more use of open questions and more emphasis on the learner doing the talking. There is also more structure around the setting of review targets and frequency of reviews.

86. He then again identified training needs in respect of management and careers guidance. The mid-year performance summary stated "myself and Louise discussed the current level of performance and we agreed that recruitment is still an issue that needs addressing to ensure that our department is successful going forward. We are looking at creating a role dedicated to recruitment for both sites and reducing the case load to support this. Louise is very focussed on the recruitment and support of learners so it makes sense to support her development in this area. I am also keen to help Louise's progress within the company and see recruitment as a potential route that if successful could develop into a leadership role. Louise remains a vital member of the team who gives her all for the department and company, her desire to help and support the young people we have on the programme is commendable, she is constantly going above and beyond what is expected of her. I am hopeful that we will see a progression consistency on the recruitment of learners going forward alongside a gradual improvement to success, retention and progressions of the learners we recruit.

87. The claimant commented "I thoroughly enjoyed working with John Westhead, I have found him to be very supportive and incredibly passionate. He also inspires not only myself but the whole team to be the best we can. I would like to pursue my staff development as soon as possible given that I have been an Engagement Advisor for some time now and would very much like to prove my capabilities in the area of recruitment as I also see this as a future challenge". See pages 191, 192 and 193 for the claimant's comments.

Other documents

- (1) Pre six week leavers. This showed 48 names which were said to be the claimant's 34 pre six week leavers. It was asserted that there were 74 leavers altogether in that period although we did not have any support for that particular figure. It was therefore said that of the leavers 34 were her students she was responsible for 46%. The note said there had been a potential loss of £163,000.
- (2) There was another document which really did not say anything, it had a list of 15 students and underneath said "PIC errors - rule violations 28th January to 30th June 2015, total errors 53, Louise Parkinson 15. It was then stated that therefore the claimant was responsible for 28% of the total PIC errors and that the average errors for everybody else was 8.5 however we do not know how they were distributed, whether one person was responsible for all of the remaining 38 errors, whether they were evenly distributed between the other 7 or whether in fact anyone else might have had 15 or more errors out of that 38.
- (3) Late Reviews. In respect of late reviews we had a document referring to reviews completed between 1st August 2014 and 31st July 2015. This referred to "EFA programmes based on planned review date, plus seven days and all other programmes based on planned review dates "therefore as we understood it was acceptable for an EFA programme review to be seven days late maximum". This showed that completed reviews were 389 of which the claimant had done 63 completed reviews. Dawn Taylor and Melissa Posthewaite who worked on the

Adult programmes were shown as having no overdue reports which we found strange given the email from March which referred to Dawn Taylor having 17. The claimant did have the highest overdue reports at 21 which equalled 33% of the total overdues, but it was difficult to see how Dawn Taylor could have had 17 overdue in March and yet this report said that she had none overdue. The respondent's witnesses could not explain this anomaly and therefore we find this document was unreliable.

- (4) There was a list of placement showing that some actions had not been completed. The claimant said that on returning from her sickness in February and March she found some folders missing and this is why these actions had not been updated.

Recruitment to Tutor job of Chris McKie

88. On 20th July Mr Westhead had sought approval for the authority to recruit for a tutor job in Blackpool. We had the form relating to this which had the box full time and permanent ticked but not internal or external ticked. It was said to be a new role and we heard that the respondents had taken on a contract in Blackpool and the purpose and justification said "the study programme will operate from the Blackpool location from August 2015, it is not cost effective to use Blackburn based staff and pay mileage so there is a need to recruit for a Blackpool based position". It seemed to have been approved on the same day. In addition on 29th July a tutor Clare Dallison had resigned, in this case the job was ticked as being in Blackburn, internal was ticked, full time and permanent was ticked and the justification was "existing tutor has handed in notice need to replace role". That seemed to have been approved on 27th July.

89. Chris McKie was recruited to one of these two positions and we were shown his contract of employment which stated that he was employed to work in both Blackburn and Blackpool and that his start date was 17th August. Mr McKie was one of the fixed term workers who had been terminated in a cost cutting exercise prior to the redundancy programme starting. The letter offering him the job was sent to him on 14th August and there was also an assessment of him on 12th August from two people and the micro teaching observation.

90. The evidence regarding this was very confusing. Mr Westhead had no knowledge of any other candidates or a short listing process, he had no knowledge of the advert or where the job had been advertised. As the original job approval had described it as being in Blackpool possibly in order to justify external recruitment then one would have expected an audit trail showing that this job was recruited externally. The fact that there was no such audit trail and the witnesses had no recollection of how or when or where it was advertised we can only conclude it was not advertised. However as Mr McKie could only have applied as an external candidate as he had had his fixed term contract terminated on the balance of probabilities it appears that the respondent although we accept there was a process of assessing him chose to recruit him without any competition.

91. Further, the claimant however saw him back at his normal desk in Blackburn on 17th August and therefore assumed that he was working in Blackburn, the

respondents produced his appointment letter which showed that he was appointed to work in both Blackpool and Blackburn which again we found inconsistent with the intention set out in the job approval. The claimant readily accepted that she was making an assumption when she formed the view he had been appointed to the Blackburn job because he was sat at his old desk in Blackburn on 17th August (which was his first day in work) and therefore she assumed at that point that the only job available was in Blackpool which she could not consider due to her childcare situations.

Other Engagement Advisors Assessments

92. We have concentrated on the assessments of professional conduct and professional working relationships and capability as the other employees had mainly the same scores for the criteria of team working and adapt to change.

(1) Helen Bell

Her assessment under professional conduct said:

- * Helen consistently shows professionalism in the office and is definitely a role model for others to follow.
- * Helen works diligently every day and constantly works over and above required working hours in order to ensure the department is successful.
- * She is a figurehead for organisations outside such as Burnley Youth Zone and Burnley ZCP and attends regular events on behalf of the business to promote all departments and I have received verbal feedback confirming this.

Miss Bell received a score of 5 for these criteria.

Capability

- * Helen is highly capable in the role she has been able to successful achieve individual targets (performance reviews). Helen has received 100% compliance on file audits (performance review). Helen has minimal late reviews well within acceptable level (late review report). Helen has minimal errors on PICS (Pic errors Report).
- * Helen has clear understanding of customers needs within her case load review attached.
- * She is a high performer within the team and she has received a Grade 1 in her observation attached 14/20.

Miss Bell received a score of 3 for these criteria.

(2) Mel Thistlewaite

Professional Conduct and Working Relationships

- * Mel has created fantastic links with local Job Centre offices in order to facilitate recruitment of learners to the adult profession.
- * Mel has formed an effective relationship with the Adult Tutor within the provision (performance reviews).
- * Mel has built up relationships with local JCP and partner organisations in order to ensure a steady stream of referrals onto the Adult Impact Programme.
- * Mel's role is heavily weighted on the maintenance of relationships to ensure the adult programme referrals are on track and her target and achievements support it (performance review).

Miss Thistlethwaite received a 5 for these criteria.

Capability

- * Mel has achieved 100% compliance on an audit (performance review).
- * Mel has achieved over 90% attendance with the learners on the programme (performance review).
- * Mel has had no recorded late reviews which is well within acceptable levels (late review report).
- * Mel has an acceptable level of PICs error given the adult provision there are generic errors that appear multiple times in a report which means they will always track over ten with anything under fifteen deemed to be good.
- * Mel has achieved a grade 1 in her observation.
- * Mel has an acceptable level of pre-qualifying learners.

Miss Thistlethwaite received a 3 for these criteria.

(3) Dawn Taylor

Professional Conduct and professional working relationships

- * Dawn always conducts herself professionally in the office. She sets a very professional outlook and I would describe her as a role model for others. She has been extremely supportive of another colleague Sonya Colley. Verbal feedback I have received from both the local Job Centres and Boots also show a high level of professionalism outside of the office.

- * The need for maintaining professional relationships directly affects the recruitment of learners onto the programme and as targets are being met this demonstrates the relationships maintain.

Miss Taylor received a 5 for professional conduct.

Capability

- * Dawn has achieved her recruitment targets.
- * Dawn has no recorded late reviews which is well within acceptable levels.
- * Dawn has acceptable PIC levels and then the generic error was referred to.
- * Graded 2 in attached observation.

Miss Taylor received a 3 for capability.

(4) Sonya Colley

Professional Conduct

- * Sonya received 3 and said Sonya is very professional in a manner both within the office and externally.
- * Sonya gives the learners a clear structure and routine to work within and the department procedures around the carousel programme.
- * Sonya is always fair in applying the rules of the programme to learners.
- * Sonya is consistent in her approach and methodical in the learner journey meaning she continues to improve all the time.

Sonya received 3 for professional conduct.

Capability

- * Sonya has demonstrated a continued progression into the role which is shown in the enclosed case load review.
- * Sonya had significant issues initially but this was due to the fact she did not have formal inductions or coaching put in place, since this has been put in place she has improved significantly.
- * Sonya has acceptable levels of late reviews.
- * Sonya has minimal errors on PICs.

- * Sonya has received a development observation, attachment is hitting all required targets at present.
- * Since the extension of her probation she has really stepped up to the mark in terms of the requirements of the role.
- * Sony has acceptable levels of pre-qualifying learners, 9 of the learners of the report were assigned to Louise Parkinson and were then passed to Sonya (after they should have already been moved to form part of her case load).

Miss Colley received a 3 for capability.

(5) Anwar Adam (on secondment)

For professional conduct 3

- * Anwar has been described as an ambassador for the business by the HR Director. Anwar has received positive feedback within his performance review demonstrating professional conduct and working relationships in his role within Rolls Royce.

Capability

- * Anwar has achieved his targets.

Performance Review

- * Anwar has been successful in his objectives set within the performance review.
- * Anwar has received praise in relation to his quality of time during his secondment at Rolls Royce.

Because Mr Anwar was on secondment it was not possible to compare his assessment directly with anyone else's but he did receive a 3 for professional conduct and capability.

(6) Sharon Williams

- * Sharon has exemplary professional conduct and has represented the business in the capacity of EA at a number of events at the local youth centre and job centres.
- * I have received multiple elements of feedback from other departments about the professional manner in which Sharon has applied herself.
- * Sharon also undertakes safeguarding responsibilities and undertakes a number of investigations and offers support to the wider

safeguarding team which further demonstrates her professionalism in the EA role.

- * Sharon has good learner interaction and has good retention of the learners she has on her caseload which further demonstrates her capacity to build relationships.

In professional conduct she got a 5

Capability

- * Sharon has instigated a number of processes, case load reviews, late reviews aimed due as part of her EA role that are enabling the department to increase performance on success, retention and progressions. The impact of this is shown on the score card performance and is also clear within the attached performance reviews. Individually Sharon has been able to successfully achieve her own targets while managing those of the department as a whole.
- * Sharon has late reviews within acceptable levels.
- * Sharon has PIC errors within acceptable levels.
- * Sharon has acceptable level of pre-qualifying leavers.
- * Sharon has achieved a Grade 1 observation.

Miss Williams received a score of 5 for capability.

The Law

93. The claimant was dismissed for redundancy. In an unfair dismissal case the respondents have to establish they had a permissible reason for dismissal in accordance with Section 98(2) of the Employment Rights Act 1996. In this case the reason was redundancy which is a permissible reason. The claimant did not dispute that that was the reason but said her dismissal was unfair for a variety of reasons.

94. In respect of unfairness Section 98(4) of the 1996 Act states that

“Where the employer has fulfilled the requirements of sub-section 1 the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

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

94.1.2 shall be determined in accordance with equity and the substantial merits of the case”.

95. The normal provisions relating to an unfair dismissal for any other reason applies in that there must be a fair procedure as outlined by ACAS. This includes a fair appeal, **Taylor -v- OCS Group Limited 2006** Court of Appeal.

96. In **Williams and Others -v- Compair Maxam 1982 EAT**, the Appeal Tribunal laid down guide lines as a reasonable employer might be expected to follow in making redundancy dismissals namely:

- (i) whether the selection criteria were objectively chosen and fairly applied;
- (ii) whether employees were warned and consulted about the redundancy;
- (iii) whether if there was a union the unions view was sought;
- (iv) whether any alternative work was available;

97. The issues in this case were regarding the selection criteria's application and whether the appeal was unfair.

Selection Criteria

98. Selection criteria should be clear and the employees should be aware of it and how it will be calculated. Criteria must be objective in order to diminish the role of subjectivity which can occur in the process when the criteria are marked by individual line managers etc. Provided that an employers selection criteria are objective a Tribunal should not subject those criteria to forensic analysis or over minute scrutiny as established in **British Aerospace Plc -v- Green and Others 1995 (Court of Appeal)**.

99. The Tribunal has to satisfy itself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion. The length of the assessment period is also important when determining the reasonableness of the application as a short assessment period may not show the true picture, employers would normally be expected to make allowances when an employer's assessment period is truncated by maternity leave, disability or other statutory absences to ensure that he or she is scored fairly as against other employees. An employer should also consider if they are applying any health considerations whether or not the health situation is related to disability and if so, whether they should make reasonable adjustments to the criteria for example absence is a common criteria, if the absence was due to disability or to for example a maternity related illness it may be reasonable to expect the employer to discount some of that absence or all.

100. Other issues such as how the criteria are applied and any weighting could also be considered. In **Eaton Limited -v- King 1995 EAT** it was established that a Tribunal should be satisfied with the method of selection and that the assessment had been done fairly on the basis of information which there was no reason to question. It would be unrealistic and unreasonable to expect the scorer to double check the information for accuracy in every case.

101. In respect of the scores of other workers the worker is entitled to their own scores but not necessarily those of everybody else's. In the British Aerospace case it was agreed that the worker should have the next nearest score.

102. In **Thomas and Betts Manufacturing Limited –v- Harding 1980 Court of Appeal** established that an employer should do what it can so far as is reasonable to seek alternative work for the claimant. An employer should not necessarily assume an employee would not wish to accept an inferior position.

103. We were also referred to **Buchanan -v- Tilcon (1983) CS** which stated that the Industrial Tribunal had imposed too high a standard of proof upon employers when it had said that the employers should prove the accuracy of the information upon which they acted in assessing the claimant. It stated that all the employer has to prove is that their method of selection was fair in general terms, that it was applied reasonably in the case of the employee. In doing so it is sufficient to call witnesses of reasonable seniority to explain the circumstances in which the dismissal of the employee came about.

104. In **Grey -v- Shetland Norse Preserving Company Limited 1985 EAT** it was held that it was acceptable to select for redundancy an individual on the basis of his poor attendance where he had not been warned that he risked losing his job if his attendance did not improve, the principle would not apply to a dismissal on the grounds of conduct as opposed to dismissal for redundancy. It was said that "however it is not incumbent upon an employer to administer warnings to an employee whose attendance is less than satisfactory, that in the event of a redundancy situation he will be the first to go".

105. In **Mitchells of Lancaster Breweries Limited -v- Mr P Tattersall 2012 EAT** which concerned how objective a criteria actually be can be and said that in assessing senior employees the fact that the assessment was based solely on the views of directors was not a matter which could be criticised as "inevitably such criteria involve a degree of judgment in the sense that opinions can differ, possibly some times quite markedly as to precisely how the criteria are to be applied and the extent of which they are satisfied in a particular case".

Sex Discrimination

106. The claimant brings a claim of direct sex discrimination. Section 13(1) of the Equality Act provides that direct discrimination occurs when "a person (A) discriminates against another person B if because of a protected characteristic (A) treats (B) less favourably than (A) treats or would treat others and sex is one of the protected characteristics.

107. Whilst discrimination claim can be brought on the grounds of pregnancy the claimant did not rely on that as her claim was that it was the possibility of future pregnancy which was the issue. As she was not pregnant the claimant was outside the protected period (ie the period of pregnancy and maternity leave) Outside of the protected period it remains open to a woman to argue that any treatment which was unfavourable because of her pregnancy amounted to less favourable treatment because of sex, contrary to Section 13 of the Equality Act 2010. She does not have to compare herself to how a male comparator has or would have been treated; this

has been long established by case law in relation to pregnancy discrimination. However for the purposes of Section 13 the comparator must mean the circumstances are not materially different from those of the complainant. Pregnancy discrimination during the protected period of the pregnancy and discrimination based on maternity leave must be brought under Section 18 however a claim for direct discrimination under Section 13 is available for pregnancy and maternity cases that fall outside the scope of the special protection in Section 18 as here.

Burden of proof under the Sex Discrimination Act section under the law section

108. In a discrimination case of any kind there are specific rules about the burden of proof and claimants benefit from a slightly more favourable burden of proof rule in recognition of the fact that discrimination is frequently covert and can present special problems of proof.

109. Section 136 of the Equality Act 2010 provides that if there are facts from which the court or Tribunal could decide in the absence of any other explanation that a person (A) contravened a provision of the Equality Act the Court must hold the contravention occurred and Section 136(3) provides that Section 136(2) does not apply if A shows that he or she did not contravene the relevant section. It is expected that the case law regarding burden of proof under the previous regime when the discrimination statute was separate still applies. The main guidelines on the burden of proof have been long established in *Barton -v- Investec Hanson Crossthwaite Securities Limited* 2003 EAT and the Court of Appeal in *Igen Limited -v- Wong* 2005 Court of Appeal. These state that inter alia:

- (i) It is for the claimant to prove on the balance of probabilities facts from which an Employment Tribunal could conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination, if the claimant does not prove such facts the claim will fail.
- (ii) In deciding whether the claimant has proved such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination.
- (iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.
- (iv) The Tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inference could be drawn.
- (v) In considering what inferences or conclusions can be drawn from the primary facts the Tribunal must assume there is no adequate explanation for those facts.
- (vi) The inferences could include anything that it is just and equitable to draw from an evasive or equivocal reply to the questionnaire (the

questionnaire no longer exists). Inferences can be also be drawn from any failure to comply with the relevant code of practice.

- (vii) When the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground the burden of proof moves to the respondent.
- (viii) It is then for the respondent to prove that he did not commit or as the case may be is not to be treated as having committed that act to discharge the burden is necessary for the respondent to prove on the balance of probabilities that his treatment of the claimant was in no sense whatsoever on the protected ground and must be adequate to prove on the balance of probabilities that the protected characteristic was no part of the reason for the treatment and cogent evidence will be required as the respondent is generally in possession of the facts necessary to provide an explanation.

110. In **Martin -v- Devonshire Solicitors 2011** the EAT stressed that "whilst the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt it is for the facts necessary to establish discrimination generally that is facts about the respondent's motivation. They have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the employer's motivation and what is in issue is its correct characterisation in law" and in **Laing -v- Manchester City Council EAT 2006** "if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination then that is the end of the matter. It is not improper for the Tribunal to say in effect "there is a nice question as to whether the burden has shifted but we are satisfied here that even if it has the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race". However Elias P went on to say "the Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage, that would be to let form rule over substance".

111. In respect of drawing inferences Tribunals have a wide discretion to draw inferences of discriminations where appropriate, we drew Counsel's attention to two recent cases, **Tudor -v- Costain EAT 2017** and **Geller -v- Yeshiva EAT 2016** where a failure to take into account sex based treatment which was not directly involved in the claimant's complaint led to an error of law and also where a failure to look at the inferences in the round also led to a overturning of a Tribunal. Things that can be looked at are stereotypical assumptions, hostile or unreasonable behaviour, unexplained unreasonable conduct, breach of policy and procedures, breach of the EHRC code of practice, statistical evidence, failure to provide relevant information. Where inferences are drawn and the burden of proof shifts it is then up to the respondent to provide a non-discriminatory reason for that treatment.

Conclusions

Unfair Redundancy Dismissal

112. We find the dismissal was unfair because:-

112.1 The appeal was defective. The appeal is part of the whole process and can make what might have been a fair dismissal unfair (although see below). We find that overall the appeal was defective because Mr Whitehead did not go back to the claimant with any of his findings to discuss it with her before he produced a final outcome. In particular in evidence Mr Whitehead said he had spoken to a number of people Ian Kimberley, Sharon Williams and Sonya Colley that he had not discussed any of this evidence with the claimant, he had also referred to documentation before him when he was making a decision but he had not shown any of that to the claimant and asked her opinion on it.

112.2 Subjective and unfair assessment. We find that the professional conduct assessment was overly subjective and unfair for the reasons set out below.

Overall the matters were mainly dependent on John Westhead's opinion and there was no independent assessment of the claimant.

We find that he has exaggerated the claimant's failings in particular as follows:-

- (i) Swearing. We preferred the claimant's evidence in this case as we found Mr Westhead evasive and inconsistent and we accept her evidence that he only remonstrated with the claimant once regarding swearing when she was outside smoking.
- (ii) Over involvement with learners. This section was not evidenced, in cross examination the claimant agreed that she had been told not to use her personal mobile phone with learners but this was because the employees received work phone and it was taking her some time to set this up and she was not familiar with it. Once she was told she did stop using her own personal mobile but up to that point all the engagement advisors had used their personal mobiles. She denied having learners in her home or giving them lifts although this was not explored in the consultation process. This in any event had never been raised with her other than the mobile phones and in fact she had been given an award for going the extra mile which contradicts the respondent's position on this point. Whilst Shetland Norse says a warning is not required, to be fair on an employee the matter should have been at least raised.
- (iii) TOIL. In the majority's view the claimant had been told that she needed to take TOIL quickly by both Sharon Williams and Mr Westhead. The email evidence showed Mr Westhead had raised it with her but when she had replied giving her explanation he had taken the matter no further and therefore she had assumed the matter was resolved. We find it was unfair then to use this issue which seemed to have been

satisfactorily resolved even bearing in mind what was said in the Gray -v- Shetland Norse Preserving Company Limited. Our third member Mr Skilling disagrees, he finds it was reasonable in the context of a redundancy exercise to consider this.

- (iv) File Throwing. Mr Westhead agreed that he considered the file throwing and counted it against the claimant clearly without any discussion with Sharon Williams who said this was simply that the claimant had pushed the file across the desk which even if done in irritation was not throwing. Without having any further information on the issue it was clearly unfair of him to rely on this matter in order to mark the claimant down on professional conduct.
- (v) That the good feedback regarding the claimant was under played in her assessment and over played in respect of others where it was recited at length.
- (vi) Application of set procedures. This overlaps with capability and with the point on carousels. We do accept that on carousels the issues this seemed to be evidenced to some extent (need to check whether with others the carousel issue came under professional conduct or capability).
- (vii) General points. Comparing the "look" of the claimant's assessment with others there seems to be a catalogue of things in the claimant's assessment which adds to a feeling that she was guilty of multiple infractions and a problematic employee whereas the other assessments were very limited and there was hardly any negative comment and no specific issues raised at all.
- (viii) In addition the claimant's assessment three bullet points related to the swearing and two to the over familiarity with learners therefore five bullet points related to two issues but by separating them out they appeared to be five problems and looked far more substantial than they actually were.
- (ix) A lack of consistency between the assessment. Each assessment did not address the same issues and therefore it is not possible to tell whether for example other people's performance in relation to, for example carousels, was better or worse than the claimant's save in relation to Sonya Colley where it was mentioned.
- (x) In addition the majority believe the respondent had decided the claimant would be made redundant from an early point . We base this on the fact that no one else's scoring was double checked, that the Jessica Wynne comment was not fully investigated, that there were no contingency plans in case the claimant succeeded in altering her score through the

consultation process and no one else was put through the consultation process even though there were only two points between the claimant and the next two employees.

Capability

113. We have considered that the respondent's capability assessment can be substantiated in part by the evidence. The respondent could substantiate some of it but not all, they advised us this was partly because they had assumed the claimant was not bringing a claim and had destroyed their records, this is bad practice on the part of the respondent, I am sure that the best advice would be to keep documentation for at least a year.

114. We considered the capability issues as follows:-

- (i) In relation to retention rate there was a small pool involved here of 74 learners who had left before six weeks, we did not have any evidence of the 74 learners. The claimant was said to be responsible for 46% although in the course of the Tribunal it was conceded this was reduced to 34%, It was said in the assessment that the next nearest was 21% and at the time it is also the case that given the small numbers a small inaccuracy would make a big difference to the percentage and therefore what was a 13% difference between the claimant's percentage and the next nearest may be relatively insignificant given that the pool under consideration was only 74 learners. Although we had no figures of that all however the claimant did have the opportunity to challenge this at the time and she saw the documentation at the time.
- (ii) Regarding the ungraded observation it was unfair to use an ungraded observation when this was development and the claimant had only just returned from maternity leave particularly as in the performance review Mr Westhead expressed himself as being confident the claimant would receive a grade 1, he does not mention in respect of the other ungraded observation (Sonya Colley) or even the grade 2 observation (Dawn Taylor) whether any action points arose and whether they were being complied with by the other engagement advisors. The two action points from the ungraded observation were about asking how, where and when questions of learners and it was not possible to see how the caseload reviews would in any way be able to test these action points.

Late Review

115. With reference to late reviews there was a chart here but no one even the respondent's witnesses could make sense of this chart. First of all the chart did not accord with the email of 16th March which suggested Dawn Taylor had 17 outstanding late reviews as the chart showed she had none, and applying logic she would have had to have completed those 17 within seven days which seems unlikely, the respondent could not explain why there were no late reviews notified to Dawn Taylor when it was clear she was said to have them on 16th March. It was not

clear whether the ones allocated to the claimant because she was off sick how they had been dealt with and whether all of them had been discounted.

116. Mr Whitehead also referred to 151 late reviews in his outcome letter but there was no evidence of how he had arrived at that figure and he could not advise us of that. This caused us to seriously doubt the authenticity of this particular document. Overall however we accept that there was sufficient objectivity to these criteria and sufficient concern to support the respondent's contentions.

Alternative Employment

117. We find that the claimant did make clear that she did not want either of the tutors jobs so that whether it was in Blackburn or Blackpool became irrelevant, she made no enquiries because she was not interested, she made it clear at all the consultation meetings and she made it clear in her witness statement. Accordingly we find that the respondent did take all reasonable steps in respect of alternative employment.

Sex Discrimination

118. Regarding the claimant's contention that she was marked down as selected for redundancy because of John Westhead's concern that she would get pregnant again and be off sick or on maternity leave we considered drawing inferences from the following matters:-

- (i) that JW commented in a favourable way on Helen Bell's ability to work late which is potentially indirectly discriminatory on the grounds of sex;
- (ii) the exaggeration of the claimant's bad points in her assessment as described above;
- (iii) the inconsistencies in JW's evidence and his evasiveness and JW failing to recall that he was interviewing Jessica Wynn with Chris McKie on the same day one example is him saying that he did not know whether Chris McKie was in on 17th August and yet there was a document that both of them had signed on that day;
- (iv) the fact that Chris McKie was recruited without any contemporaneous competition and whilst the consultation process was still ongoing with the claimant;
- (v) Chris McKie was present in Blackburn on 17th August and involved in effect in the claimant's redundancy consultation by assisting and interviewing Jessica Wynn on what was his first day back.
- (vii) the fact that there were no contingency plans if the claimant's marking changed as she only needed two points to be equal with two other employees;
- (viii) the failure to properly investigate the claimant's allegation that pupils had been told she wasn't coming back after her sick leave;

- (ix) John Westhead's "sick note" comment which suggests a concern about absence;
- (x) the perfunctory nature of the back to work interview;
- (xi) the fact that the only assessment form signed by a member of HR and as we have found discussed with HR was the claimant's.
- (xii) that the respondents initially included the claimant's pregnancy related absence in the assessment of her absence which would have given her even less points.

119. On the other hand we have borne in mind:

- (i) that whatever the circumstances of Chris McKie's recruitment there was still a job available which the claimant was not interested in;
- (ii) that Sharon Williams denied in cross examination she passed on any details to Mr Westhead that the claimant would be happy to get pregnant again; Sharon Williams was an impressive witness.
- (iii) that the claimant volunteered the information that John Westhead had hugged her when the return from sick leave and
- (iv) that the other EA's were mainly women and all bar one were of childbearing age.
- (v) that the respondents offered the claimant flexible working when she returned from sick leave (although the claimant denies it).
- (vii) that we had found a large part of the claimant's assessment acceptable.

Conclusion

120. In considering the inferences and whether the burden of proof moves as a result of those inferences we have decided against drawing inferences of ostensible discrimination from the inferences because although they clearly were matters of great concern to us in how the process was undertaken and some matters which add the taint of discrimination we felt on balance that two of the issues cited in favour of the respondent above actually are more powerful considerations. Those are that there was no evidence that Mr Westhead knew that the claimant would have been happy to get pregnant again, (we have considered whether he would have made this assumption in any event and there was a degree of disagreement amongst us therefore we conclude as a panel that this would not be obvious to Mr Westhead) and we have also considered that the fact that the majority of the Engagement Advisors were women who could have had children in any event in the foreseeable and proximate future militates against the claimant's potential pregnancy being a sub conscious motivating factor.

121. We have fully considered the inferences as of course they are the indicators of sub conscious or unconscious motivation however we find that the two factors are more compelling factors in deciding whether the claimant has established a prime facie case. Therefore we find the burden of proof does not shift and no further explanation is required from the respondent.

Polkey

122. In respect of **Polkey** we did not feel that this issue was properly evidenced and argued in Tribunal, probably due to the claimant being unrepresented when she drafted her witness statement. Therefore we will be re-visiting the point in the remedies hearing which now needs to be listed.

Employment Judge Feeney

Date 14th June 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 June 2017

FOR THE TRIBUNAL OFFICE