EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

MEMBERS **MR E WALKER**
MS SV MACDONALD

BETWEEN: **Mr A GHEASUDDIN** **CLAIMANT**

AND

BRITISH TELECOMMUNICATIONS PLC **RESPONDENT**

ON: **9TH -12TH MAY and (in chambers) 12th JUNE 2017**

Appearances

For the Claimant: **In person**
For the Respondent: **Ms I Shriastava, counsel**

JUDGMENT

The Judgment of the Tribunal is that:

(i) The Claimant was not unfairly dismissed.
(ii) The Claimant's claim of direct age discrimination is not well founded and is dismissed.

REASONS

1. In this case the Claimant claims unfair dismissal and direct age discrimination. The issues were set out in a case management summary issued following a case management hearing on 7 February 2017.

2. The Claimant who was 55 when he was dismissed claims that (I) he had been targeted for a performance improvement procedure because he was aged over 50 and (ii) that the Respondent applied to him a more rigorous standard than it would have applied to a person under the age of 50. He also alleges that his dismissal was tainted with age discrimination. The Respondent denies direct discrimination on grounds of age and says that the Claimant was fairly dismissed for capability.

3. The tribunal had two bundles of documents running to over 500 pages. For the Claimant we heard from Ms McHugh, Assistant Secretary for Prospect and from the Claimant himself. The Claimant had a witness statement from Mr Flett, his trade union representative during the capability process, who however did not attend.

4. For the Respondent we heard from Mr Mark Bartlett, Director of the Business and Network Infrastructure Centre of Excellence for Openreach. We also heard from Mr Andrew Wright, formerly the Claimant's line manager and from Mr McQuoid (at that time) Managing Director, Customer Service for Openreach, who heard the Claimant's appeal. We did not hear from the dismissing officer Ms McFarlane and we understand that she has left the business. Nor did we hear from Ms Henry who communicated the decision to dismiss to the Claimant and who was tasked with assisting the Claimant in his search for alternative jobs.

Findings of relevant fact

5. The Claimant began employment with the Respondent in late 1987 and had very long service. At the time of his dismissal he had just under 29 years' service. In 2001 he was promoted to a managerial role, as first line manager, and he remained at that grade throughout. Until the process which ultimately led to the Claimant's dismissal he had had no significant attendance or performance issues.

6. By 2013 the Claimant was employed as the first line manager as "Ethernet Front Office Team Manager" within Openreach. He managed a team of 18 people. Before then in 2012 he had been employed as Work Volume Control Manager. Mr Wright began managing the Claimant in or around 2013.

7. The Respondent's system of performance review (the APR), grades its employees according to 5 bands. E (excellent), VG (very good), AS

(achieves standards), DN (development needed) and U (unsatisfactory). Ms McHugh gave evidence, which we accept, that very few people were assessed as either excellent or unsatisfactory. Approximately 60% would be assessed as achieves standards with around 20% very good.

8. The Claimant was scored AS by his manager, Paul Endean, in his annual performance review for 2012/2013 and had some very positive comments as to his management capabilities (39). At the beginning of 2013 he moved roles into the Ethernet team and was managed by Mr Wright. For the 2013/2014 appraisal year he was also scored AS (46), (though on the particular goal of "inspire, challenge and coach" he scored DN). It was in that year that the Claimant "Embarked on his Pioneers development Journey" (see below).

9. In 2014/2015 the Claimant was managed by Ms Provan (while Mr Wright was on secondment) and was expected by then to apply his Pioneers training. He was rated DN for the overall year. (He scored AS on 2 measures of "connecting with customers, "creating new possibilities" and a VG in the measure "contribute to our communities".)

10. During the 2014/2015 year the Respondent introduced new training programs for managers. For first-line managers this training was called Pioneers. (More senior managers attended training called Pathfinders.) This was a structured attempt by the Respondent to change the culture. Mr McQuoid explained that Openreach is essentially an engineering business and managers had been promoted from engineers to managers without understanding management skills. The Pioneers process placed emphasis on coaching and development of the teams and "emotional intelligence". BT had been fined £42m for Ethernet delivery failures and a change in culture was needed to address such failures. Mr Wright told the Tribunal that "people managing became more important than promoting BT products" for those who were in a management role, and there was an emphasis on "building brilliant teams" and "creating first-class leaders". Mr Wright refered to this change in culture as a "seismic shift" and Mr McQuoid told the Tribunal that this culture change had resulted in the loss of significant numbers of managers.

11. The new approach is reflected in the Claimant's APR for 14/15 where Ms Provan notes that the Claimant was expected to apply his Pioneers training to deliver improved outcomes from each member of his team. (51) After getting DN in this APR Ms Provan notes that the Claimant had worked hard over the year and put in a lot of effort when faced with challenges. However she notes that he had been "levelled against his peers" and that there was more work required in order to be Achieving Standard.

12. The DN rating affected the Claimant's bonus for that year, and in line with company policy he was awarded a nil bonus. The Claimant appealed his bonus award by writing to Mr McQuoid. Mr McQuoid rejected the appeal on the basis that the Claimant had had 4 quarterly DNs and an overall rating of DN so that a nil bonus was appropriate.

13. Mr Wright returned from secondment towards the end of the first quarter of 2105/15 and began managing the Claimant again. He noted that the Claimant had received a DN grade for his APR and the performance concerns that had been identified. He spent some time with the Claimant and gave evidence that the essential concern for him was that the Claimant could not differentiate between the performance of different members of his team and act upon it. The Claimant's performance ratings distributions for his team were always towards the upper end of the grading spectrum although there were clear differences between the performances of the members of the team.

14. In July 2015 the Claimant received a high CARE rating. These were the scores given to the Claimant by those that he managed.

Coaching Plan

15. Mr Wright spoke to the Claimant about his concerns and on 12th August 2015 he emailed the Claimant a Coaching Plan which was intended to support the Claimant to improve to the required standard. The Claimant agreed to the content of the Coaching Plan which began on 1st September 2015 and was scheduled to end on 3rd October. At that stage the coaching plan identified 2 main areas where the Claimant was underperforming. First his team was not delivering the operational targets and secondly there was an issue with his ability to coach the team members and to manage their performance. During the plan the Claimant met with Mr Wright 3 times (on 3rd, 14th and 25th September.) The Claimant also attended a meritocracy workshop on 23rd September.

16. At the end of the Plan Mr Wright concluded that the Claimant had met the required standard in relation to the first objective (delivering operational targets) but had not met the required standard in relation to his ability to coach his team members and manage their performance.

17. The Claimant was told that Mr Wright was considering progressing to the next stage of the process. He was invited to and attended a meeting on 16th November with his trade union representative to consider whether an informal written warning should be given. (103) The outcome of that meeting was that the Claimant was given an Initial Formal Warning (IFW) in relation to his performance. The rationale for that warning was set out in some detail (107) and responded at some length to the points that the Claimant and his representative had made.

Formal Plan

18. Following the IFW Mr Wright drew up a Performance Improvement Plan (PIP) to run over 4 weeks (110) commencing on 30th November to end on 31st December. The Claimant was given the opportunity to input into the Plan and some amendments were made as a result. The required outcomes were set out (109g) and the Claimant was informed what support would be available (109i). This included weekly coaching sessions with Mr Wright, training refresher of some of the Pioneers modules, additional coaching sessions with other SOMs. The Claimant was also told that (i) operational manager peer-to-peer support of performance (i.e. a buddy) would be available and (ii) that a performance mentor would be available. Mr Wright identified Alan Sammy as a suitable buddy. The latter two opportunities were to be organised proactively by the Claimant and used on demand. In the event the Claimant did not avail itself of these latter 2 opportunities. To some extent the Claimant was required to identify what he needed or what would help and to ask for it, but he did not do so.

19. Essentially what Mr Wright required was for the Claimant to provide evidence in the way of documents or notes which showed that he had been providing coaching to his team. The Claimant was asked to provide that evidence during the weekly sessions which Mr Wright reviewed. This consisted of review of one-to-ones that the Claimant had held with his team members. Mr Wright did not consider that these notes met the required standard and provided a detailed critique to the Claimant of why he considered that they fell short.

20. In the meantime on 15th December the Claimant attended a meritocracy coaching session with a meritocracy coach, Ms Shakespeare, on a one-to-one basis, which included going through different scenarios. Ms Shakespeare reported that there was very little input from the Claimant and he struggled to demonstrate and deploy the knowledge on a day-to-day basis. Ms Shakespeare offered a further session but the Claimant did not take this up. He felt that she was against him and disliked him. There is nothing to suggest, as the Claimant alleges, that Ms Shakespeare was hired for the Claimant's character assassination. (The Claimant complained that he asked her to help him navigate the HR System and did not help but that was not the purpose of the session.) He also attended some Pioneers refresher training open to all.

21. At the end of the PIP Mr Wright considered that there was no improvement in the Claimant's performance and the Claimant was invited to a meeting to consider a final written warning. The Claimant attended the final written warning meeting with his union representative on 26 January 2016. At that meeting the Claimant said he felt he had been improving and had only known he was failing right at the end. He said that the mentoring and meritocracy coaching was ineffective. He said that he had not been given

enough time to improve during the formal plan. He also felt the way his performance was evaluated was subjective and unfair.

22. Nonetheless the outcome was that the Claimant was given a final written warning. The rationale for that (196 to 199) sets out at some length why the Claimant's representations had been rejected and what had been expected of him.

23. The Claimant appealed the final formal warning and that appeal was heard by Caroline Illingworth a senior manager from customer service in Liverpool on 8 April. The appeal was rejected.

24. For 15/16 the Claimant received an unsatifactory in his APR reflecting the fact that the was going through a performance management process.

Second Formal Plan

25. Mr Wright then put together a new PIP which was agreed with the Claimant and began on 20th April 2016 to run for 4 weeks. It set out 7 measures of success. Each week the Claimant provided notes of his one-to-ones, all coaching discussions with direct reports and team meeting minutes which were reviewed by Mr Wright each week. Mr Wright marked those as pass or fail in respect of each of the measures, following the Claimant's earlier criticism that he had not known he was failing the last plan until the end. It was Mr Wright's opinion that the evidence the Claimant provided of conversations with his team "still did not show any evidence of performance management, real coaching conversations, targets or agreed objectives." It was, and remains, the Claimant's case that documented evidence did show this.

26. At the end of the four-week period Mr Wright determined that there had been no improvement and his performance was below the expected standard for a first line manager. As a result Mr Wright referred the matter to his line manager to consider whether to invite the Claimant to a meeting to determine if dismissal is appropriate.

27. At that point Mr Wright also discussed alternative jobs with the Claimant who said he was willing to take a role at a lower grade, although he would prefer to work away from Colombo House, where he had been working. Mr Wright started a job search and identified that there were some 23 field engineering roles available (309). The Claimant expressed an interest in 3 of them. He also expressed an interest in two desk-based roles. As a result the Claimant was invited to an assessment day in Sevenoaks on 16 June for the field engineering roles (307). Mr Wright also wrote to a Mr Parker to highlight an interest in the desk-based roles in which the Claimant had expressed an interest—though it appears these roles were withdrawn or filled.

Dismissal Process

28. The Claimant attended a capability hearing on 9th June with Ms McFarlane, Director Openreach Customer Service Centres. The Claimant attended with his representative and the outcome was that he was dismissed with 12 weeks' notice, to expire on 9th September 2016.

29. We did not hear from Ms McFarlane but the rationale for her decision is set out at page 317. That rationale sets out at some length why Ms McFarlane concluded that the Claimant's performance had not sufficiently improved to meet the expected standard. In summary Ms McFarlane felt that the key issue was the Claimant's failure to acknowledge or accept the specific areas of underperformance and the business impact in the context of team management and that he did not understand or acknowledge the importance of BT leadership capabilities. "This lack of self-awareness is my primary cause of concern and the reason for my decision to terminate employment." Ms McFarlane accepts that the Claimant has been a hard-working and well intentioned manager and that he would do whatever was asked of him but that he was unable to be sufficiently self-aware with regard to the leadership content of his role.

30. In early June Mr Wright moved role and Ms Henry took over as the Claimant's manager.

31. On 16th June the Claimant was called to see Ms Henry and informed of the outcome of the final capability hearing. The Claimant says, and we accept, that Ms Henry, who he described as the acting manager came in at 10 a.m. and told him without further ado that he had been dismissed and that he was to return his computer, mobile phone and ID card and to leave the premises. He was given the letter of dismissal and the rationale and asked to sign it which he duly did. He was understandably shocked and distressed. He says that Ms Henry told him that she would call him every Friday with details of new jobs. The dismissal letter made it clear that a search for alternative roles would continue throughout the notice period.

32. The 16th June was the day that the Claimant had been due to attend an assessment in Sevenoaks at 2 p.m. for three London based field engineer roles that were available and had been lined up by Mr Wright. The Claimant did not attend. He says that he was unable to go to the interview because he didn't have details of where the interview was as those details were in his work emails which he could no longer access. Despite a direct question from the Tribunal he was not clear in evidence as to whether he had told Ms Henry that he had an interview arranged for later that day, simply saying that she told him that she would call him every Friday. He did not attend the assessment day in Sevenoaks and told the tribunal that he had heard nothing further about the field engineer vacancies.

33. The Claimant appealed and his appeal was heard by Mr McQuoid on 11th July. The Claimant was accompanied by his trade union representative who made some representations on his behalf. The Claimant maintained he had been performing well and provided a number documents as evidence that he was not underperforming. He said that there was a lack of evidence that his team did not understand their objectives or were under motivated. He referred to his CARE score, to various operational difficulties that he had had over the year, that may have prevented a focus on leadership . The Claimant accepts that Mr McQuoid listened to all the Claimant's points and has no complaint about the fairness of the hearing. (The notes do not indicate and the Claimant did not suggest that he had made any complaint about the missed interviews on 16th June.)

34. The outcome was that the appeal was rejected. The rationale was sent to the Claimant on 26 July 2016. (330-337) In relation to the CARE scores Mr McQuoid noted that the view of Mr Wright and Ms Provan was that the high scores reflected the fact that the Claimant was not managing underperformance. (It seems to us that this presents the employee with a bit of a Catch 22 situation.) Mr McQuoid felt that the high score was good but could not be taken in isolation and was not of itself enough to contradict the other evidence in the coaching plans. He had reviewed the documents provided which demonstrated that they did not set clear and structured objectives, plans or evidence of coaching.

35. An incomplete record of the job search undertaken for the Claimant appeared in the bundle (342/343) and on the 3rd day of the hearing the Respondent provided a further page identifying actions taken on 9th and 16th August. It appears from these documents that after he had been given notice of dismissal the Claimant was sent details of 2 roles on 4th, July (one in Cheltenham), two roles in Cheltenham on 11th July, 3 roles on 26th July and 8 jobs on 9th August. Some of these were in locations which the Claimant considered to be unsuitable and the Claimant says that his applications to other departments were unsuccessful (para 21 of his witness statement) - though we have heard no evidence as to what these jobs were. He complains that he only spoke twice to Ms Henry following his dismissal but it is clear that there were other attempts to communicate via email, voicemail and messages left with his wife.

36. The Claimant did not mention age discrimination during the course of the capability process. However, before us he relies on a number of matters in support of his claim that the capability process was initiated, and he was ultimately dismissed, on grounds of age. These document are: –

    a. A spreadsheet (27) created in 2013 by or on behalf of a Mr Dix, who reported to Mr Bartlett in Next Generation Access, Network Planning. (This was not the Claimant's area).

b. A 2015 research briefing from Prospect.

c. An Operational Review for Service Enablement UK North dated 4th November 2015 (497) showing the age profile for UK North. This showed a very high proportion of employees over 50. 61% of total FTE were aged 50 and over. The percentage of over 50s in various teams ranged from 43-86%. The Respondent accepted that the age profile would be "similar" in London.

37. The spreadsheet is clear evidence that at least in that part of BT at that time age was a factor in determining who should be "managed out". It names 20 team managers who are subject to performance management. The spreadsheet identifies over 50s by age, identifies the likelihood of their exit and states whether compromise agreements have been discussed or are to be discussed, gives a timescale for managed exits for performance or illness and the % likelihood of them taking a settlement. Mr Bartlett gave evidence that while he would expect to see a spreadsheet containing names of those employees on performance management he had never seen, before or after, a document which identified them by reference to age or a timeline to, and % likelihood of, exit. Steps had been taken to ensure that employees were made aware this was not acceptable. Nonetheless we consider that it demonstrates a culture where managers believed that this would be relevant and/or acceptable.

38. The Prospect Briefing is a survey of 3,106 Prospect members employed by BT. It reports that age appeared to be a factor in APR scores received in that younger employees had a higher performance profile than older ones. Nearly one 3rd of the under 40s saw a high rating, while just 8% were rated as low performers. In contrast, the percentage of those aged 55 and over with a high rating fell to 15%. Furthermore, one half those few employees with an unsatisfactory rating (U) were 55 and over. 26% of the under 50s received a high rating, compared to 16% of those age 50 and over. Conversely, 10% of the under 50s received a low rating compared to 14% of the 50+ group.

39. The Service Enablement document when setting the age profile contains a Box "What are doing about it?" The answers given refer to amongst other matters Natural Churn and says under the heading "People"

    i. Rigorous adherence to the 14 point sick plan

    ii. Deliver Low Contributor Exit/Healthy Churn as per forecast

    iii. Succession planning.

    The Respondent's age profile is a concern which they are seeking to manage. The note suggests that one of the ways that this might be done is

to target older workers for "low contributor exits". The reference to "as per forecast" indicates pressure on managers to deliver such exits.

40. Ms McHugh gave evidence that since 2007 BT had practiced an "aggressive" form of performance management. In particular it sought to force a fixed distribution of ratings so that there were quotas for each rating. This had been discussed between the union and management and in 2010 an agreement was reached between management and the union that there would be no targets for managed exits or forced distribution of marks. However the Union continued to get reports from its members that the practice continued and that subtle means of pressure were imposed - such as telling managers they needed to differentiate or they would be differentiated themselves. Patterns continued to show lower marks for older workers. Ms McHugh was an impressive witness whose evidence was clear and measured and which we accepted.

The law

Age discrimination

41. Section 39 of the Equality Act 2010 prohibits an employer discriminating against its employees by dismissing them or subjecting them to any other detriment. Section 13 defines direct discrimination as follows:-

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

Age is a protected characteristic

42. Section 5(1) of the Equality Act states that a reference to a person who has the protected characteristic of age is "a reference to a person of a particular age group" and "a reference to persons who share a protected characteristic is a reference to persons of the same age group" Section 5(2) defines an "age group as a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages." In this case the Claimant refers to over 50 and under 50 as being the comparative age groups.

43. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

44. The principles for determining whether there has been a breach of the Equality Act 2010 were set out in Islington London Borough Council -- v-

Ladele 2009 ICR 387 Elias J (as he then was) said (as summarised in the head note)

(1) In every case the tribunal has to determine the reason why the Claimant was treated as she was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

(3) Direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. This is a two stage test. The first stage places a burden on the Claimant to establish the prima facie case of discrimination.

(4) [If the Claimant can establish a prima facie case of discrimination] then the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the tribunal must find that there is discrimination.

(5) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the Claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the Claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. Of course in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment then the inference of discrimination must be drawn. …..the inference is then drawn not from the unreasonable treatment itself -- or at least not simply from that fact -- but from the failure to provide a non-discriminatory explanation for it.

(6) It is not necessary in every case for a tribunal to go through a two-stage process. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under the stage one. The employee is not prejudiced by that approach because in effect the tribunal is acting

on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non discriminatory explanation for the less favourable treatment.

(7) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts are set out in some detail what these relevant factors are.

Unfair dismissal

45. Section 94 of the ERA sets out the well-known right not to be unfairly dismissed. It is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Capability is a reason which may be found to be a potentially fair reason for dismissal.

46. If the Respondent can establish that the principal reason for the Claimant's dismissal was a real and honest belief that the Claimant was not performing his job to the required standard, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

47. In Alidair v Taylor 1978 IRLR 82 the Court of Appeal said that in such cases the employer does not have to establish that the employee was in fact incapable provided that the employer honestly believes on reasonable grounds that the employee is incapable of doing the job to the required standard. The Tribunal has to determine if there was material in front of the employer that satisfied it of the employee's lack of capability and on which it was reasonable to dismiss.

48. Having reached that conclusion and in considering whether it would be reasonable to dismiss, an employer will not usually have acted fairly in dismissing an employee for capability unless they have been given a proper appraisal of performance, an opportunity to improve, including adequate training and supervision, and fair warning of the consequences should they not improve. Targets set for an employee to monitor improvement should be realistic, fair and objective. There should be a fair process and a hearing and a chance to make representations to save his job. In some circumstances there may be an obligation to seek and consider alternative employment.

Conclusions

Age discrimination

49. It is the Claimant's case that he was targeted for a performance improvement procedure because he was over 50. It is also his case that the Respondent applied to him a more rigorous standard than it would have applied to a person under 50. He does not rely on any actual comparators and so we have considered whether the evidence suggests or leads us to infer that he was less favourably treated in these regards than a hypothetical comparator who was under 50. From Tribunal questions it emerged that the other 6 individuals who reported to Mr Wright were all under 50 and none of the others had been rated DN, though we have heard no other evidence about them.

50. The Claimant submits that the BT practice of managed exits and cultural ageism were a "catalyst" to his dismissal". He submits that BT had a hidden agenda in relation to the over 50s and that perfectly capable employees like himself were marked down in performance management to reduce the over 50s.

51. The Claimant has produced evidence which shows a prima facie case of age discrimination such that the burden of proof shifts to the Respondent to provide an explanation. The documents set out at para 36 and Ms McHugh's evidence suggest that there are factors at play in the Respondent's performance processes which might lead to conscious or subconscious age discrimination. The Claimant had worked for the Respondent for 29 years and had been a first line manager since 2001, managing a number of different teams. He had not before been subject to a performance process. He was over 50 (nearly 55) when the Respondent began the capability process.

52. We therefore looked to the Respondent to provide an explanation. Mr Wright denied that he had been under any direct or indirect pressure to force the distribution of his performance ratings. He explained in evidence the factors that led him to take the actions that he did. Our assessment of Mr Wright was that he was an honest witness and a thoughtful and conscientious manager who went to some trouble to explain to the Claimant what was required and how to go to go about it. He answered questions in cross examination and from the Tribunal in a way that appeared to be candid and was not defensive. It was apparent that he had had a good relationship with the Claimant that had survived even a difficult and uncomfortable process. In answering questions about the search for alternative employment the Claimant commented that if Mr Wright had still been there when he was given notice he would probably still have a job.

53. The paper trail of the performance management process is long and detailed. The Claimant was at each stage given an opportunity to comment on the content of each Plan as it was set. The Plans set clear goals and a

consistent message that the Claimant as a manager was now being judged less on the outcomes of his team than on "the behaviours that drive those outcomes".

54. The Claimant was given a clear explanation at each stage of why he had failed. The Claimant was asked to provide documents to demonstrate how he was coaching and managing his teams, such as notes of one-to-ones, coaching plans or team building agendas and so on. When the Claimant provided documents which Mr Wright felt were lacking, the reason for that was explained. It was clear from the documents in the bundle that Mr Wright explained to the Claimant what was required of him and advice as to how to achieve that. It was equally apparent that the Claimant did not grasp it. We have no doubt that he had been a good and effective manager in the past but what was required had changed.

55. The real difficulty is that the Claimant had not understood the change in the measure of his performance that had come about as a result of the Pioneer programme. The Claimant says that he kept asking for examples of where his failures had impacted the business and that Mr Wright failed to do that, but Mr Wright made it clear that delivering targets was no longer sufficient.

56. We have considerable sympathy with the Claimant who felt that his team were performing. As such he could not be held to be underperforming as a manager if they were performing. However, rightly or wrongly, there had been a company-wide change in the way that the Respondent expected management to be done and the Claimant was required to adjust his style to deliver that change. He had to show evidence of coaching, developing and "stretching" his direct reports and we accept that it was the Respondent's genuine belief that he had not done so.

57. A number of people assessed the Claimant and came to the same conclusion. Ms Provan had scored the Claimant DN in his APR for the 14/15 business year. Ms Shakespeare considered that the Claimant had not really understood. Ms Illingworth, who considered the Claimant's appeal against the Final Formal Warning reviewed the documents that the Claimant provided to her as evidence of his management and performance capabilities and also found that they failed to meet the required standards. Ms McFarlane reviewed the written evidence that the Claimant provided and also concluded that it fell short and lacked structure. Mr McQuoid looked at the evidence that the Claimant provided including his team Charter, one-to one email notes and performance management plans for three of his teams and also assessed those examples as not meeting the required standard. While no doubt management may be inclined to simply back each other up, the evidence before us does not suggest that Mr Wright or others were influenced by his age, rather than their assessment of his performance in the new world.

58. The Claimant was given considerable support including regular coaching from Mr Wright, feedback notes, opportunities for a buddy, mentoring and an individual session with Ms Shakespeare. (The further offered session with Ms Shakespeare was not taken up). None of this suggests that he was deliberately set up to fail as he alleges. In the absence of any clear comparator evidence the evidence does not suggest that another younger manager in similar circumstances would not have been managed in the same way and found wanting.

59. We were concerned that we had not heard from the dismissing officer Ms McFarlane. Nonetheless given the material before her and the rationale she provided the explanation is consistent with the reasons given by Mr Wright and Mr McQuoid.

60. For those reasons, despite the evidence at paragraphs 35-39, we accept the Respondent's explanation that the Claimant was underperforming according to the new management requirements and that neither the performance management process nor the dismissal were tainted with age discrimination.

Unfair dismissal.

61. For the reasons set out above we are satisfied that the Respondent Mr Wright, Ms McFarlane and Mr McQuoid honestly believed on reasonable grounds that the Claimant had not adapted to the post Pioneer world and was not delivering effective management to his team. We are satisfied that the process was fair. The Claimant himself does not attack the process per se, save only that he says that the timeline over which he was assessed was too short and the targets were too subjective.

62. We did not consider that the timeframe was unreasonably short. The process began with a Coaching plan in in September 2015 and continued through the stages until early June 2016. That was a reasonable time, with very regular meetings throughout. The Claimant also complains that the measures were subjective. He believed that he had met the standard and it was only Mr Wright's opinion that he had not. He says for example that the notes of his one-to-ones were adequate and clear. While an assessment of management skills can be subjective, Mr Wright set out what evidence he was calling for in his assessment and made it as clear as it is possible to do what was required. The Claimant did not avail himself of opportunities that might have helped such as buddying and mentoring, perhaps because he believed that he had met the standard.

63. There was a fair process. The Claimant attended a formal meeting at each stage of the process with his Trade union representative, and was able to make representations and provide evidence of his performance. The

Claimant now says that Mr McQuoid should not have heard his appeal as he had turned down his request that his nil bonus award be reconsidered, but he accepts that this was in line with the Respondent's process. We do not consider that it was inappropriate for Mr. McQuoid to hear the appeal.

64. Once it was clear that dismissal would be considered Mr Wright initiated a search for an alternative role for the Claimant. The Claimant agreed that he would consider a lower grade role and three field engineer roles were identified.

65. The Claimant was clearly shocked to be told of Ms McFarlane's decision on 16th June and being asked to clear his desk and leave immediately. It was insensitive to have informed the Claimant of this in the morning of the day he was due to attend an assessment for an alternative role. We considered whether this alone made the dismissal unfair. The Claimant said he could not attend the assessment as he had no means of accessing the details once his laptop and phone were taken away. We understand that he may well have been too shocked to attend an interview that afternoon.

66. On the other hand there was no evidence, from the Claimant or elsewhere, that he ever raised this matter with the Respondent—either at the appeal or with Ms Henry during the notice period. If he was too shocked to mention it on the 16th he could have raised it the next day. It may not have been too late. He did not do so. On balance we concluded that while it was insensitive not to have waited till the following day to tell the Claimant the timing alone did not make the dismissal unfair.

67. In capability cases there is not the same duty on employers to seek alternative employment as there is in a redundancy context. (Bevan Harris Ltd v Gair (1981 IRLR 520). Nonetheless, it seems to us that in the case of an employee with such long service (particularly one such as the Claimant whose underperformance was over a relatively short part of that overall service), a reasonable employer of the size of BT would have an obligation to look for opportunities that might be available.

68. The job search record establishes that the employer did look for and send vacancies to the Claimant. The Claimant says he only received 2 phone call form Ms Henry but it is clear that she sent him vacancies and there appears to have been little active engagement from the Claimant himself. The Claimant also says that given the size of the Respondent there must have been other vacancies but we have no evidence of that and it is not a conclusion that we can reach on the basis of an assumption alone.

69. The Claimant presented well in evidence. He is clearly a bright and measured individual who had done a good job for BT over many years. We were all very sorry that his long service to BT had ended in this way but for

the reasons set out above we find that the decision to dismiss the Claimant was not outside the band of reasonable responses.

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Employment Judge Frances Spencer
16 June 2017