



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs Anu Bala Bassi

v

London Borough of Hillingdon

Heard at: Watford

On: 3-6 April 2017

Before: Employment Judge Alliot
Mrs I Sood
Mrs E Newton

Appearances

For the Claimant: Mr N Shah, Solicitor
For the Respondent: Mr S Forshaw, Counsel

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was not unfairly dismissed.
2. The claimant was not subjected to harassment on the grounds of the protected characteristics of race or age.
3. The claimant was not discriminated against on the grounds of the protected characteristics of race or age.
4. The claimant was not victimised for doing or possibly doing a protected act.
5. The claimant's claim is dismissed.

REASONS

Introduction

1. Mrs Anu Bassi was employed by the London Borough of Hillingdon as a residential support worker. She first worked for Hillingdon on a casual basis in 1996. She began work at the Colham Road Care Home as from 1 February 2008. She was therefore a longstanding employee. She was

dismissed with notice on 18 December 2015 with effect on 14 March 2016. The reason for the dismissal given by the respondent is capability. Mrs Bassi brings claims of unfair dismissal, harassment related to race and/or age, direct discrimination because of race and/or age and, by late amendment, victimisation. Mrs Bassi has characterised her race as Indian Asian and in 2015 she was 52 years old.

Application to amend form ET1 and the list of issues to include claims of victimisation

2. At the outset of this hearing Mr Shah made what was in effect an application to amend form ET1 and the list of issues to include a claim of victimisation (s.27 Equality Act 2010). We noted that at the preliminary hearing Mrs Bassi was acting in person when the list of issues was set out by Employment Judge Bedeau. The new claim of victimisation was put on two grounds:
 - 2.1 Firstly, a protected act of making a written complaint on 12 May 2015 said to have been submitted to Kim Jepson.
 - 2.2 Secondly, a protected act of making a written grievance dated 23 October 2015.
3. In both cases the detriment relied upon was being made subject to the capability procedure and ultimately being dismissed. Mr Forshaw opposed the application on the basis that, essentially, he was prejudiced by the lateness of the application. Firstly, no copy of the complaint dated 12 May 2015 was available and Kim Jepson was not scheduled to give evidence. Secondly, he would need to investigate the timings in relation to the preparation by Mrs Annet Nassuna of the report that led to Mrs Bassi being referred for a formal capability hearing. Due to further enquiries being necessary, we adjourned determination of the application until the conclusion of the evidence. Despite the delay, Mr Shah was unable to produce the complaint dated 12 May 2015. Mr Forshaw was able to take instructions from Mrs Jepson and his case was that no complaint had been received by the respondent. Clearly, a conflict of evidence would arise on this issue and Mrs Jepson was not to be called. In the absence of the complaint and due to the factual basis of this issue being new and disputed we did not allow this victimisation claim to be made. The lateness of the application clearly prejudiced the respondent and was more than a simple labelling issue.
4. As regards the victimisation claim regarding the grievance, Mr Forshaw was able to provide us with a chronology of events and Mrs Nassuna was able to give evidence concerning it. In our judgment the factual background to this additional claim was already before us and the motivation for referring Mrs Bassi to a formal capability hearing was already to be determined as regards issues of race and/or age. As such, we concluded that we were also able to determine whether it was in response to Mrs Bassi doing a protected act. The respondent was not prejudiced by the lateness of the

application and we determined that this was simply a labelling issue. We allowed the amendment.

The issues

5. At a preliminary hearing held on 12 October 2016 Employment Judge Bedeau recorded the issues as follows:-
(Note: In the original Annet Nassuna's forename was spelt Annette and Katie or Catie Holmes was referred to as Katie Hampton)

6. Unfair dismissal claim

- 6.1 What was the reason for the dismissal?

The respondent asserts that the claimant was dismissed on the grounds of capability, which is a potentially fair reason under s.98(2) Employment Rights Act 1996.

The claimant asserts that she was dismissed because of race and/or age. The claimant had been working for 20 years without issues being raised about her performance until placed on PEP.

- 6.2 Did the respondent hold the belief in the claimant's capability on reasonable grounds? The burden of proof is neutral, however the claimant challenges the fairness of the dismissal on the following grounds:

- i. The claimant was the only one placed on a PEP and was not given prior notice that she would be placed on it.
- ii. The respondent failed to take into account that the claimant was not given appropriate training and risk assessments.
- iii. The respondent will say that the claimant was provided with support under the capability procedure but consistently refused to acknowledge any shortcomings in her performance. It will also say that the claimant was provided with adequate training and was advised of her responsibilities to keep training up to date.
- iv. The respondent only took into account one written assessment completed by the claimant which did not provide a true representation of her written work.
- v. The respondent understands the claimant to be referring to the respondent taking into account the claimant's failure to complete resident BA's review report despite having three weeks' notice. The respondent will say that it is wrong to say that this was the only factor taken into account when dismissing the claimant. The respondent took into account, inter alia:

- a. failing to reach required standard despite the implementation of a capability programme and performance plan;
 - b. incidents giving cause for concern about care provided to residents, including: pushing a resident in a wheelchair through a closing door on 17 August 2015; leaving a resident DS unattended for an inappropriate length of time, following which an ambulance had to be called; handling a patient inappropriately on 28 October 2016; leaving residents unattended/without care staff in attendance.
 - c. poor recording of resident's notes;
 - d. the claimant's unwillingness to acknowledge any need for change or improvement.
- vi. The claimant was singled out as she was using a "commonly implemented" moving and handling procedure.
 - vii. It is understood that this relates to the respondent taking into account its finding that the claimant had inappropriately transferred a resident on 28 October 2015, reported to the respondent by a student nurse who was concerned by the unsafe transfer. The respondent denies that the claimant's method was "commonly implemented" or that the claimant was unfairly singled out.
 - viii. The respondent failed to take into account that the claimant was "a victim of bullying and harassment" which "affected [her] work performance".
 - ix. It is understood that the claimant is referring to bullying she alleges on the part of Annet Nassuna, Katie Holmes and Carole White (see below). The respondent will say that the claimant's grievance against these staff members was investigated and not upheld.
 - x. The respondent failed to take into account the claimant's 20 years' service "with no prior issues until Annet Nassuna became [the claimant's] line manager in January 2015".

The respondent will say that it did take into account the claimant's long service.

The respondent will also say that it is incorrect that the claimant had a clear disciplinary record, having received a formal written warning on 13 July 2015 owing to her refusal to follow a reasonable management instruction. Additionally, prior to Annet Nassuna becoming the claimant's line manager, in January

2015 concerns had been raised by the District Nurse about standards of care provided at the lodge where the claimant was working, which resulted in the claimant being line managed by Annet Nassuna, who developed a performance plan in order to assist the claimant.

- xi. The respondent did not take into account inaccuracies in witness statements.

The respondent is unclear what inaccuracies in witness statements are referred to.

- xii. The respondent was not impartial when considering the claimant's account of incidents reported in witness statements.

The respondent will say that witness statements were taken from a variety of staff members in the course of a fair procedure. The respondent evaluated those statements impartially.

- xiii. The respondent failed to take into account that it was procedure to inform a Duty Senior, in the first instance, if there were any concerns about a service user.

It is understood that this relates to the respondent taking into account concerns that the claimant had left a resident, DS, unattended for an inappropriate length of time on 23 August 2015. The respondent will say that it expressly took the above into account, however its concern was with the claimant's failure to attend to DS in a timely fashion.

- xiv. The respondent failed to take into account that "it was a joint agreement to complete the report".

It is understood that this related to the claimant's failure to complete resident BA's review report despite three weeks' notice, which was the responsibility of the claimant and her colleague, Peter, who she was advised would be on annual leave during the relevant period. The respondent will say that it did take this into account and it is expressly referenced in the dismissal letter.

- xv. The respondent failed to take into account the claimant's grievance.

The respondent will say that it carried out an investigation into the claimant's grievance and that the grievance was considered at the same time as the final capability hearing. The grievance was not upheld.

- xvi. The respondent did not comply with its policies and procedures on Bullying and Harassment, Equality and Diversity, or its code of conduct. The claimant was saying that she was the subject of bullying and harassment.

The claimant is asked to set out the breaches of policy and procedure on which she relies.

- xvii. The capability process was predetermined. No discussion with the claimant beforehand.

The respondent will say that the process was not predetermined and that the dismissing officer was fair and impartial. The respondent will also highlight that the dismissal was upheld on appeal by a more senior officer with no previous involvement.

- xviii. Dismissal was unjustified and unfair.

The respondent will say that the decision to dismiss was reasonable and proportionate.

6.3 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

6.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This required the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

6.5 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

7. Section 26: Harassment related to race or age

7.1 Did the respondent/its employees engage in unwanted conduct as follows:

- i. In 2013 the respondent did not investigate the claimant's photograph that was defaced. (Note: The claimant did not proceed with this allegation)

Bullying by Annet Nassuna, by:

- a. placing the claimant on a Performance Enhancement Plan (PEP) in January 2015. Her comparators for purposes of direct discrimination are Peter and Lorraine Sergeant;

- b. not giving the claimant a “straight answer” and laughing when the claimant asked why the PEP was being implemented;
- c. falsely stating that the claimant had ripped her PEP folder;
- d. commenting that there “wasn’t anything good about” the claimant’s performance;
- e. forcing the claimant to sign her supervision notes, which were different from the hand written notes.

ii. Bullying by Katie Holmes and Carole White:

Katie Holmes and Carole White harassed the claimant. Ms White would shout at the claimant when raising issues with her. Ms Holmes also regularly shouted at the claimant.

7.2 Was the conduct related to the claimant’s race or age? The claimant was the only Indian-Asian in the workplace.

The respondent denies (b)-(d) above. In respect of (e), above, it is denied that the claimant was “forced” to sign her supervision notes. The claimant was requested to sign them as is customary in accordance with the respondent’s practices. The claimant was given the opportunity to, and did, add her own comments to the notes prior to signing them. It is admitted that the claimant was made the subject of a PEP plan. This was following an investigation made after a complaint was received from the District Nurse, undertaken by a different team and prior to Annet Nassuna being made the claimant’s line manager. It is therefore denied that any unwanted conduct, as alleged or at all was on account of the claimant’s race or age.

The claimant has not set out any facts upon which a tribunal could reasonably conclude that any unwanted conduct was because of a protected characteristic. It is a mere assertion. The claimant herself states: “I felt like I was being treated differently to others maybe because of my race and maybe because I’m the oldest staff, and [Annette Nassuna] was just trying very hard to get rid of me” (emphasis added).

7.3 Did the conduct, have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

The respondent will say that none of the conduct alleged had the above purpose.

- 7.4 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

The respondent will say that it was not reasonable for the conduct to have that effect. The respondent notes that the claimant was averse to any constructive criticism and lacked insight into issues with her capability. The claimant accordingly unreasonably perceived proper management guidance and instruction as bullying and harassment.

8. Section 13: Direct discrimination because of race or age (53 years now, 52 years when dismissed)

- 8.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010, namely:

- i. the claimant's dismissal was because of her age and/or race.
- ii. penalising her for inappropriately handling a resident;
- iii. any of the treatment found not to have been harassment;
- iv. the claimant was questioned by Ms Nassuna about her pay and benefits which were based on her age relating to length of service.

- 8.2 Has the respondent treated the claimant as alleged less favourably than it treated the comparator, namely Peter Kariuki and Lorraine Sergeant?

The claimant will rely on James who did not follow the proper handling procedure in relation to a resident on 4 October 2015.

The claimant is requested to set out the comparators on which she relies. The claimant has said "I contend that my capability case would never have been brought if I had been treated in the same manner as my fellow colleagues and I will produce evidence that proves this." It is presumed that the claimant does therefore have an actual comparator in mind.

- 8.3 If so, has the claimant provided primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

The respondent will say that the claimant has not set out any facts upon which a tribunal could reasonably conclude that any unwanted conduct was because of a protected characteristic. It is a mere assertion. The claimant herself states: "I felt like I was being treated differently to other maybe because of my race and maybe because I'm the oldest staff, and

[Annet Nassuna] was just trying very hard to get rid of me” (emphasis added).

- 8.4 If so, what is the respondent’s explanation? Does it prove a non-discriminatory reason for any proven treatment?

The respondent repeats the points made at para 5.2 above.

9. Equality Act Time/Limitation issues

- 9.1 The author has not had sight of the ACAS certificates, however understands that early conciliation commenced in early June 2016. Accordingly, any act or omission that took place before early March 2016 is potentially out of time, so that the tribunal may not have jurisdiction.

- 9.2 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

The claimant has alleged a series of individual acts of discrimination by Annet Nassuna, and non-particularised general allegations against Katie Hampton and Carole White. The respondent will say that it is not a continuing act extending over a period of time.

All of the allegations of discrimination made by the claimant are said to have occurred prior to her dismissal on 18 December 2015. The claimant herself states “the bullying and harassment had ceased when I was line managed by Angela Walking in end of October 2015.” The respondent will therefore say that the Equality Act claims are out of time.

- 9.3 Was any complaint presented within such other period as the employment tribunal considers just and equitable.

The respondent will say that it is not just and equitable to extend time.

10. Section 27: Victimisation

- (i) Did the respondent subject the claimant to a detriment because she had done a protected act. The protected act was the submission of a grievance and the detriment was being subjected to the capability performance procedure which ultimately led to her defence. The respondent asserted that the submission of the grievance was not a protected characteristic as it was based on false evidence or information and made in bad faith. Further, the respondent submitted that the decision to refer the claimant to the formal capability hearing had already been effectively taken prior to the submission of the grievance.

11. **Remedy**

- 11.1 What loss has the claimant suffered as a result of any conduct found to have been unlawful? The claimant is seeking re-instatement, re-engagement, compensation. Award for injury to feelings with XXXX.
- 11.2 Has the claimant taken reasonable steps to mitigate her loss? If not, what steps should she have taken?
- 11.3 What is the likelihood that the claimant would have been dismissed fairly in any event?

The law

12. **Unfair dismissal**

13. We have taken into account s.98 of the Employment Rights Act 1996 and the same is not recited here, in particular s.98(1)(3)(a) and (4). In his closing submissions Mr Forshaw referred us to the following cases: Alidair Ltd v Taylor [1978] ICR 445, Abernethy v Mott, Hay & Anderson [1974] ICR 323. The Court of Appeal's test of a fair capability dismissal has two elements, namely:

- Does the employer honestly believe this employee is incompetent or unsuitable for the job?
- Are the grounds for that belief reasonable?

14. Put another way, what the tribunal has to decide is whether there was material in front of the employer that satisfied the employer of the employee's inadequacy or unsuitability and on which it was reasonable to dismiss. Incapability is usually established over a period of time and a number of small incidents by themselves relatively unimportant may add up over a period of time to a sufficient reason for dismissal. Once the reason for dismissal has been established the question of whether the dismissal was fair or unfair in the particular circumstances of the case will be judged according to the reasonableness test set out in s.98. As regards procedural factors, for a dismissal on the grounds of incapability we note that the following basic steps are expected, namely:

- Proper investigation/appraisal of the employee's performance and identification of the problem;
- Warning of the consequences of failing to improve;
- A reasonable chance to improve.

15. In addition Mr Forshaw drew our attention to the case of Orr v Milton Keynes Council [2011] ICR 704 which emphasised the importance of looking at the honest belief of the decision maker as regards the dismissal.

16. **Direct discrimination**

17. We took into account at ss.13, s.23 and s.39(2)(d) of the Equality Act 2010 and the same are not set out here. Mr Forshaw referred us to the cases of Shamoon v Chief Constable of the RUC [2003] IRLR 285, Amnesty International v Ahmed [2009] ICR 1450, Hewage v Grampian Health Board [2012] IRLR 870 and we have considered the extracts of those cases that have been drawn to our attention. In addition we took account of the burden of proof in s.136 of the Equality Act. We approached the issue of direct discrimination in accordance with the issues.
18. **Harassment**
19. We took account of s.26 Equality Act 2010.
20. **Victimisation**
21. We took into account s.27 Equality Act 2010.

The evidence

22. We heard oral evidence from the claimant, Mrs Bassi. In addition we heard oral evidence from: Mrs Annet Nassuna, team leader/adult resources, working at the material time in North Lodge at Colham Road; Mrs Sandra Taylor, head of service, London Borough of Hillingdon; Catherine Dolly, human resources adviser, London Borough of Hillingdon; and Tony Zaman, corporate director for adults, children and young people, London Borough of Hillingdon. In addition we were provided with a witness statement from Lydia Newman, human resources manager, London Borough of Hillingdon. She was not called as her evidence was not challenged. We have been provided with a main trial bundle, a supplementary trial bundle, a bundle of witness statements and a bundle of the respondent's authorities.

The facts

23. The respondent's Colham Road care home is a home for adults with learning disabilities. The home is home to 13 adults and is divided into four lodges, North, South, East and West. Each lodge houses around 2-4 residents. The claimant began work as a residential support worker at Colham Road from 1 February 2008. Towards the end of 2014 the claimant was working in South Lodge. We have been provided with a breakdown of the age and ethnicity of the 22 permanent members of staff working at Colham Road Care Home. It is quite clear that the workforce was ethnically diverse. The claimant was the only employee to describe herself as Asian British Indian. 5 are described as Black British African / Caribbean or other, 1 European other, 1 White other and the rest White British. 7 were in the claimant's age group 50 – 64. In addition agency workers were employed and the evidence was that the agency workforce was also ethnically diverse.

24. Having had the advantage of seeing and hearing from the witnesses in person we begin by giving our overall impression of their oral evidence.

25. The claimant

25.1 The claimant does not have English as her first language and we made due allowance for that fact and the fact that certain English words and idioms were unfamiliar to her. Further, we recognise that every litigant will want to put the best possible case forward. We observed that the claimant was nervous and prone to becoming upset on occasions. Lastly, we recognise that all witnesses were dealing with events that took place in 2015, some time ago. Nevertheless, we found numerous instances in the claimant's evidence where her evidence was unsatisfactory. We found her evidence to be evasive and defensive on occasions and she gave the impression of trying to anticipate questions by reading ahead and not answering questions posed to her directly. A notable part of the claimant's attitude was her total failure to accept responsibility for anything. Virtually without exception, every time an allegation of poor performance that was recorded in the documentation was put to her, her reaction was to deny it or assert that it was someone else's fault. This was entirely consistent with what was recorded as being her attitude during the capability hearing before Mrs Taylor where her reaction to the same points being put to her was that they were all lies. We formed the distinct impression that the claimant lacked fundamental insight into the effect of her actions on her colleagues and, more importantly, service users as regards both potential and actual risk of harm.

26. Mrs Annet Nassuna

26.1 We thought that Mrs Nassuna gave clear evidence, although on occasions we detected that her answers were somewhat set and somewhat prepared in defence to the respondent's case. There were one or two inconsistencies in her evidence, for example whether or not she had seen the PADA (the Employee Performance and Development Appraisal) covering the year March 2014 to April 2015, signed off in August 2015, prior to placing the claimant on the Performance Enhancement Plan. However, notwithstanding these occasional inconsistencies, we found Mrs Nassuna to be a credible and reliable witness.

27. Mrs Sandra Taylor

27.1 We found her evidence entirely straightforward, clear and credible. She conceded if she could not recall something and was thoughtful in her approach. We regarded her evidence as entirely reliable.

28. Mr Tony Zaman

28.1 Again, we found his evidence entirely straightforward, clear and credible. We found him reliable.

29. Catherine Dolly

29.1 She was entirely straightforward and credible in the largely uncontroversial evidence she gave.

30. An obvious question that arises in a case such as this is how it is that an employee of some 19 years standing can suddenly be found to be incapable of doing their job. This was certainly an impression that the claimant sought to advance in her witness statement and in her claim forms. In her appeal following her dismissal, one of her grounds was that her “professional record with the council of 20 years with no prior issues until Annet Nassuna became my line manager in January 2015 was not taken into account”. In the list of issues at 6.1 above it is recited that:-

“The claimant had been working for 20 years without issues being raised about her performance until placed on PEP (Performance Enhancement Plan)”

The same point is made at 6.2 x.

31. Further, in her witness statement at paragraph 58 she states:-

“There had been no concerns under other managers for 20 years.”

32. We were taken to a number of additional performance documents recording management issues with the claimant between 2006 and 2014. Whilst it is true to say that the claimant had not been subjected to any formal capability procedures prior to 2015, in our judgment the impression given by suggesting that there had been no previous issues with the claimant’s performance is wrong. We cite some of the more important examples of where the claimant’s performance had been raised with her. In a supervision meeting of 9 September 2006 reference is made to having to constantly ask the claimant to do tasks and refers to her not always attending to her duties and being ready to leave her shift prematurely. Those observations were made by the claimant’s then line manager, Tracie Hamer. On 12 March 2009 the claimant’s then line manager, L Garlick, raised a performance issue concerning her allowing a service user to go to a day centre in his pyjamas which was not acceptable. On 24 January 2010 the claimant’s then team leader, Leigh Claxton, had a meeting with the claimant concerning her health concerns. However, it is notable that on that occasion the claimant was alleging that she was being bullied by Christine Cox and Patricia Ramsamy in the context of complaints about the quality of her work. It is notable that she asserts that those two members of staff went out of their way to look for mistakes within her work. We find as a fact that there is a recurring theme to the claimant’s attitude towards being managed by her line managers. Each and every time a performance issue is identified and raised with her, her instinctive reaction is to claim that she is being bullied and shouted at

and/or that the performance issues are an invention or someone else's fault. In an information record sheet concerning the claimant it is recorded that the claimant was placed on informal performance monitoring by her then line manager, Jayne Smith. This was because of continuing concerns about the claimant's performance. This indicated to us that the claimant was familiar with the informal preliminary aspect of capability management. In her evidence the claimant was somewhat dismissive of this episode in that she stated that after a four or five weeks of performance review she improved and it was all alright.

33. We have a management note concerning a shift on 18 March 2010. In short, the claimant's performance was poor but a complaint from the claimant was anticipated. The note prepared by Christine Cox, team leader, concludes:-

“I feel that I should be the one to complain as this is a regular occurrence, not just with me but with other team leaders, I am also getting fed up with being blamed for doing my job and would like to make a formal complaint against Anu, she is not a team player, she ignores instruction and does her own thing, myself and other team leaders have complaints about her all the time from other staff that works with her, and this has been going on for a very long time but nothing seems to be done about it.”

34. This is reinforced in a letter dated 31 March 2010 from Christine Cox in which she states:

“This is an example of the way Anu is while on shifts, I feel that if I say anything to Anu about her work or her attitude to work, she immediately reports me for bullying her, I have spoken to her line manager in the past about her work, but she is still the same. Can you please look into this matter as service users are the ones that are suffering the consequences of her actions...”

35. There are records that on 22 June 2010 when Christine Cox requested the claimant to assist a service user she was ignored and that on 23 June when Christine Cox requested the claimant to administer medication to a service user, this did not take place. Christine Cox stated:-

“Anu seems to go out of her way to be awkward while on my shift, I feel that I can't say much to her as I would again be accused of bullying or picking on her but her behaviour affects the service users, I also believe other team leaders are still having problems with her.”

36. There is a handwritten report dated 2 December 2010 from an agency staff member alleging inappropriate behaviour towards a service user by the claimant. There is a file note concerning an incident with the claimant on 24 February 2012 when it is alleged that the claimant shouted at another member of staff. There is a file note dated 5 March 2012 recording the claimant using an inappropriate lifting technique on a service user.

37. The incidents that we have highlighted above are representative and not the entire picture of performance issues raised with the claimant during this period. The examples we have set out relate to no less than 6 line managers / co-workers. It is wholly implausible that so many different individuals at different times would conspire to invent the performance issues. We have come to the clear conclusion and find as a fact that there was a consistent pattern of behaviour on the part of the claimant. When performance issues were legitimately raised with her by her line managers or others her immediate reaction would be either to deny that anything had gone wrong or to blame others. She would seek to deflect any criticism of her performance by raising allegations of bullying or shouting against those who were trying to manage her.
38. We find that far from having worked without issues being raised for 20 years, in fact the claimant was repeatedly informally being managed for poor performance. Having reviewed the documentary evidence provided to us the main surprise that we had was that the claimant had not been managed for capability formally well before January 2015.
39. In early January 2015 the claimant returned from a period of illness. Prior to returning she had requested that she was moved due to potential infection issues. South Lodge at the time had four service users with very complex needs. Before the claimant moved there were two incidents involving services users on 20 and 21 January 2015. On 20 January the service user involved was DB. Both the claimant and another care assistant, Peter Kariuki, were responsible for the care of service user DB. Early on in the shift it was observed that DB's urine bag was empty. However, it was some substantial time later that it was realised that the catheter was being bypassed and that DB was significantly wet and had been for some time. We find that this was an instance of poor performance, both by Peter Kariuki and also the claimant. On 21 January 2015 an incident took place concerning service user RB. On this occasion the claimant was the link worker for service user RB. There is a surprising lack of contemporaneous documentation concerning this incident. However, in short it is said that service user RB was extremely ill and indeed receiving palliative care. As part of his care there had to be frequent monitoring of his airways due to a tendency to accumulate phlegm which would impair his breathing. Due to a lack of care the district nurse had to be called and service user RB had to be hospitalised. This was clearly a potentially serious incident. We were told that following it the district nurse made a verbal complaint to Annet Nassuna about the poor care provided. We consider that it is unlikely that such a complaint would have been made verbally and should have been made in writing. Be that as it may, we find that the complaint was made by a district nurse and it concerned a lack of care by the claimant.
40. As a result of the complaint from the district nurse and as a result of the claimant's own request to be transferred, she was transferred to the North Lodge section of the home. The North Lodge section had three service users with less challenging problems and less complex needs. Also

transferred were Peter Kariuki and Lorraine Sergeant. There was some conflict in the evidence as to why Peter Kariuki and Lorraine Sergeant were also transferred. Lorraine Sergeant had not been involved in either of the incidents and so cannot be said to have been transferred as a result of them. Peter Kariuki was involved in one of the incidents and Annet Nassuna stated that "Peter appeared to understand where he had gone wrong and accepted responsibility." Annet Nassuna gave evidence that Peter and Lorraine had been moved due to a routine transfer of staff.

41. The claimant began working on North Lodge with Annet Nassuna as her line manager in late January or early February. At a one-to-one meeting between the claimant and Annet Nassuna on 25 February 2015 the claimant was informed that she would be having her performance closely monitored using performance monitoring sheets to help shape her performance to the required standards. It is recorded in the notes of that meeting that the claimant had been involved in an incident where a district nurse felt she had not worked appropriately with one of the homes' most vulnerable residents. This reference supports the evidence concerning the complaint made by the district nurse and refers to the 21 January incident.
42. The evidence concerning the claimant being placed on the Performance Enhancement Plan was as follows. Annet Nassuna told us that she had decided to place the claimant on the Performance Enhancement Plan due to the incident that resulted in a complaint from the district nurse about her and also due to information provided to her by the claimant's previous line manager, Angela Walking, when Ms Walking handed over to Annet Nassuna on the transfer of the claimant. Annet Nassuna gave evidence that Ms Walking made a verbal handover in relation to all three members of staff who transferred at that time. However, we were not provided with any information as to the nature of the handover as regards Peter Kariuki and Lorraine Sergeant.
43. We find that during the handover from Ms Walking to Annet Nassuna, Ms Walking in all probability identified to Annet Nassuna the prior recent history of the claimant in relation to her performance issues. We note that when being managed by Ms Walking, both prior to January 2015 and after the claimant raised her grievance in October 2015, the claimant apparently had no difficulties with being managed by Ms Walking. However, when Mrs Taylor invited the claimant to provide her with details of staff members who could support her allegations contained in her grievance the claimant volunteered Ms Walking. It is notable that Ms Walking's response to Mrs Taylor's investigation is reported as follows:

"I interviewed Angela Walking as Mrs Bala Bassi had stated to me that Ms Walking would support her evidence of bullying, harassment and that she is treated differently. Ms Walking stated that she had not, nor had she seen anyone else raise their voice to Mrs Bala Bassi. She described Mrs Bala Bassi's behaviour as exasperating, stating that she is needy, cannot work independently and needs constant observation and support."

And that is from someone the claimant thought she had a good working relationship with.

44. A reflection of the concerns likely to have been raised by Angela Walking is contained in the PADA. This document appears to be a composite document in the sense that several people have had input to it, principally Angela Walking, but it is clear that Annet Nassuna also had input. However, the six month progress notes are likely to have been entirely Angela Walking's work and it can be seen that performance issues are raised within that document. Of principal note is the fact that Angela Walking's assessment of the six month competency of the claimant was graded "C". The overall job rating which Annet Nassuna stated was also assessed by Angela Walking (notwithstanding that at the time in April 2015 Annet Nassuna was her line manager) shows a current year level of achievement of "D". The grading key provides as follows:

C "The minimum quality standard has generally been achieved over the period but this is an area for improvement which should be reflected in the learning and development plan."

D "Demonstrably does not have quality required. This means that you are not performing at the standard required."

45. We note that the claimant took issue with many of the matters set out in the PADA but that was an entirely typical reaction from the claimant. Be that as it may, the fact of the matter is that performance issues were identified to Annet Nassuna by Angela Walking on handover in January 2015. We find that those performance issues were genuine.
46. We have carefully considered why it is that the claimant was placed on the Performance Enhancement Plan. In particular we have closely examined whether there was less favourable treatment compared with Peter Kariuki or Lorraine Sergeant. We note that Lorraine Sergeant was of a comparable age to the claimant. We find as a fact that Peter Kariuki and Lorraine Sergeant were not appropriate comparators. Lorraine Sergeant had not been involved in either of the incidents on 20 and 21 January. Peter Kariuki had not been involved in the incident on 21 January that led to the complaint by the district nurse. Peter Kariuki had acknowledged his fault as regards the incident on 20 January 2015. There has been no suggestion from the claimant that either Peter Kariuki or Lorraine Sergeant had anything like the history of performance issues that undoubtedly existed as regards the claimant. Even if a hypothetical comparator were to be raised, we find that that individual would have been treated in the same way and placed on a PEP. We find that the reason that the claimant was placed on the performance enhancement plan was due to genuinely held performance issues as regarding the claimant's capability. We have not detected and have no evidential basis for finding that Annet Nassuna was motivated by an intention to treat the claimant less favourably on the grounds of her race or her age. Further, we find that this was not

‘unwanted conduct’ in terms of harassment and was not related to her age or race.

47. The issue concerning the alleged age discrimination arises out of an allegation that the claimant was questioned about her pay and benefits and the implication was that, as she received more than younger members of staff, so there was a financial motive to get rid of her. The evidence on this was that such questioning would not have taken place as there was no such differential. We accepted that evidence.
48. As ever when dealing with an allegation of race or any other discrimination we have examined the evidence closely, aware that discriminatory acts can often be hidden beneath a veneer of otherwise innocent conduct. The overwhelming impression that we each got in this case was the absence of any such motivation. As the respondent submitted in the list of issues at 7.2 the claimant herself advances the case somewhat diffidently, saying ‘maybe because of my race or because I am the oldest’.
49. The Performance Enhancement Plan that the claimant was placed on consisted of a single sheet of tasks she was expected to accomplish during the course of her shift which needed to be ticked when undertaken and countersigned by a duty senior with the opportunity of making comments as appropriate. We find that this informal and low level performance monitoring was a good starting point to manage the claimant’s performance. It is fair to say that it could be criticised as being open-ended and did not contain a clear list of targets to be achieved. Following the inception of the Performance Enhancement Plan the evidence was that the claimant complied in completing the am and pm shift sheets as appropriate. Indeed, it is recorded in the notes to the February 2015 meeting that the claimant thought the monitoring sheets were a good idea and suggested that all staff should have them. In due course the claimant had a one-to-one meeting on 30 March 2015. In the notes to both the February and the March one-to-one meetings we find that very clear and detailed instructions were given to the claimant as to the performance that was expected from her. We find it was clear to the claimant why she was put on the PEP and reject the suggestion that Annet Nassuna did not give a straight answer or laughed at her.
50. In the March one-to-one notes a performance issue is recorded in relation to service user AD. There was a conflict of evidence as to how AD had been left without personal care for approximately four hours. We were provided with handwritten notes concerning the service users in South Lodge who had stated that the claimant had escorted AD to South Lodge and simply said “give him lunch”. The claimant claimed that she had provided a full handover. The claimant acknowledged that simply saying “give him lunch” was inadequate. We do not believe the claimant when she says she did a full handover. We find that she was as casual as the other care workers reported and that this was a clear incident of poor performance during the Performance Enhancement Plan period.

51. There did not appear to be a one-to-one meeting held in April. We have not been provided with any notes of such a meeting. However, it was suggested by Mrs Nassuna that a meeting would have taken place in order to complete the PADA document.
52. The next incident of note took place on 3 April 2015. On that occasion service user VA had been placed on a commode by the claimant and another care assistant, Linda Hughes. VA was left alone on the commode and the claimant later found her on the floor. The claimant pressed the panic alarm and in due course Peter Kariuki, Catherine Holmes and Annet Nassuna also attended. In her oral evidence the claimant was adamant that all four brakes on the commode's legs had been put on and that the safety belt had been appropriately fitted to VA. The claimant suggested that the fall had occurred due to the fact that VA was listening to music and had moved around in such a way as to topple the commode. The incident reports by Catherine Holmes and Peter Kariuki state that when they attended in the immediate aftermath it was clear that the brakes had not been applied and that VA did not have the seat belt around her. In the contemporaneous investigation involving the claimant she is recorded as stating that she put on the brakes on her side of the commode and assumed that Linda Hughes had put the brakes on the other side. She maintained that the belt had been secured by both staff members. Clearly an incident of this nature should not have taken place and the criticism of the claimant was that she had not double-checked that the brakes had been applied and the belt correctly placed on the service user. We find it inherently implausible that the service user could have caused the commode to fall to the ground had the brakes been applied and the belt correctly put on. We do not accept the claimant's evidence on this point and find that it represents a classic example of the claimant seeking to deny shortcomings or deflect responsibility for poor performance.
53. The next incident of note occurred on 12 May 2015. To an extent this is a curious event. On the day in question the claimant had been instructed to take some service users for an outing to the pub for lunch. Whilst the claimant was away one of the service users from North Lodge, namely BA, was taken to South Lodge to be cared for during the claimant's absence. A care assistant called Katie Holmes was allocated to care for BA in the absence of the claimant. On the claimant's return she discovered that BA had not received personal care and was wet. The claimant proceeded to clean BA.
54. The reason we find this a curious incident is that the claimant later became extremely upset on her own admission. The curiosity is why she should do so given that on this occasion she was not responsible for the lack of care for BA as she had been on an authorised outing at the time.
55. It would appear that towards the end of the shift the claimant was having a conversation with Annet Nassuna in the context of completing her shift Performance Enhancement Performance plan document. Katie Holmes apparently was passing and questions were directed to her by Annet

Nassuna as to why BA had not been cared for. According to the claimant Katie Holmes started shouting at the claimant, possibly because Katie Holmes believed that the claimant had in some way informed on her lack of care to Annet Nassuna. Both Katie Holmes and Annet Nassuna deny that Katie Holmes shouted at the claimant. Their evidence was that the claimant became agitated and upset. Initially Annet Nassuna could ascribe no reason for this but later surmised that the reason the claimant became upset was because of the Performance Enhancement Plan and the fact that it lacked targets or an end date. There is reference to the claimant grabbing one of the Performance Plan sheets and leaving stating that she was going to see the Union. The contemporaneous note made by Annet Nassuna records that the claimant started to rip a page out of the performance plan. We find that this probably took place and so any reference to ripping a PEP was not false.

56. We do not consider that it is crucial that we determine the varying accounts of this incident. However, we find that the claimant probably became upset for a combination of factors. Firstly, the perception that Kate Holmes thought that she was being informed upon. Secondly, frustration with the Performance Enhancement Plan checklists and the fact that she had been filling these forms in for some two months or so with no end in sight. Her frustration with the forms would be explained by her grabbing one and stating she was going to see her Union representative with it. What we do find is that as a result of this episode, Mrs Nassuna decided that a clearer Performance Plan should be devised with targets and a timescale involved.
57. There is a curiosity concerning the Performance Enhancement Plan checklist document. Not one of the completed forms has been produced by either the claimant or the respondent. The claimant asserts that they were kept securely by Annet Nassuna in her control; the respondent asserts that the documents were to be kept by the claimant and filled in by her. There is a suggestion that the performance sheets were destroyed by the claimant although there is no evidence other than another care assistant allegedly seeing the claimant shredding certain unnamed documents on 12 May. It is odd that the March 2015 one-to-one meeting does not record a review of these sheets, which one might perhaps have expected. We do not consider that we are in a position to determine what happened to the PEP sheets. If they were destroyed by the claimant we would have expected misconduct proceedings to be taken against her and this did not happen. No-one appears to have looked for them or referred to them after 12 May.
58. Following the incident on 12 May we find that Annet Nassuna decided to create an Informal Capability Performance Plan identifying targets within a specified timescale. We find that this was due to continuing performance concerns. To that end the claimant was invited to attend a meeting on 26 May with Annet Nassuna and two others. This was at fairly short notice and the claimant refused to attend the meeting without a Trade Union representative.

59. As far as the respondent was concerned the claimant had committed an act of misconduct by refusing to attend the meeting on 26 May which the respondent regarded as a legitimate management request. The claimant was suspended and disciplinary proceedings were taken against her which ultimately resulted in her being given a written warning for 12 months on 13 July 2015. We do not consider that we need to go into the whys and wherefores of this episode as it was misconduct and the case we are dealing with concerns capability. We have disregarded it.

60. Following the resolution of the disciplinary proceedings the claimant returned to work and on 20 July 2015 there was a one-to-one meeting with Annet Nassuna during which the claimant was placed on the informal Capability Performance Plan. The plan itself is eight pages long and identifies four areas in need of performance monitoring, namely communication, following instructions, accurate recording and teamwork. It has been signed by both parties on 20 July 2015. This is a clear document setting out the performance issue, the improvement required, how it would be measured, how it would be monitored, what outcome was expected and the timescale to achieve it. The document on its front page has the following set out clearly:-

“The tasks outlined in this plan will be reviewed in six weeks or more as appropriate. If the objectives outlined are not satisfactorily met by the end of the review period, the matter will progress to formal capability action.”

61. We have been provided with a copy of the capability policy which sets out that a capability hearing may be arranged for any of the following reasons:

“

- Where informal discussions with you have failed to improve unsatisfactory performance.
- Where your performance deteriorates following a written warning.
- Where there is sufficient evidence that the required improvement in performance is unlikely following a written warning.
- Where your recent poor performance has given rise to serious concerns about your ability to do your job. This may be the result of a specific incident or an accumulation of events.
- Where the requirement for a capability hearing is activated under the managing attendance policy.”

62. The policy goes on to give a range of outcomes which could include:

“Training, allocation of suitable alternative duties within the group (where available), demotion with associated reduction in responsibilities and grade, a further opportunity to meet the standards required, or dismissal.”

63. Between 20 July and 4 October 2015 there were seven one-to-one meetings, albeit that the final one on 4 October had been adjourned from 19 September. Although the claimant sought to dispute and/or distance herself from the performance issues raised in each of these one-to-one

meetings, we find that the performance issues that were documented in the typed up notes of the meetings were genuine management concerns. The claimant sought to challenge the typed up notes of the meetings as inaccurate and not reflecting the handwritten notes that she had signed. The handwritten notes are no longer available. Annet Nassuna stated that the handwritten notes would have been photocopied and a copy handed to the claimant after each meeting. The claimant disputes this and has produced no such copies. On balance we accept the evidence of Annet Nassuna on how these notes were produced. It is notable that in many instances when the typed up versions were sent to the claimant she wrote extensively on them and challenged them. In this context it cannot be stated that the claimant was forced to sign any of these notes and we so find. Indeed in her witness statement the claimant refers to refusing to sign notes on occasions.

64. In the one-to-one dated 25 July 2015 general issues regarding a lack of communication and poor teamwork by the claimant are documented and discussed. These continue through all the one-to-one meetings without any real improvement. Apart from general issues, further specific performance issues that arose are as follows.
65. In the capability meeting dated 5 August 2015 the claimant was requested to archive service user BA's old documents. This involved placing them in a box, sealing it and arranging for it to be placed in the loft. There is a recurring theme over the next three or four meetings where the claimant is repeatedly being reminded to do this task and does not accomplish it.
66. At the capability meeting on 18 August, a performance issue was raised concerning an incident on 17 August where a student nurse had observed the claimant pushing a service user on a wheelchair forwards through a closing door with risk to the door striking the service user.
67. On 8 September 2015 a range of performance issues were raised concerning the claimants care of service users and the cleanliness of the kitchen and floors. A performance issue was raised in relation to an incident on 23 August 2015 where the claimant left another resident unsupervised with glasses despite the resident not being permitted to have his glasses without supervision as he might choke on them. When the resident was discovered he was chewing on his glasses. The claimant's response is recorded as being that it was all lies. At the conclusion of that the following is recorded:-

“Anu was advised to report all concerns to duty seniors for these to be dealt with immediately. The next meeting will be our sixth meeting and if the objectives outlined are not satisfactorily met by the end of the review period, the plan will stay in place and continue to be monitored for another two weeks after which a review will take place and if the objectives outlined are still not satisfactorily met by the end of the review period the matter will progress to formal capability action.”

68. A further capability meeting took place on 19 September 2015. It was observed yet again that the archiving of BA's old documents had not yet

taken place. In the initial notes of 19 September 2015 the claimant is recorded as replying: "You carry on. You cannot send me to jail so write what you want. I won't sign anyway." The claimant was also asked to explain why she had not completed BA's review report as previously requested. Her reaction was to say that it wasn't her responsibility despite it being clearly documented in the notes of the meeting on 5 August that she had been made solely responsible for BA's care. Before the conclusion of this meeting the claimant alleged she was being harassed and bullied and left saying she was going to her union.

69. The meeting was reconvened on 4 October 2015. In the interim yet more performance issues had arisen. On the 29 September 2015 the claimant was found on the computer in the office having left 2 residents unattended. On the 3 October 2015 she gave a service user a bed bath when the care plan was that she should have a bath.
70. We have summarised examples of the continuing performance issues that were raised in each of the one-to-one meetings during the course of the Capability Performance Plan operational period. The claimant sought to dispute the accuracy of the performance issues raised or minimise them. We have concluded that the performance issues raised by Annet Nassuna, often based on reports from a number of different individuals, were genuine and were not motivated by anything other than an intention to manage the claimant's poor performance.
71. Given that the claimant is alleging she was unsupported and did not receive appropriate training, we note that it is agreed that she was provided with the following training during this period:-

Moving and Handling (21 July 2015)
Infection Control (26 June 2015)
Food Hygiene (1 May 2015)
Fire Awareness (17 September 2015)
Health and Safety Awareness (25 June 2015)
Basic Epilepsy/Rectal Buccal (3 July 2015)
Mental Capacity Act (17 June 2015)

72. At the conclusion of the 4 October 2015 capability meeting the claimant was advised that Annet Nassuna would now review the six capability meeting records, see if the claimant had met the standards or not and after that Annet Nassuna would advise the claimant on the way forward. This is what Annet Nassuna did. She prepared a review of the Informal Capability Performance Plan and this was sent to HR on 20 October 2015. The review concluded:

"Anu does not take criticism positively and always becomes anxious when reminded by her colleagues to follow instructions."

And

"As much as I tried to engage and focus Anu to her own practices in a positive way she would deflect and interrupt and brings negativity about other staff practices. Anu does not seem to have listened to any of the advice given in these

meetings and she continued to fall back on to her negative practices. Anu would threaten to contact her union whenever she did not have her way in this meeting loosing focus of the general intent to these meetings. I do not feel Anu has benefitted that much from these meetings as her practices have not really changed to required standards with performance improvement still required.”

We find that Annet Nassuna had clearly formed the view by that time that the claimant was incapable of improving her performance. We find that that was an entirely justified view based on ample evidence.

73. Thereafter we find that she prepared her final report recommending that the claimant be put forward for a capability hearing. This was finalised on 17 November but was clearly work in progress well before that as we have an email attaching it dated 2 November 2015 (a Monday) and it is referred to as 'Draft 2'. Annet Nassuna's evidence was that she was preparing this report in October and we find that she probably was; that is to say that she had made the decision to refer the claimant for a capability hearing prior to being aware of the fact that the claimant had submitted a grievance about her. Although the grievance is dated 23 October, we have the email whereby the claimant sent it to the respondent. We note that the file attachment containing the grievance is dated 27 October. It was suggested by the claimant that she had left a hard copy of the grievance in Annet Nassuna's tray on her desk on or about 23 October; we find that to be unlikely and we find that the grievance was first submitted to the respondent on 27 October and that it was only after that date that it came to the attention of Annet Nassuna. It is clear that during the course of the capability meetings the claimant made allegations of bullying and had been referred to the relevant grievance policy by Annet Nassuna. In evidence Annet Nassuna told us that she was not certain that the claimant would make a complaint and she asserted, which we accept, that the claimant made these sort of throw-away comments on a regular basis. Annet Nassuna gave evidence, which we accept, that the decision to refer the claimant for a formal capability hearing and the preparation of the forms for that referral were already in progress by 27 October, the date upon which we find that the grievance from the claimant was first sent to the respondent. As such, we find that the decision to refer the claimant for a formal capability hearing was not reactive either to the prospect of a grievance being lodged or to the actuality of a grievance being lodged.
74. In due course the report was made by Annet Nassuna recommending that the claimant be referred for a capability hearing. This was accepted. By the time the report was finalised, yet more performance issues had arisen and these are included in the report. On 21 October 2015 the claimant had gone home at the end of her shift leaving a student on her own with all the residents. The manager found the student alone and the student made a written report. On 28 October 2015 another student reported in writing her unhappiness at being told to use an inappropriate lifting technique with the claimant when moving a service user. That student also reported the claimant being responsible for delaying care for 2 residents who were

incontinent of urine. The claimant's record keeping was criticised. Again we find that these matters were genuinely raised and recorded at the time.

75. A capability hearing was convened for 7 December 2015 to be chaired by Mrs Sandra Taylor. The claimant was provided in advance of that meeting with the report from Annet Nassuna and all the appendices containing all the relevant documents. The capability hearing took place over six hours. On 7 December it had to be adjourned due to an apparent omission in the documents that the claimant had received. It was resumed on 10 December. There are no notes of the meeting as apparently at the time the respondent's practice was to regard a thorough outcome letter as being the record of the proceedings. The outcome letter is dated 21 December 2015. The result was that there was a decision to dismiss the claimant and her grievance was also rejected. We find that the outcome letter is a thorough and careful document, accurately reflecting a review of the evidence that was placed before Mrs Taylor.
76. Following the outcome letter the claimant appealed and the appeal was heard by Mr Zaman on 2 March 2016. The outcome letter is dated 23 March 2016 and the appeal was rejected. Mr Zaman conducted the appeal as a review to ensure that the correct procedure had been adopted and that the outcome was proportionate.

Conclusions

77. We find that the reason for the dismissal was capability. We find that Mrs Taylor and Mrs Nassuna both honestly and genuinely believe that the claimant's performance was below the standard required to ensure service users' safety and that there was no realistic prospect of her improving her performance. We consider that the respondent had reasonable grounds for this conclusion following a reasonable investigation. In particular we find there was a proper and reasonable investigation/appraisal of the employee's performance. The problems had been clearly identified with targets and a timescale for improvement. We find that the claimant was given adequate support, both in one-to-one meetings and also by the provision of training. We find that the claimant was warned of the consequences of failing to improve in good time and was given a reasonable chance to improve.
78. Whilst it is true that the claimant was the only one placed on a PEP in January 2015 and indeed on a Capability Performance Plan on 20 July 2015, we find that there were proper and reasonable reasons for this course of action. The reasons being the claimant's persistent poor performance. We find that the claimant was informed of the reasons she was put on the PEP in the one-to-one meeting in February 2015.
79. We reject the suggestion that the claimant was not given appropriate training and risk assessments. We find that the claimant was given appropriate advice, guidance, support and training during the assessment period when she was on both the Performance Enhancement Plan and the

Capability Performance Plan. We find that the claimant did consistently refuse to acknowledge shortcomings in her performance. Whilst it is asserted that more than one written assessment should have been taken into account, we were not provided with any other examples of the claimant's written work. It wasn't the quality of the assessment that was in issue but its absence. The one written assessment was not the deciding factor in the decision to dismiss given the mass of other performance issues.

80. We find that the claimant was not singled out for failing to use a commonly implemented moving and handling procedure. It is true that her failure to use a correct handling procedure was one of the performance issues raised in the report. However, we note that during the course of the capability hearing in front of Mrs Taylor the claimant apparently demonstrated the technique used and this was manifestly unsuitable in the judgment of Mrs Taylor. We find that the technique that the claimant used on that occasion was unsuitable and represented a risk to the service user. It was not commonly used.
81. We find that the claimants allegations of bullying and harassment were appropriately dealt with and investigated in the grievance procedure. They were rejected. We find there was no bullying or harassment by Annet Nassuna. We have rejected the alleged unwanted conduct set out in issues 7.1 I a – e. What the claimant characterises as bullying and harassment was managing her poor performance. Of course she did not like it but it was entirely justified.
82. The respondent did take into account the claimant's service, such as it was. The allegation concerning inaccuracies in the witness statements is too vague to be determined. We find the respondent was impartial in assessing the evidence which came from a large number of fellow employees and was usually documented contemporaneously. The issues with service users DS and BA were appropriately taken into account by the respondent as issues of poor performance. We find that the respondent did comply with its policies and procedures and the decision to dismiss was not predetermined.
83. We find that the decision to dismiss was within the range of reasonable responses of a reasonable employer and that it was fair taking all the circumstances into account as the respondent was reasonable as treating it as sufficient to dismiss the claimant.
84. The relevant ACAS notification date is 9/6/16 and hence any act or omission prior to 10/3/16 is potentially out of time.
85. We treated the allegations of harassment and direct discrimination against Annet Nassuna as a continuing act culminating in the dismissal. We have found the allegations of harassment 'unwanted conduct' against Annet Nassuna as not proved. Such conduct as there may have been we find was not related to the claimant's race or age. Further its purpose was to

manage the claimant's poor performance and this is the circumstance of how it should have been perceived.

86. As regards the harassment allegations against Katie Holmes and Carole White, we have found these not proved due to the imprecise nature of the allegations as to when, where and in what circumstances they are being alleged and due to the claimant's propensity unjustifiably to accuse anyone managing her or working alongside her of bullying and harassment. The claimant has asserted that the bullying and harassment ceased when she reverted to being line managed by Ms Walking in October 2015. As regards Katie Holmes and Carole White we find that there were no continuing acts thereafter and the allegations are out of time. We did not consider it just and equitable to extend time due to the generalised nature of the allegations and our other conclusions on the merits.
87. We find that the claimant was not treated less favourably than the alleged or any hypothetical comparators. We find that the claimant has failed to provide primary facts from which we could conclude that any treatment was due to the protected characteristics of race and age.
88. We find that the claimant was not subjected to the capability performance procedure due to lodging a grievance. We find she was not victimised for doing so or possibly doing so.
89. Accordingly, the claimant's claim is dismissed.

Employment Judge Alliot

Date:14 June 2017.....

Sent to the parties on:

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For the Tribunal Office