



EMPLOYMENT TRIBUNALS

Claimant **Ms J Nyarega**

v

Respondent **Lewisham and Greenwich NHS Trust**

Heard at: **London South Employment Tribunal**

On: **10 - 13 October 2017**

Before: **EJ Webster**
Ms V Stansfield

Appearances

For the Claimant: **Mr Sheppard (FRU)**

For the Respondent: **Ms S Ramadan (solicitor)**

JUDGMENT

1. The Claimant's claim for race discrimination fails.
2. The Claimant's claim for unfair dismissal fails.

REASONS

1. By an ET1 dated 17 October 2016 the claimant brought claims for race discrimination and unfair dismissal. The respondent refuted those claims in their entirety.

Evidence and the hearing

2. The Tribunal was unable to provide a business member for the purposes of the hearing. Under s 4(1)(b) ETA it is possible for a tribunal to hear a case with only two members. The Tribunal sought the approval of the parties to conduct the hearing with only 2 panel members, notifying them that Ms Stansfield was from a TUC background. Both parties agreed to proceed on this basis.
3. The Tribunal was provided with 2 lever arch bundles, an agreed chronology, a cast list and an agreed list of issues. The bundles were added to during the hearing with additional pages produced by the respondent. The claimant objected to the inclusion of some of the papers particularly in circumstances where a further 40 pages had been produced the day before the hearing. It is regrettable that such a large employer, faced with a litigant in person, does not comply with its disclosure obligations in a timely fashion. Nonetheless, on balance, the Tribunal assessed that the documents disclosed during the course of the hearing were sufficiently relevant that they needed to be considered by the Tribunal as it was in the interests of the overriding objective. The Tribunal allowed the claimant time to consider the documents with her FRU representative and allowed her to give evidence in chief about the new documents.
4. The Tribunal heard from six witnesses (the claimant, Ms Noble, Ms Hoyte, Ms Dark, Ms Power and Ms Lynch). Each provided a written witness statement and gave evidence to the Tribunal.

The Issues

5. The parties provided an agreed list of issues to the Tribunal which was confirmed at the outset of the hearing.
6. Unfair Dismissal
 - a. Did the Respondent have a potentially fair reason for dismissing the Claimant pursuant to Section 98(2) Employment Rights Act 1996 (“ERA”)? The Respondent contends that the Claimant was dismissed for a potentially fair reason, namely on the grounds of capability due to poor performance.
 - b. Did the Respondent form an honest belief on reasonable grounds that the Claimant was incapable or incompetent in performing her role as a Band 4 Rotational Pharmacy Technician?
 - c. Was the Claimant’s dismissal substantively fair pursuant to Section 98(4) ERA and having regard to the size and administrative resource of the Respondent and equity and substantial merits of the case?
 - d. Did the Respondent follow a fair procedure in dismissing the Claimant?
7. Race Discrimination

- a. The relevant aspect of race for the purposes of Section 9 of the Equality Act 2010 (“EqA”) is the Claimant’s colour; the Claimant is a black person (see 3.2 of the Tribunal’s Notes and Order’s dated 11 January 2017).
- b. Was the Claimant treated less favourably because of her race contrary to Section 9 and 13 EqA in respect of the following allegations:
 - i. Did the Respondent fail to provide the Claimant with training as follows:
 1. Medicine management training on the ward – the Claimant relies on an actual comparator, Chloe Johnson, who she says was sent for an external LPET course in 2016;
 2. Controlled drugs dispensary training – the Claimant relies on two actual comparators, Pharmacy Technicians, Ms Seidi Posio and Mr Richard Akinola;
 3. Mental health dispensing training – the Claimant relies on an actual comparator, Carly Wood, Pharmacy Technician who she says received training in 2016 (see Claimant’s Further and Better Particulars for full details). The Respondent contends that Ms Wood is not an appropriate comparator (Para 49(b), Amended Grounds of Resistance).
 - ii. If so, was that less favourable treatment because the Claimant is black?
 - iii. Did Paula Noble stringently supervise the Claimant’s tea breaks throughout the period from May 2015 until the Claimant’s dismissal and if so, was that less favourable treatment because the Claimant is black; and
 - iv. Did Paula Noble and Sandra Power shout at the Claimant as follows:
 1. Paula Noble on 8 October 2015, as described in the Claimant’s letter dated 21 November 2015;
 2. Sandra Power in May 2016 stating that she must ask for permission to go to the loo in the future;
 3. Sandra Power on 6 October 2015 about some papers and asking why the Claimant had been 15 minutes late that morning;
 4. In late September 2015, Sandra Power telling the Claimant in an aggressive way that she expected to see the Claimant back at work as soon as possible after her hospital appointment (see Claimant’s Further and Better Particulars for full details).
 - v. If so, was that less favourable treatment because the Claimant is black?
 - vi. The Claimant relies on a hypothetical comparator (a non-black person) to show that she was treated less favourably because of her race in respect of allegations (iii) and (iv) above.

8. Jurisdiction

- a. In respect of any act or omission that is alleged to constitute unlawful discrimination that occurred on or before 2 June 2016:
 - i. Do such acts/omissions constitute part of conduct extending over a period for the purposes of Section 123(3)(a) EqA which ended after 2 June 2016?
 - ii. If not, would it be just and equitable to extend time in respect of such acts/omissions pursuant to Section 123(1)(b) EqA?

9. Remedy

- a. The Claimant does not seek reinstatement or re-engagement (Section 9.1, Claimant's ET1 Form). The Claimant is seeking compensation.
- b. If the Tribunal finds that any of the Claimant's claims above are well founded:
- c. What, if any, basic award is the Claimant entitled to if successful in her claims?
- d. If the Claimant is entitled to a basic award, should any reduction be made to reflect contributory fault on the part of the Claimant?
- e. What, if any, level of compensatory award would it be just and equitable for the Tribunal to award? In respect of any compensatory award made should any deductions or uplifts be made to reflect the following:
- f. Whether the Claimant has complied with her duty to mitigate her loss under section 123(4) of the Employment Rights Act 1996;
- g. To the extent that there was any procedural unfairness, whether the outcome of the dismissal process would have been the same in any event, *Polkey v A E Dayton Services Limited* [1987] ICR 142 applied, and if so, by what percentage should the Tribunal reduce the compensatory award;
- h. Whether the Claimant unreasonably failed to follow the ACAS Code of Practice in not appealing the Stage 2 outcome (Para 57, Amended Grounds of Resistance), and if so, by what percentage should the Tribunal reduce the compensatory award;
- i. Whether the Claimant's conduct contributed to her dismissal, and if so, by what percentage should the Tribunal reduce the compensatory award;
- j. The application of the statutory cap (if applicable)
- k. Is an injury to feelings award appropriate in the circumstances? If so, how much should this injury to feelings award be taking into consideration the bands as set out in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102 (EWCA) as clarified in *Da'Bell v NSPCC* UKEAT/0227/09?

Findings of Fact

10. The claimant was employed by the respondent from 17 March 2014 until 29 June 2016 as a Band 4 Rotational Pharmacy Technician. She was employed from a community pharmacy background and it was not in dispute that this meant she would be unfamiliar with some of the work that a hospital pharmacist does.

Training

11. The main area of dispute between the parties was what level of training the claimant received during her employment. The respondent operates staff on a 'rotation' basis between departments within the Pharmacy. Those rotations are; dispensary, medicines management, mental health and controlled drugs. Every new member of staff is given a four week induction. There was considerable dispute as to what the induction was meant to entail.
12. The tribunal was taken repeatedly to the induction checklist completed by/on behalf of the claimant and the respondent's induction policy. The completion of the induction was meant to be a collaborative process in which the claimant completed the sections of the induction that that she had completed and presented them to her managers for signing off.

13. There were several boxes and areas of the induction that remained unticked. Nobody, including the claimant, was able to say whether this meant that she did not have the induction in those areas or whether the boxes were just not ticked. Ms Dark gave evidence that many of the boxes that were not ticked were areas that were not necessary to the claimant's role at that time eg card payments, reception duties and stores. We accept Ms Dark's evidence in that regard as it was not challenged that these were areas which the claimant did not work in.
14. The main area of dispute around the induction was that the claimant considered that this 4 week induction should have entailed 'proper' training in each of the rotation areas. The respondent, viewed it more as an orientation procedure to be built on at the outset of each of the rotation areas where more specialized knowledge and practice would be provided.
15. The Tribunal concludes that in a 4 week period it would be unrealistic to expect a deep level of training in all of the areas covered by the induction. It is clear from the sheer volume of boxes to be ticked that this could not be seen as anything other than an introduction to the pharmacy department as a whole as opposed to an attempt to comprehensively train an employee in all areas they would work in at the pharmacy.
16. When the claimant was recruited from the community background she could reasonably have been expected to have had experience in labelling and dispensing medication other than controlled medication. She stated to the tribunal that she was capable of this work and had done this in her previous role as a community pharmacist. It was accepted by the respondent that the areas of medicine management, mental health and controlled drugs would have had new elements of work for the claimant. They were aware of this on employing her.
17. The claimant's rotations were as follows:

March – June 2014 – Dispensary

7 July – 31 October – medicines management

3 November – 25 May – Mental Health

1 June -27 November – second rotation in medicines management

30 November – 10 January – 2 rotation in dispensary

10 January – 29 June 2017 – various roles as part of capability management process

The claimant stated in her witness statement that she had further rotations after 10 January 2017 however we find that is not correct. Firstly it contradicts the agreed chronology and secondly, the dates set out on page 5 of her witness statement do not appear to fit within the time frame she gave (ie there are 3, 6 month rotations allocated to 2015).

18. The claimant worked without note until her annual personal development review some 16 months after starting work on 21 May 2015. At that review concerns were voiced by both her and her managers, Ms Power and Ms Hoyte that she was struggling with some areas of her work. As a result an informal capability meeting was proposed. This took place on 1 July 2015 and a performance monitoring log (p276) was put together. The claimant asserted that this was not a collaborative document but in the record of the PDR meeting, (p260) it confirms that it was agreed that part of development plan was to

produce an informal performance action plan. Therefore whilst we accept that not all of the aims will have been agreed, the idea of putting one together was agreed.

19. The problems highlighted by the claimant's representative in relation to this document and all the subsequent performance action plans were that much of the support/training to be provided to achieve the various objectives were not active management support. Instead it relied on the claimant reflecting and identifying her own strengths and weaknesses and putting together her own self checking routines. However the claimant's representative omitted that also mentioned in these columns were elements such as a completing logs with manager's support, assessing strengths and weaknesses with managers, support from Band 5 supervisors and others to implement action plans. In addition other columns within the logs required feedback and observations from managers and colleagues.
20. In our view the claimant's interpretation of this document reflects her understanding of training as a whole. The claimant in evidence confirmed that her view of proper training would have required the following:
 - (i) Initial one to one comprehensive training from Sharon Hoyte at the outset of her employment.
 - (ii) Training to be delivered by managers only
 - (iii) Training to be delivered in a modular way.
 - (iv) Training to be an external, formal course.

That is not to say that the claimant expected this at all stages. However she was clear that she had expected comprehensive initial training in all areas and that when weaknesses in her performance were recognized, a course should have been provided. It was clear that in her view training did not include the following:

- (v) Peer to peer training and knowledge exchange
 - (vi) Shadowing on wards
 - (vii) Log completion
 - (viii) Error finding in manufactured drug charts
 - (ix) Understanding and looking up common acronyms
 - (x) Self-reflection
 - (xi) Reading Standard Operating Procedures (SOPs)
21. We find that the above methods do constitute training and that the claimant did receive training in the forms set out (v – vi). We find that the claimant's assertions throughout the process and in front of the tribunal that this was not training reflect a very narrow and unrealistic definition of training in the workplace.
 22. In support of the claimant's race discrimination claims she states specifically that she did not receive the training that others received. She states that she did not get training in Controlled drugs in the same way that Seidi Posio and Richard Akinola were provided with training because she was black.
 23. We find that she was provided with a week's training in controlled drugs (those controlled by statute) in May 2015 during her dispensary rotation. This training was working in the Controlled Drugs section of the dispensary under supervision. She

requested a second week of this training and this was agreed to by Ms Noble but had to be cut short due to the volume of errors she was making. As a result she could not be signed off in Controlled Drugs work and did not do it again. The respondent in evidence said that she would have been allowed to go back to Controlled Drugs work once she had mastered the normal dispensing and labelling part of her role which is what was focused on by the respondent during the capability process. We find this explanation plausible given the highly pressurized environment of the Controlled Drugs dispensary and potential harm to patients.

24. In addition we accept Ms Noble's evidence that neither Richard Akinola (who is also black) nor Seido Posio went on Controlled Drugs training and that there is no specific training course relevant to this. Nothing was put forward to the Tribunal to challenge this evidence and the claimant was unable to identify what training either these two people had received that she had not nor what training she wanted that she did not receive.
25. We find that the claimant was not provided with any mental health refresher training because she was not formally rotated back to that area after she had made the request because she was in the capability procedure. We accept the various respondent witnesses' evidence stating that the claimant was not put back on formal rotations whilst she was on a formal capability management procedure. The claimant's evidence about this period of time was contradictory and did not accord with the agreed chronology. We find, on the balance of probabilities, that the respondent's witnesses are correct in saying that she was not formally back doing a mental health rotation and that therefore there was no formal refresher training provided. However all the performance improvement plans which the claimant was meant to be working to during this period, included peer to peer observations and various different elements of training within them. As stated above however the claimant did not recognize these steps as training.
26. Further we find that the claimant was not sent on the LPET (London Pharmacy Education and Training) course in 2016 because at the time she was not working in medicines management due to being on a capability management procedure. Richard Akinola and Chloe Johnson were not in capability proceedings and were therefore sent. At the hearing the claimant was not able to challenge that this was the reason they received the LPET training. Nor did she did not put forward any reasons as to why this decision had been made because she is black.

Performance management process

27. The claimant asserts that she never received the informal stage plan at page 276 of the bundle. On balance, we do not believe that to be correct. Although there was no covering letter or email in the bundle, we accept Ms Hoyte's evidence that this was sent to the claimant after the informal hearing. Even if this is incorrect, the claimant confirmed in evidence that she had discussed the objectives with her managers and was aware of what she was meant to be trying to achieve.
28. We accept the respondent's evidence that she received various elements of support at this point. We accept this because in fact the claimant did not dispute that she got the support the respondents have said she got. However she states that this did not constitute training which we disagree with.

29. On 7 December 2015 the claimant attended a meeting with Ms Power which escalated the situation to being a formal capability process. The basis for this was that although the claimant had achieved 100% accuracy in labelling and dispensing for a short period, she did not maintain that level of performance. This was not in dispute. What was in dispute was whether achieving 100% accuracy was a reasonable target for someone on capability measures as this remained the target throughout the claimant's capability process.
30. The claimant has asserted at various stages that several colleagues made errors and were not put on capability as a result. Therefore it was unfair and unrealistic to require her to achieve 100%. However, the tribunal accepts Ms Dark's evidence on this matter. Ms Dark stated that it was right to expect and aim for 100% accuracy for all her staff given the potential for patient harm. However we also accept Ms Power's evidence that everyone makes mistakes and a certain level of mistakes were tolerated because everyone is human. Ms Dark explained that someone who consistently made mistakes would be placed on capability and this was the situation with the claimant. The level and severity of the claimant's mistakes are evidenced in the bundle at various points but summarized in the capability report at p319 of the bundle. We accept that had other members of staff made such frequent mistakes they would have been put on capability measures as well.
31. At the outset of the formal process, Ms Hoyte agreed to shadow the claimant on her ward rounds to assist her with her medical history taking. This involved finding out what medications the patient was taking currently and historically. We accept Ms Hoyte's evidence which was not disputed, that she gave the claimant a high level of one to one support which involved checking her logs of medication histories, observing her interactions with patients and asking her to identify deliberate errors in drug charts and providing her with feedback as this progressed.
32. This only continued for 3 days as during her observations Ms Hoyte became concerned about the level of irrelevant information being taken and the fact that the claimant was not carrying out appropriate investigations into additional medication. On this basis, due to the level of potential harm to patients, Ms Hoyte decided that the claimant was not safe to take those histories on her own. Ms Power informed the claimant of this and the claimant therefore continued in dispensary.
33. The claimant's representative asserted that this did not constitute training and showed that the respondent was setting the claimant up to fail by removing responsibilities as opposed to training her. He also stated that this it showed their lack of commitment to training. However, the Tribunal considers that due to the inherent risk in allowing the claimant to continue this work without constant, intensive management supervision, it was reasonable to remove some responsibilities from the claimant in this way given that the claimant had remaining responsibilities within her job description and was told that the decision to remove these elements was not permanent and that the purpose for the removal was to enable her to focus on achieving other goals within her performance management plan. Any lack of performance in this area was therefore not going to be counted against her as part of the performance management process. Therefore rather than counting against the possibility of her passing her capability assessments, it increased her ability to do so as there were fewer areas for her to master. In particular they allowed her to continue to concentrate on the area which she should have been able

to perform from the outset of her employment, namely dispensing and labelling of non-controlled drugs.

34. In terms of process, the Tribunal concludes that Stage 1 was reasonable in terms of process and content. The claimant was represented by a TU representative and was given the opportunity to contribute to her training objectives. She agreed to the shadowing by Ms Hoyte as detailed above and she requested refresher training when she began her next rotation in mental health. This was not provided because the claimant never did another formal rotation in mental health and we find that this was not unreasonable in the circumstances as discussed above.
35. Following the agreed period of 5 weeks, the claimant's performance did not improve. A stage 2 meeting was scheduled with Ms Power on 24 February 2016. It was deemed necessary to move to Stage 2 because the claimant had not succeeded with improving her medical history training and further complaints had been received about her performance from various colleagues including emails from Richard Akinola (pg 291), Paula Noble (pg 291A), and Miah Shah (pg 292-293). All raised significant concerns about her attitude and willingness to engage with colleagues when mistakes were made. At the Stage 2 meeting it was formally confirmed that medical history taking was no longer part of her objectives. All that remained on her objectives was labelling and dispensing and to conduct communications in a professional manner.
36. Following the agreed period of 4 weeks the matter was escalated to a Stage 3 hearing. The poor performance was evidenced in the bundle, in part by the drug error slips at pgs 264-266. The claimant asserted before the tribunal that she did not make some of the errors that have been attributed to her. The type of error she disputed were those evidenced by the drug error slips. The respondent asserted that she had never denied the mistakes before and only sought to challenge them now before the tribunal.
37. The claimant refused before the tribunal to comment on these slips saying that she could not identify from them what the error was, who it related to and when it had occurred because she did not have the prescription from which they came from to compare them to. She also maintained that being provided with these error slips was not training for the same reason – she could not identify her mistake just from these bits of paper. The respondent conceded that in isolation they do not provide this information but it was stated by several of their witnesses that these errors would have been fed back to the claimant almost immediately in real time for her to rectify. The respondent operates a two person checking process so that pharmacists check the accuracy of the technician's work so the claimant would have been told about these errors as they occurred. We are therefore not persuaded that she could not have commented on these mistakes when they were raised as part of the capability process.
38. However it is clear that the claimant had previously refuted making these mistakes to the respondent at the Stage 2 capability hearing. She told them at the Stage 3 meeting that in her view anyone could have completed the error slips and that her colleagues could have fabricated them. Ms Dark confirms this in her Stage 3 outcome letter (p474 bundle). We therefore find that this clearly shows the claimant refutes that she made the mistakes alleged before today.

Dismissal process/investigation

39. Ms Dark conducted the stage 3 hearing and made the decision to dismiss. The claimant's representative asserted that she did not conduct a reasonable investigation on the evidence before her, in particular she did not properly consider:
- (i) Investigating further allegations regarding the falsification of the error slips
 - (ii) Investigating whether the claimant had been properly trained and inducted
 - (iii) Investigating the impact of the grievance against the claimant's managers on her performance
 - (iv) Investigating the impact of the claimant's ill health through stress on her performance.
40. Taking these in turn. We do not consider it would be reasonable to expect the respondent to investigate these allegations fully at this time. We accept Ms Dark's evidence that in effect the claimant was making an allegation of fraud and that this would be entailed a huge investigation and considerable delay to the process. The claimant had provided no evidence of these slips being falsified nor any reason when her colleagues would do this. She advanced no such arguments in front of the tribunal either. We think it is implausible that there was a campaign amongst the staff to implicate the claimant in mistakes that were not hers. The claimant put forward no evidence of such a conspiracy other than the fact that she was performance managed at all. We therefore do not think that the respondent was obliged, as part of a reasonable investigation, to investigate these allegations further given the lack of evidence available.
41. Ms Dark was provided with all information about what training and support the claimant had received as part of the capability report compiled by Sandra Power (p319). Whilst the claimant disputes that this amounted to training we have already made findings above which confirm that in the Tribunal's view the claimant did receive a large amount of both support and training but failed to recognise it as such. In addition we accept Ms Dark's evidence that she considered the boxes ticked on the induction report. Whilst she agreed there were gaps she clearly considered what caused those gaps and found that they were either regarding elements not essential to the claimant's role or elements not being measured by the capability process or areas which had been superseded by the additional training and support that was evidenced as having occurred since the induction. We therefore do not think that it was unreasonable for her not to investigate further regarding the claimant's training.
42. The claimant submitted a formal grievance against Ms Noble on 21 November 2015. Ms Noble is the dispensary manager for the respondent. The allegations were of harassment and bullying. They were investigated over a 4 month period by Steve Williams and not upheld. The claimant did not appeal the grievance outcome. She did not tell the tribunal in her witness statement or oral evidence as to why she did not appeal the grievance decision. Whilst the tribunal accepts that grievances can and usually do damage relationships between employees and managers, we do not consider that it was unreasonable for Ms Dark to disregard the possible impact of the grievance process on the claimant's ability to do her job particularly in circumstances when the claimant was deemed fit to work by Occupational health and had not appealed the grievance outcome.
43. The claimant was off sick with stress for several weeks during 13 October - 8 November 2015. This was during the six month informal capability monitoring period.

No formal process had started at this point and any mistakes or issues which had arisen during this period did not form the basis for the decision to dismiss the claimant. The claimant attended an occupational health meeting on 8 November and was deemed fit to work. It was therefore reasonable for Ms Dark not to consider whether the claimant's health had an impact on her ability to do her job, particularly in light of the frequency and gravity of the errors made and the fact that the errors had been occurring with similar frequency before there were any issues with the claimant's health and in fact throughout the claimant's employment.

44. The claimant also stated that the procedure was unfair because the Stage 3 capability hearing was held on the same day as a disciplinary hearing regarding her conduct concerning the signing off of a prescription. It was alleged that the claimant had signed a drug order form to say that she had spoken to a pharmacist about a prescription when the pharmacist stated that she had not. The respondent alleged that this amounted to gross misconduct. After the hearing which was held on the same day and with the same decision making panel as the Stage 3 capability hearing, the claimant was given a final written warning. This matter is relevant to these proceedings only in so far as the claimant alleges that the holding of both these issues on the same day muddied the waters and clouded Ms Dark's decision making process and contributed to her decision to dismiss the claimant thus making it unfair. The respondent maintained that it did not form part of their decision to dismiss the claimant and that they dealt with the matters separately.
45. In answer to a question from the tribunal Ms Dark stated that she did not believe the matters were linked when she considered them and that she had made both decisions separately. On balance, whilst we think it highly likely that she did believe the matters were linked, we accept that Ms Dark behaved professionally in the circumstances and made separate decisions on the evidence before her regarding each set of facts. This was evidenced by the outcome letters describing why she concluded as she did. This is particularly so regarding the outcome of the capability process which clearly sets out her findings regarding the claimant's ability to do the job and why she has come to the conclusion to dismiss. At no point does she refer to the disciplinary sanction in that letter.
46. The claimant appealed against the decision. The appeal was heard by Ms Lynch. Ms Lynch upheld the decision to dismiss the claimant for capability but overturned the decision to issue a final written warning regarding the misconduct on the basis that it had been made on balance of probabilities and she did not regard that as sufficient grounds to issue a final written warning. No sanction was imposed in its stead. There were no allegations that the procedure was unfair. The claimant challenged the reasonableness of Ms Lynch's conclusion given that she found that the decision making around the misconduct was not sound. We find that Ms Lynch did examine the matters properly and the claimant did not challenge her evidence in this regard. The fact that she overturned the decision to issue a final written warning shows that she did analyse and was willing to criticize Ms Dark's decision making process and that this was a genuine appeal process.

Incidents of alleged race discrimination

47. The claimant alleges that Ms Noble stringently supervised her tea breaks. Ms Noble denies that she did this to the claimant alone but confirmed that she is strict about

people's breaks because she runs a busy dispensary. The claimant did not put forward any evidence that she had been singled out by Ms Noble and we accept Ms Noble's version of events that she was strict with everyone because of the demands on the service. The claimant put forward no evidence to suggest that others were treated differently from her in this regard.

48. At point 7.2.4.1 of the list of issues (above) there is an issue of discrimination raised regarding an incident on 8 October. The sentence appears incomplete and does not specify the event. The Tribunal read the grievance letter and found reference to an incident on 8 October at page 272A of the bundle. We cross referenced it with the claimant's witness statement and the cross examination of Ms Noble and cannot find that the claimant has advanced this issue at all before the tribunal. We therefore make no finding in this regard.
49. We do not find it plausible that either Ms Power or Ms Noble shouted that the claimant could not go to the toilet without permission. They both remembered a flooding incident in which people were told not to use a certain toilet in the basement which suggests that general instructions were provided to all staff. The claimant's witness statement states that Ms Noble said this to her in May 2016, but the agreed list of issues and the further and better particulars state that it was Ms Power. At the hearing the claimant stated that it was Ms Noble. Whilst this may have been a typing error it does not enhance the claimant's credibility particularly around this allegation but we do not find her account in this regard plausible in any event.
50. The claimant alleges that Ms Power shouted at her on 6 October 2015 because she was 15 minutes late. Ms Power confirms that she spoke to the claimant about her time keeping which was historically poor and on this occasion the claimant had been 50 minutes late. The department operates a policy whereby if people are late they can make up the time either at lunch or staying late or using annual leave. The claimant was not able to provide any evidence that she was treated differently on this occasion from any member of staff who was late. We do not find it plausible that Ms Power shouted her on this occasion. The claimant submitted a grievance about Ms Noble shortly after this and made no mention of Ms Power treating her badly at this time.
51. The final specific incident relied upon by the claimant was that she was shouted by Ms Power that she had to back as soon as possible after a hospital appointment the following day. Ms Power addressed this issue at paragraph 42 of her witness statement stating,

"The procedure at the Trust is to allow employees to take up to two hours within the working day to attend medical appointments, with any additional time being taken as annual leave or worked back. In light of this, when discussing medical appointments with members of staff it is my standard practice to ask whether they intend on coming back to work after the appointment."

We find that this account is plausible. The Tribunal concludes that by this time the claimant's trust and relationship with her managers had broken down and that she was interpreting all of their actions as hostile because of the performance management process that was running at the time. We therefore think it is likely that the issue of her time keeping was raised with the claimant but not in the aggressive shouting manner which she attributes to Ms Power.

The Law

Discrimination

52. Direct discrimination occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (*section 13(1), Equality Act 2010*).

53. Race is a protected characteristic under s9 Equality Act 2010.

S9(1) Race includes—

(a) colour;

(b) nationality;

(c) ethnic or national origins.

54. S 23 Equality Act 2010 states that the claimant must show that they have been treated less favourably than either a real or a hypothetical comparator whose circumstances are not materially different to theirs. The circumstances to be considered are those which the employer has taken into account when making their decision – apart from race. (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 (HL)*).

55. S 136(2) and s 136(3) Equality Act 2010 sets out the burden of proof in discrimination claims.

S136(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

S136 (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

56. The explanatory note for the Equality Act states:

This section provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act. The exception to this rule is if the proceedings relate to a criminal offence under this Act"

57. However this interpretation of the requirement for the claimant to shift the burden of proof has been challenged by the EAT in the case of *Efobi v Royal Mail Group Ltd UKEAT/0203/16*. Instead there is a more neutral burden of proof which states that a tribunal must consider all the facts, whether provided by the claimant or otherwise and then determine whether they are facts from which they could conclude that discrimination has occurred. If there are such facts and the respondent offers no reasonable explanation for them, then a tribunal must conclude that discrimination has occurred.

Unfair dismissal

58. S98(1) Employment Rights Act 1996, an Employer must show that they have dismissed an employee for a potentially fair reason.
59. Section 98(2)(a) Employment Rights Act 1996 (ERA), A dismissal is potentially fair if it "relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do".
60. Capability should be assessed by reference to an employee's "skill, aptitude, health or any other physical or mental quality" (section 98(3)(a), ERA 1996).
61. Where the employer has fulfilled the requirements of s98(1), whether the dismissal is fair or unfair must consider the following factors.
 - (a) Depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.
 - (b) Shall be determined in accordance with equity and the substantial merits of the case.
62. As set out by the Court of Appeal in Alidair Ltd v Taylor [1978] IRLR 82 "Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent".
63. What amounts to reasonable grounds are echoed in the statutory ACAS code. A capability process should be followed during which an employee should be given at least two opportunities to improve, be notified of the possibility that a failure to improve could result in dismissal, and a realistic time scale set for improvement. During the procedure the employee should be given appropriate support or training Steelprint Ltd v Haynes EAT/467/95 and progress should be reviewed, monitored and discussed.

Jurisdiction

64. S123(1) Equality Act 2010 states that a discrimination claim must normally be submitted to an employment tribunal before "the end of the period of three months starting with the date of the act to which the complaint relates".
65. S 123(3) EqA 2010 states that acts occurring more than three months before the claim is brought may still form the basis of the claim if they are part of "conduct extending over a period", and the claim is brought within three months of the end of that period.
66. S123(1)(b) EqA 2010 states that time can be extended by such a period as the tribunal thinks just and equitable.
67. When considering whether there is a continuing act of discrimination as opposed to a one off act or incident or a series of one off acts or incidents, the Tribunal must consider whether the employer is responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686, and Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548).

Conclusions

Race discrimination

Jurisdiction

68. We have found that Ms Power and Ms Noble did not shout at the claimant on the occasions alleged namely:

1. Paula Noble on 8 October 2015, as described in the Claimant's letter dated 21 November 2015;
2. Sandra Power in May 2016 stating that she must ask for permission to go to the loo in the future;
3. Sandra Power on 6 October 2015 about some papers and asking why the Claimant had been 15 minutes late that morning;
4. In late September 2015, Sandra Power telling the Claimant in an aggressive way that she expected to see the Claimant back at work as soon as possible after her hospital appointment.

It has therefore not been necessary to consider whether those incidents are in time.

69. With regard to the various allegations of a failure to train, we believe that if there was a failure to train these matters would have formed part of an ongoing act as the failure would have been ongoing state of affairs until the date of dismissal particularly in the context of a capability process. We therefore consider that the tribunal has jurisdiction to consider whether these incidents constitute direct discrimination.

70. With regard to the allegation that Ms Noble stringently supervised the Claimant's tea breaks, we find that if it occurred this would constitute an ongoing situation and the tribunal has jurisdiction to consider whether the incident constituted direct discrimination.

71. The claimant relies on three specific incidents of not being provided with appropriate training as acts of discrimination.

- a. Medicine management training on the ward – the Claimant relies on an actual comparator, Chloe Johnson, who she says was sent for an external LPET course in 2016
- b. Controlled drugs dispensary training – the Claimant relies on two actual comparators, Pharmacy Technicians, Ms Seidi Posio and Mr Richard Akinola
- c. Mental health dispensing training – the Claimant relies on an actual comparator, Carly Wood, Pharmacy Technician who she says received training in 2016

72. Although it is for the claimant to provide a comparator, real or hypothetical, a tribunal can consider whether the claimant has used the correct comparator in all the circumstances. We do not think the claimant has properly identified her comparators as those she identifies were all in materially different circumstances.

73. For the first incident the claimant relies upon Chloe Johnson who was materially different because she was Band 5 (the claimant was Band 4) and was not subject to a capability process at the time that she was sent on the LPET course.
74. Secondly the claimant relies upon Ms Seidi Posio and Mr Richard Akinola. We are not aware of which race Ms Posio is but it was not in dispute that Mr Akinola was black. He is therefore not an appropriate comparator as he cannot be differentiated on grounds of colour. Neither Ms Posio nor Mr Akinola were subject to capability proceedings and they were therefore in materially different circumstances at the time they were apparently provided this training.
75. The final comparator was Ms Carly Wood and we accept the reasons set out in the respondent's ET3 as to why she is not a suitable comparator given her extensive experience for another employer in mental health giving her materially different levels of experience and expertise compared to the claimant.
76. The tribunal considers that the appropriate comparator on all three incidents should be a hypothetical comparator who was a Band 4 technician, also subject to capability proceedings who was not black. If this comparator is used for all three of the above incidents we do not consider that the claimant has produced any evidence which would suggest that the hypothetical comparator would have been treated any differently from her.
77. There are factual problems with the claimant's assertion that she was treated less favourably because she was black. Mr Akinola, a black employee, also at Band 4 was provided with the LPET training as well as the controlled drugs training the claimant alleged he received. Therefore a fellow black employee was treated in the way that she states she would have been but for her colour.
78. The claimant provided no evidence whatsoever that these decisions were made because she is black. When directly asked why she had reached this conclusion she said that it was because she could not think of any other reason.
79. The tribunal could therefore determine no facts which could allow us to conclude that the claimant had been discriminated against because she was black.
80. If we are wrong in that conclusion and the facts we have found provide evidence that the claimant was discriminated against we find that the respondent has provided non-discriminatory explanations for the treatment complained of. The non-discriminatory reasons the respondent gave for not providing these three types of training were:
- (i) The claimant was not doing medicines management at the relevant time so was not provided with the training.
 - (ii) There was no such thing as controlled drugs training in the manner that the claimant appears to assert. The two comparators relied upon were allowed to continue in this work because they did not make the same number of errors and were not subsequently subject to capability procedures.
 - (iii) The claimant was not on a mental health rotation again so did not receive the refresher training. Had she returned to rotations she would have been offered this training at the relevant time.

81. We accept that these reasons were genuine as there was no evidence provided by the claimant to suggest that they are not correct.
82. We therefore find that the claimant was not discriminated against because of her colour regarding the training provided and her claim for race discrimination regarding a failure to offer these three specific types of training fails.
83. With regard to whether Ms Noble stringently supervised the claimant's tea breaks, the claimant relied upon a hypothetical comparator. In this instance the tribunal considers that the correct comparator would be a Band 4 colleague working in the pharmacy who is not black. The claimant provided no evidence that she was treated differently from any of her colleagues. We found Ms Noble's evidence plausible that tea breaks were often monitored because the pharmacy was very busy and there were no set entitlements to tea breaks so she had to actively manage the team to make sure the patient needs were met. We therefore do not find that the claimant was treated less favourably than her colleagues and we have found no facts from which we could conclude that discrimination may have occurred.
84. We have found as a matter of fact that the claimant was not shouted at as alleged by Ms Power or Ms Noble and was therefore not discriminated against because of her colour in relation to these incidents and her claim for race discrimination fails.

Unfair dismissal

85. It is accepted by the claimant that the reason for dismissal was capability which is a potentially fair reason for dismissal.
86. We accept Ms Dark's evidence that she honestly believed that the claimant was not capable of doing her job. She based that belief on the level of errors which were clearly evidenced to her, the procedure followed for the capability process and the training that the claimant was provided with during that process. We find that Ms Dark's belief was based on reasonable grounds namely that:
 - (i) there were a catalogue of frequent and serious errors made by the claimant for which she had evidence
 - (ii) she considered all relevant information including what support the claimant had been provided with to that date
 - (iii) she met with the claimant who was given the opportunity to explain her side of the situation
 - (iv) the claimant had been given several opportunities to improve, clear and attainable targets, and ample support and training for someone employed at that level.
87. The tribunal finds that the dismissal was procedurally fair. The capability process had followed the respondent's capability policy. There was a relatively lengthy informal stage during which the claimant was supported, followed by a three stage formal process. The claimant was set clear targets and time frames at each stage and the tribunal found that she had been offered support and training throughout.
88. We agree that it was less than optimal that the misconduct hearing and the Stage 3 capability hearing were held on the same day. However both the claimant and her trade union representative accepted that the hearings should proceed on that day and we accept the respondent's explanation that this occurred due to availability of senior staff and the trade union representative.

89. We accept that it is possible in some situations where allegations of gross misconduct are heard on the same day as a capability hearing it could muddy the waters because it is always possible that issues can overlap. Nonetheless we consider that the evidence regarding the claimant's capability was so overwhelming that the decision regarding the misconduct would not have made a difference in any event.
90. In addition the appeal hearing did reconsider the issue and reviewed the sanction given regarding the conduct matter but upheld the capability dismissal. We believe that this exercise was sufficiently robust to have corrected any muddying of the waters that may have occurred in the original decision making by Ms Dark.
91. We therefore conclude that the claimant's dismissal for poor performance was fair in all the circumstances. The claimant's claim for unfair dismissal fails.

Employment Judge Webster

Re-sent to the parties on: 24 November 2017