



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Denise Regan  
**Respondent:** Kent Community Health NHS Foundation Trust

**Heard at:** Ashford                      **On:** 19-20 October 2017

**Before:** EMPLOYMENT JUDGE CORRIGAN

## **Representation**

**Claimant:** Miss Jacqueline-Ann Regan, daughter  
**Respondent:** Mr P Halliday, Counsel

## RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.

## REASONS

1. By her complaint dated 21 December 2016 the Claimant brings a complaint of unfair dismissal.

### Issues

2. The issues were set out in the Case Management Order dated 24 February 2017 and, after amendment in discussion with the parties, were agreed to be:
  - 2.1 What was the reason for dismissal?
  - 2.2 If the reason was capability, what steps did the Respondent take to support the Claimant and provide an opportunity for the Claimant to improve her performance?

- 2.3 Did the Respondent take into account the Claimant's medical condition before making any decision?
  - 2.4 Was a fair procedure followed?
  - 2.5 Did the decision to dismiss fall within the band of responses open to a reasonable employer?
  - 2.6 If the dismissal was procedurally unfair, would a fair dismissal have made a difference to the outcome (ie is there a chance of a fair dismissal having occurred at some stage in any event)?
  - 2.7 Was there any blameworthy conduct by the Claimant that caused or contributed to her dismissal?
  - 2.8 If the claim is successful, what is the appropriate remedy?
  - 2.9 Was there an unreasonable breach of the ACAS Code of Practice by either party? Should any award be adjusted to reflect this?
3. It was agreed with the parties that liability would be decided first and issue 2.8 would be dealt with at a separate remedy hearing, if appropriate.

### **Hearing**

4. On behalf of the Respondent I heard evidence from Ms Emma Darvill (Organisational Development Business Partner for Public Health Services) and Ms Nikki Clark (Clinical Services Manager).
5. I heard evidence from the Claimant on her own behalf.
6. There was an agreed bundle.
7. Based on the evidence heard and the documents before me I found the following facts.

### **The Facts**

8. The Claimant worked for the Respondent as an Administrator in the Paediatric Audiology Service from 14 October 2012. Her Line Manager at the relevant time was Jane Kirby (Business Support Manager).
9. The Claimant's job description included providing an efficient administrative support to the West Kent Children's Hearing Services; having good computer skills to enter and extract information, and produce reports and letters; providing a confidential, tactful and sensitive service to parents and colleagues; and assisting in the co-ordination of the clinicians' diaries and clinics (page 63).

10. The Respondent's capability policy provides for an informal stage with a performance improvement plan and a two part formal stage, with a further period of performance review, followed by a formal meeting. The options open to the decision maker at stage 2 of the formal stage are listed as "no action, an extension of review, redeployment, downgrading or dismissal".
11. The Claimant's appraisal for 2014-2015 shows an overall rating of "good". Her manager's comments were "good work, well done". She achieved a number of "outstandings" and some under performance. The appraisal does not record any problems with accuracy and information governance.
12. The Claimant was placed on an informal performance improvement plan (PIP) on 29 June 2015. It lasted six weeks. It had three objectives in relation to booking appointments and recording data about ear moulds. There were three review meetings on 13 July, 27 July and 10 August 2015. The outcome was that the Claimant successfully met the objectives.
13. However in November 2015 Ms Kirby was informed of a number of other errors by the Claimant including sending a confidential report to the wrong patient (page 130). This was an information governance breach. Ms Darvill provided HR support to Ms Kirby. She advised Ms Kirby that information governance breaches should normally be addressed through the disciplinary process as misconduct but Ms Kirby wanted to manage the Claimant supportively through the capability process.
14. On 1 December 2015 the Claimant was invited to a formal capability meeting (pages 91-92, 93-94). That letter recorded the areas of concern as attention to detail and inaccuracy of information, such as:
  - 14.1 failure to book an interpreter;
  - 14.2 incorrectly entering a child's gender;
  - 14.3 misfiling a patient's notes,
  - 14.4 sending a digital review letter rather than a normal review letter,
  - 14.5 sending a patient discharge letter to the wrong address,
  - 14.6 inaccuracy of ear mould stats, and
  - 14.7 sending an email unsigned.
15. In January 2016 the Claimant was informed she might have cataracts and informed Ms Kirby of this (pages 160 and 222).
16. The formal capability meeting eventually took place on 27 January 2016. A further PIP was agreed with weekly monitoring. The final review was due to be on 4 April 2016. The Claimant was warned that should there not be satisfactory

improvement she could be invited to a capability hearing which could result in formal action up to and including dismissal.

17. A number of supportive measures were put in place. Ms Kirby went through the Auditbase new user workbook; her Deputy Manager, Lorraine Flett, and Ms Kirby observed the Claimant book appointments to try to identify problems. A list of appointments symbols was printed out and placed at the Claimant's work station. Lorraine Flett also sat with the Claimant when doing ear mould statistics. She was also given advice to prevent two patient letters going in one envelope.
18. The Claimant's diagnosis of cataracts was confirmed on 23 February 2016 and she informed Ms Kirby on 24 February 2016, as recorded in her PIP. She said that she believed this was why she had been making errors.
19. Ms Kirby referred the Claimant to Occupational Health on 29 February 2016.
20. In the Claimant's appraisal for 2015-2016, dated 14 March 2016, the Claimant achieved "outstanding" in a number of areas but overall her performance was recorded as requiring improvement.
21. The Claimant had a brief telephone consultation with Occupational Health on 22 March 2016. The Occupational Health report (page 110) stated the Claimant had attended an Optician who diagnosed bilateral cataracts (one eye worse than the other) and that the Claimant had been referred to Ophthalmology and was awaiting an appointment. It confirmed the Claimant "was temporarily visually impaired needing management's discretion and support with adjustments as operationally feasible. Once surgery has been prescribed, planned for and conducted her recovery will be quick -3-7 days". The recommendations were that the Claimant would need support from management with closeness to her VDU and hard copy of documents to read characters and interpret without mistakes. The Claimant did not consider this much assistance as she had already put these adjustments in place.
22. On 4 April the Respondent held the capability review meeting. The outcome is recorded at pages 120-121. The Claimant was achieving the accuracy of work required. However her overall output on a day to day basis was significantly lower than her colleagues. The Occupational Health report was discussed and the Claimant is recorded as having said the adjustments in place were sufficient and should she require additional support she would approach Ms Kirby. The Claimant says in fact she was asked if there was anything she needed and she had responded by saying that if she knew, she would ask. Either way the Claimant was not herself identifying further adjustments. She also accepts that, when asked, she said she did not want a further referral to Occupational Health, the reason being she had found the first one so disappointing (witness statement, paragraph 64). The Claimant advised she hoped to have an appointment with a consultant in the next 3-4 weeks. She did not yet have a date for surgery. A further PIP was set to include accuracy and level of output, with further regular weekly monitoring. The final review was to be on 3 May 2016. Again the Claimant was warned that should there not be satisfactory improvement following

the review period she might be required to attend a capability hearing which could result in action up to dismissal.

23. I find that on the balance of probability, with the benefit of the report from Moorfields (at paragraph 32 below) which was not before Ms Kirby at the time, the Claimant's visual impairment meant that it was very difficult for her to achieve the accuracy and level of output required. The Claimant said in evidence, and I accept, that by this time she was very stressed. She would contemplate driving into a tree on the way to work. She would return home on occasion and burst into tears. She feared both the loss of her vision and the loss of her job. She accepts though that she did not appreciate that she was experiencing stress at the time and did not mention it to Ms Kirby.
24. The PIP record for 20 and 26 April 2016 notes a number of errors. These included booking an over 4 child inappropriately in an under 4 clinic, and sending patients letters with the wrong venue for their appointments. There is also a typed up record of the 20 April review meeting at page 123. This records the Claimant confirmed some jobs took her longer than her colleagues due to rechecking work. She believed her eyesight had deteriorated further due to the number of recent mistakes. She was chasing her referral for surgery.
25. The final review meeting was on 3 May 2016 and resulted in a decision to move to stage 2 and a formal meeting. The outcome letter is on pages 124-125. This lists a slightly different list of errors as follows:
  - 25.1 an under 4 had been booked into an over 4s clinic on two occasions;
  - 25.2 the same appointments were graded doubles (requiring two clinicians) but marked as singles;
  - 25.3 an appointment for a digital hearing aid had been booked with the wrong clinician;
  - 25.4 on two occasions patients had been booked for one venue but sent a confirmation for another venue.

The Claimant is also recorded as having said she was doing the best she could with her limited vision. She confirmed her initial appointment with her ophthalmologist was to be 13 June 2016 (wrongly noted in the letter as 16 June 2016). The letter recorded that following a time and motion study it was identified that the Claimant needed additional time to complete her tasks and "it would be reasonable to allow you additional time due to your eye sight however, the study highlighted that it [could take the Claimant] three times as long to complete booking new referrals". The letter goes on: "we discussed whether [the Claimant] required any additional support and [the Claimant] advised that [she was] trying her best with [her] limited sight and until it [was] resolved [she did not] know what else [she could] do". The Claimant is recorded as saying she was checking letters and appointments in her second language. She was advised that she would be invited to a Stage 2 Formal Capability Hearing.

26. On 4 May 2016 a further error came to light, when a parent telephoned the Respondent to say they had received another child's letter in with their own letter. The Claimant had printed both letters. Again this was an information governance breach.
27. The Claimant was signed off sick from work from 5 May 2016. She said in her statement this was because she could no longer cope with the pressure at work. During her grievance she informed the Respondent this was because she went to her GP because she was so stressed at work and starting to have thoughts about whether to hit a tree on the way to work rather than go to work. She also said that at the time the sickness was linked to the visual problems (page 219), though when she informed Lorraine Flett, Lorraine had acknowledged it was a "horrible" position to be in.
28. On 5 May 2016 the Claimant was invited to a stage 2 formal capability meeting. She was advised that the specific concerns involved her attention to detail in particular:
  - 28.1 ear mould stats being recorded incorrectly;
  - 28.2 appointments being booked inappropriately resulting in clinicians being unable to see the patient booked in;
  - 28.3 letters sent to patients detailing the incorrect clinic location;
  - 28.4 information governance breaches in that patient appointments had been sent to the wrong patient;
  - 28.5 letters sent to the wrong patient address when the correct address was available.The Claimant was warned that a possible outcome was dismissal (p145).
29. On 19 May 2016 the Respondent held the Stage 2 formal capability meeting, chaired by Ms Clark. Ms Darvill supported Ms Kirby in presenting the management case. During this meeting the Claimant raised the fact that she felt the Occupational Health advice was inadequate. She also raised that her stress levels were increasing. The Claimant read out her statement at pages 150-153. This said she believed with hindsight her problems with vision had begun in early 2015. She made a number of allegations about how she had been managed, referred to her stress levels reaching breaking point and that office lights were affecting her vision, which she asserted was common with cataracts. She suggested that the capability process could have been put on hold due to her cataracts. At p152 she also suggested that on at least one occasion an incorrect booking of an over 4 child in an under 4 clinic was a deliberate decision on her part.
30. This meeting was adjourned and reconvened on 28 June 2016. This was to give management a chance to respond to points made by the Claimant. Ms Kirby was

very distressed by what the Claimant had said about feeling bullied by management and was assisted by Ms Darvill to prepare a response.

31. The Claimant had her appointment with the ophthalmologist on 13 June 2016. She said he advised he would not expect her to be able to do computer work. There is a report dated 13 June from Moorfields Eye Hospital confirming the Claimant's appointment that date. It confirmed the diagnosis of bilateral cataracts, right worse than left, and that she had been listed for surgery and an admission date was to be arranged shortly. He confirmed that her poor vision had almost certainly contributed to her difficulties at work. He said he was expediting the surgery and "implored" the Respondent take account that her vision would have made computer work very difficult and it was impossible to say for how long this had been going on (p167). The Claimant says she sent this to Jane Kirby but it is not referred to in the processes until the grievance (below) (p316). I accept she did send it as it is unlikely the Claimant made no attempt to submit this letter in some way given the reference to her work situation and the clear intention within it that it would be read by her employer. However I accept that for whatever reason it is not mentioned within the Respondent's processes until the grievance and there is no evidence the Claimant mentioned it in the resumed 2<sup>nd</sup> Stage capability meeting. I accept therefore that the 2nd stage panel were not aware of it.
32. The Claimant had cataract surgery on her right eye on 21 June 2016. She had informed Ms Clark of the date of surgery (page 168).
33. The formal capability meeting resumed on 28 June 2016 therefore after the ophthalmologist appointment and first surgery. There is reference to a further statement by the Claimant but this is not included in the bundle. As said above there is no evidence she made reference to the Ophthalmologist's letter of 13 June 2016 though she did say she had a GP fit note expiring on 1 July 2016 and had already had her first surgery, with the next surgery due on 11 July 2016.
34. The decision was confirmed by letter dated 29 June 2016. The letter recorded that Ms Kirby considered that the two serious information governance breaches and not following processes were not related to the Claimant's vision and that she had considered that dealing with these as disciplinary issues but capability was considered a more supportive approach. The letter also records that the Claimant accepted that the two information governance breaches were not due to her eyesight; she had a fit note that expired on 1 July 2016, she had had surgery to remove the cataract in one eye and had a further appointment on 11 July 2016 in relation to the treatment for the left eye. The letter also recorded that the Claimant confirmed that if the decision was that she could return to work she would prefer not to return to her substantive role and would prefer to be redeployed. The Claimant argues that she was pressured to say this but it is consistent with her behaviour in relation to appeal. In evidence she did confirm that she did come to the conclusion at some stage she did not want to return to audiology because of the way she had been treated.
35. Ms Clark gave her decision that a return to the Claimant's substantive role would not be appropriate due to the ongoing and serious capability issues outlined; the

need for attention to detail, the impact on patients and the service that had resulted from the errors. The panel accepted that some of the errors could be attributed to the visual impairment but concluded there was evidence of a prolonged period of management support, adjustments and occupational health guidance that did not address the errors and the negative impact on patients and the service.

36. During the investigation into the grievance (below) and in her evidence Ms Clark expanded on her decision. She felt the Claimant did not appreciate the impact of her errors on others. There were a number of mistakes made impacting the service and, ultimately, children. She also believed that the relationship between the Claimant and Ms Kirby had broken down and it would be unreasonable to return the Claimant to work with Jane Kirby. She had spent time considering which errors related to sight (the errors related to computer work) and which were unrelated (the information governance errors, such as putting two letters in one envelope and the booking of children in the wrong clinic). As they are a big organisation with jobs in the system all the time she wanted to see if there was an alternative to be found.
37. The Claimant was instead to be supported to establish if there were suitable roles available via the Trust redeployment process for a time limited period, commensurate with her notice period. The Respondent's approach to redeployment in redundancy situations is also to limit it to the notice period. If no suitable alternative was found then the employment was to be terminated on 1 August 2016. She was to be given refresher information governance training. Ms Darvill was to contact the Claimant about the redeployment process and support.
38. During her notice period the Claimant returned to work after an extended absence and was placed at Wrotham Road Clinic, Gravesend, within Ms Clark's team. She was managed by Ms Keeler-Lux.
39. During her placement issues were reported about the Claimant's performance. Her new manager found the Claimant challenging and felt she was "full of animosity" and did not want to be there (pp351-3). From the Claimant's perspective she felt that there was no role for her to do, that she had no work station and was just being given the kind of work a work experience person would be given (page 181). She also felt that the team were facing their own administrative review and that it was not good for anyone's morale that she had been placed in this team. She felt so uncomfortable that she used up her annual leave to avoid attending.
40. The Claimant was informed of one vacancy as part of the redeployment process. At first she believed she had missed the deadline. Then she believed she was not qualified for the position as she did not have the secretarial qualification and experience required (p203). Ms Darvill felt it may have been suitable employment and that the Claimant made the conclusion it was not suitable without discussing with her or the recruiting manager, however she did not contact the Claimant further about it. Internal management emails suggest that by this time the



Claimant was seen by Ms Darvill and others as a problem to be managed and garden leave was considered.

41. On 13 July 2016 the Claimant raised a grievance but confirmed she was not exercising her right to appeal, with the implication that she was not seeking to return to her post. In her grievance she raised bullying and harassment by her line manager and issues in relation to the management of the capability procedure. She did provide the letter from Moorfields Eye Hospital (p167). She explained that at her Ophthalmology appointment she had been advised that moving the monitor closer to her eyes (as recommended by Occupational Health) would exacerbate her problem. She also raised that she now understood that the brightness of the office lights were affecting her ability to see.
42. The Claimant's employment terminated on 1 August 2016.
43. The Claimant had surgery on her other eye on 27 September 2016.
44. The Claimant was interviewed as part of the grievance process on 11 October 2016. By that date her eyesight was fine (page 221). She explained that her cataracts had progressed very quickly. Ms Flett, Ms Clark, Ms Darvill and Ms Keeler-Lux were also interviewed. An investigative report was completed into the Claimant's grievance on 22 November 2016.
45. The Claimant was informed that her grievance was not upheld on 30 November 2016, although the grievance report in fact indicates that one point was partially upheld in relation to the redeployment process not being "robustly carried out" and there being no return to work interview when the Claimant returned from sick leave. At the same time the report was critical of the Claimant's lack of engagement with redeployment.
46. In evidence the Claimant accepted that sending the wrong correspondence to patients was nothing to do with her cataracts. She also accepted that she had deliberately booked one of the children's appointments incorrectly, although she asserted this was with Lorraine Flett's authorisation. This is not referenced anywhere in the documentation. The Claimant's own statement for the stage 2 meeting suggests that the Claimant made this decision herself (p152).

### **Relevant law**

47. The law in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

**(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-**

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and**

- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

**(2) A reason falls within this subsection if it-**

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
- (b) relates to the conduct of the employee,**
- (c) is that the employee was redundant, or**
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

**(3). . .**

**(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-**

- (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, and**
- (b) shall be determined in accordance with equity and the substantial merits of the case.**

The test to establish incapacity was set out by Lord Denning in *Alidair Ltd v Taylor* 1978 ICR 445: "Whenever a [person] is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that [he/she] is incapable or incompetent".

- 48. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The band of reasonable responses test applies both to the substantive decision to dismiss and to the procedure followed by the employer (*Whitbread plc v Hall* [2001] ICR 699).
- 49. The Respondent's Representative referred to *Awojobi v London Borough of Lewisham* EAT 0243/16 in relation to redeployment. That case confirmed the principle in *Bevan Harris Ltd v Gair* [1981] IRLR 520 that there is not necessarily an obligation upon every employer considering dismissal for capability to

consider redeployment. Every case depends upon its own circumstances. Where the reason for dismissal is capability and the employee received adequate warning and an adequate opportunity to improve and failed to do so, there is not the same obligation upon an employer to attempt to fit the employee in a subordinate capacity as in redundancy cases.

50. Where any action by the Claimant to any extent caused or contributed to the dismissal the compensatory award may be reduced by such amount as the Tribunal considers just and equitable (s123(6) Employment Rights Act 1996). For conduct to be the basis of a finding of contributory fault under s123(6) it must be culpable or blameworthy (*Nelson v BBC (No 2)*[1980] ICR 110).
51. Where an employer or employee unreasonably fails to comply with the applicable ACAS Code of practice a Tribunal may adjust any award by 25% if it considers it just and equitable to do so in all the circumstances (s207A Trade Union and Labour Relations (Consolidation) Act 1992).
52. The ACAS Code of Practice on Disciplinary and Grievance Procedures (March 2015) applies to dismissals for poor performance. This provides that employers should carry out any necessary investigations to establish the facts of a case and that an employee should be informed of the basis of a problem and given a chance to state their case. Where an employee feels that disciplinary action is wrong or unjust they should appeal the decision.

## **Conclusions**

*What was the reason for dismissal?*

53. I accept the principal reason for dismissal was capability, due to the errors made by the Claimant.
54. The perceived breakdown in the Claimant's relationship with Ms Kirby during the capability process was also a factor in the decision that the Claimant could not stay in her position in Audiology and had the Claimant been successfully deployed she would not have been dismissed at all. However, I accept that the main, underlying, reason for dismissal was the Claimant's capability.

*If the reason was capability, what steps did the Respondent take to support the Claimant and provide an opportunity for the Claimant to improve her performance?*

55. The Respondent explained the performance concerns to the Claimant and followed both an informal and then a formal performance improvement plan. Within this support from management was offered. When the Claimant informed the Respondent about her cataracts a referral was made promptly to Occupational Health. Up to this point the Respondent's conduct was a

reasonable response. The Claimant had been supported and given opportunities to improve, which at times had been successful.

56. By January/February 2016 the Claimant had become aware of her cataracts and informed the Respondent that these were the reason for her errors. The OH report confirmed she was visually impaired with cataracts and that management discretion was needed until surgery, when recovery would be quick. Some adjustments were suggested which the Claimant had already put in place.
57. The Respondent's response was to continue the capability process, with a further performance improvement plan to cover both accuracy and output (page 120) as her output on a day to day basis was significantly below her counterparts. The regular monitoring was to continue and a warning was made that if there was not satisfactory improvement the Claimant might be dismissed.
58. A performance improvement plan is a supportive measure unless it sets unrealistic targets. As the Respondent was now aware of the Claimant's visual impairment it was not reasonable to continue to require improvement and to require her to speed up her output without checking that these expectations were realistic whilst she remained visually impaired. These questions were not asked of Occupational Health. On the balance of probability the continuing performance improvement plan was difficult for the Claimant to achieve whilst her visual impairment remained and placed unrealistic expectations on the Claimant. It ceased to be a supportive measure and I accept caused the Claimant to suffer stress which contributed to her extended absence.
59. That is not to say that no reasonable employer would have continued with any kind of capability process. However a reasonable process would have continued on the basis of what the Claimant could realistically achieve whilst visually impaired and whether the employer could reasonably accommodate this until the Claimant's surgery, given that the prognosis from Occupational Health was that she would make a swift recovery once this occurred.

*Did the Respondent take into account the Claimant's medical condition before making any decision?*

60. Clearly the Respondent was aware of the Claimant's visual impairment and that the Claimant was to have surgery which should rectify the visual impairment. Ms Kirby did obtain the Occupational Health report. However as set out above, she took insufficient account of the impact of the Claimant's cataracts on her ability to perform without error or without the additional time she was taking. She did recognise that some additional time was required but decided the Claimant was taking longer than this without consultation on Occupational Health in respect of what was reasonable.
61. When the Claimant was referred to the stage 2 capability hearing, the matter proceeded on the basis of the Claimant's lack of attention to detail, rather than

her difficulties in relation to the performance of her tasks due to her visual impairment. Ms Clark and the stage 2 capability panel did consider the Claimant's visual impairment to a degree but did not obtain the full medical picture.

62. By stage 2 of the capability hearing the Claimant had said her eyesight had worsened and she was on an extended sickness absence which commended the day after she was informed she was to progress to stage 2. She had also seen her ophthalmologist and had her first surgery. Ms Clark said she spent some time considering which of the Claimant's errors were due to her eyesight and which were not, without the benefit of any medical advice about this. It is unfortunate that the Claimant did not ensure that the stage 2 panel had sight of the Moorfields report but a reasonable employer would have ascertained the up to date medical position, along with which tasks were likely affected, through a further referral to Occupational Health or via the Ophthalmologist. This should have elicited that the Claimant's visual impairment would have made computer work very difficult and it was impossible to say how long this had been the case (as stated in the Moorfields report).
63. In addition the stage 2 capability panel did not take account of the Claimant's stress levels. The Claimant told the panel that her stress levels were at "breaking point". She described how her state of mind contributed to her errors and how she felt when the performance improvement plan, and the performance expectations therein, continued once the cataracts were known. She was on a lengthy sickness absence commencing after her final stage 1 review. The Respondent's own process sets out steps to be taken if someone's sickness absence appears triggered by the capability process which includes a referral to OH and a stress risk assessment. The question of why a stress risk assessment did not take place was addressed by Ms Kirby in the stage 2 hearings, who said that had she been aware of the increasing stress levels a stress risk assessment would have been completed. The capability panel were therefore made aware that the Claimant was potentially suffering from stress in the later part of the performance improvement process, possibly because of how her visual impairment was managed. No consideration was given to how this was affecting her performance.
64. Ms Clark's decision was based on "the ongoing and serious capability issues outlined, the need for attention to detail...and the impact on patients and the service that [had] resulted from the ongoing errors. The panel accepted that some of the errors could be attributed to the visual impairment but concluded "there was evidence of a prolonged period of management support, adjustments and Occupational Health guidance that did not address the errors and the negative impact on patients and the service". On the one hand there was an acceptance that the Claimant had an underlying health condition impacting her performance but on the hand she was dismissed due to the prolonged period of errors, and the fact they had not been addressed by adjustments and Occupational Health, which is contradictory and suggests she was dismissed in part due to the errors caused by her underlying health condition. Again there was a failure to acknowledge the Claimant could not help making the errors

caused by her visual impairment and that the management support and adjustments could not alter the fact she was likely to find computer work difficult until her eyesight was restored. There was also no consideration of how long the Claimant's work had been affected by the cataracts. Rather the lengthy period was held against the Claimant as the assumption was made, in the absence of medical advice about this, that her long term performance issues were not just due to her cataracts.

*Was a fair procedure followed?*

65. Initially the procedure was fair. However it was not reasonable to persist in requiring improvement once the Claimant's visual impairment was known, at least not without medical confirmation she could achieve the improvement required. At that time the focus should have adjusted to how the Claimant's inability to perform fully while she was visually impaired could be accommodated, rather than to continue to insist upon what was, on the balance of probability, unrealistic improvement. Instead the stage 2 proceeded on the basis of the Claimant's inattention to detail.
66. One reason that the Claimant was dismissed was because the panel felt she could not continue in her position as it was not reasonable to return her to work with Ms Kirby. The Claimant was not informed that that was a potential reason for dismissal and it was not one of the matters to be discussed at the capability hearing. This in itself was unfair in terms of process.
67. It is not clear exactly what caused the perceived problem with Ms Kirby. The Claimant had provided a statement which she had said was an emotional response and explained how she felt as a result of how she was managed. She made some valid points. The approach to the management of the Claimant once the cataracts were known was, on the balance of probability, setting unrealistic expectations and increased her stress. The Claimant was entitled to state her position in the capability hearing without penalty. Yet instead, the fact that Ms Kirby took what she said personally and was very upset, was held against the Claimant and was a significant factor in the decision to dismiss. This was not fair procedurally.
68. I accept that, when asked, the Claimant said she could not return to work in her position but this question was asked because of Ms Kirby's upset and the Claimant's answer was due to the way she had been managed, which I have found unreasonable.
69. Once a decision had been made to redeploy, that process should have been reasonable. The grievance outcome identified that the redeployment process had no guidance and was not robustly carried out.

70. The Respondent's own process identifies redeployment as an alternative to dismissal. The process does not provide for a decision limiting redeployment to the notice period with dismissal as the alternative. In my experience, this was an unusual approach and carries the danger, as seen here, that the decision to dismiss impacts the relationship between employee and employer, contributing to the redeployment being unsuccessful. In this case it also led to a short redeployment period, which was harsh. I accept though that a reasonable response could be to limit redeployment to the notice period, particularly a longer notice period. However, the Claimant was promised support during the redeployment period. A reasonable minimum would be to speak with the Claimant, explain any preferential treatment she could expect in relation to vacancies and discuss any potential roles with her. In this case the redeployment process consisted of a couple of emails from Ms Darvill who identified one potential role. At first the Claimant believed she had missed the potential deadline (as she had not been informed how redeployment would work) then she believed she did not have the minimum required qualification. She is criticised for not speaking with Ms Darvill or the relevant manager about this before reaching this conclusion. However in my view the onus was on the Respondent to speak with the Claimant. A reasonable employer would have spoken with the Claimant both to fully explain the process (and how it differed to ordinary recruitment) and to discuss a particular alternative role. Ms Darvill did not do this as the reality is that the Respondent gave up on the Claimant during the redeployment process, believing by this stage that she was uncooperative and difficult.

*Did the decision to dismiss fall within the band of responses open to a reasonable employer?*

72. The decision to dismiss was not reasonable in all the circumstances.
73. A reasonable employer of the nature, size, and resources of the Respondent, should have been able to manage the Claimant's time limited disabilities caused by her visual impairment and made appropriate arrangements. Indeed the Respondent had made adjustments during the period of performance management, putting in checks on the Claimant's work, and then had no difficulty accommodating the Claimant's lengthy absence and her short notice redeployment in her notice period. To continue instead to expect improvement without checking it was realistic, and to continue to manage the Claimant on the basis of inattention to detail rather than someone with temporary visual impairment (again without checking it was appropriate) was outside the range of reasonable responses and contributed to the Claimant suffering stress and to the issues in the relationship between the Claimant and Ms Kirby.
74. It was in the circumstances unreasonable to take account of Ms Kirby's upset at the Claimant's statement in the stage 2 meeting, which was one of the reasons for redeployment rather than a return to the Claimant's post with the retraining. The Claimant should have been able to put her position forward without penalty.

75. The Respondent's own decision was redeployment, with information governance training, in the first instance. Ms Clark felt the Respondent was large enough that she wanted to see if the Claimant could be accommodated rather than dismissed. This suggests that in the Respondent's own eyes the capability issues were not so serious as to warrant dismissal. Moreover, I have found the way the redeployment was approached was not reasonable, with the Respondent having given up on the Claimant by this stage.
74. All of these factors contribute to the overall conclusion that the decision to dismiss was outside the range of reasonable responses.
75. The Respondent relies on the fact that it is the Respondent's case that there were some errors that were unrelated to the Claimant's visual impairment. I have found that it was not reasonable to try to distinguish which errors were related to the sight issues and which were not without some medical advice. I accept however that the Claimant indicated that she had made an inappropriate decision in relation to booking an appointment in the document she produced for the capability hearing (though this was not one of the errors being considered). She also accepted that the two information governance breaches were not connected to her visual impairment, though there was no consideration as to whether stress was a factor in the more recent of these.
77. However, the way the Claimant was managed once the cataracts were known impacted what then followed such that in all the circumstances it is not appropriate to take these three errors in isolation and say that the dismissal was nevertheless reasonable.

*If the dismissal was procedurally unfair, would a fair dismissal have made a difference to the outcome?*

77. This essentially is the question of whether there is still a chance that the dismissal would have occurred if a fair process had been followed (or that there would have been a fair dismissal at some stage in any event). I have found the dismissal both substantively and procedurally unfair. I have also found that it is not possible to isolate the three errors that were essentially admitted to be unrelated to the cataracts as the way the Respondent conducted the process and managed the Claimant impacted on the Claimant and her performance and attitude and affected too many parameters – for example her stress levels, the relationship with Ms Kirby and redeployment. It cannot therefore be said that due to these errors there is a chance there would have been a dismissal at the same stage in any event.
78. What can be said is that there is a possibility that some errors would continue to have been made due to carelessness rather than the visual impairment. It is possible that after a reasonable process managing the time limited limitations on the Claimant's performance, and after her surgery, that it would have emerged that she continued to make errors due to carelessness rather than her eyesight.



In the circumstances I do not find this more likely than not. However there is a significant possibility and this can be reflected by a 30% reduction in the Claimant's award following an appropriate period to allow for the surgery and a fair process. The parties will have an opportunity to address this point further at the remedy hearing.

*Was there any blameworthy conduct by the Claimant that caused or contributed to her dismissal?*

79. It is right that the Claimant did accept the three errors described above were unrelated to her visual impairment. Two were serious information governance errors that would usually be managed via a disciplinary process. . She did therefore contribute to her dismissal and I consider it just and equitable to reduce her award by 10% to reflect this.
80. There are other ways in which it can be said the Claimant did not help herself. She did not show the panel the letter from Moorfields, which is odd given the way it was written with the intention of the Respondent seeing it. However whilst this was unhelpful to her own cause, I do not find this blameworthy or culpable and justifying a reduction in her award.
81. She also said she did not think there should be a further referral to Occupational health as she had not found the first referral helpful. Had she said she did want a further referral then this would probably have occurred and the Respondent would have been better informed. However again I do not find this blameworthy or culpable and it is not akin to the Respondent requiring the Claimant to attend and her refusing.
82. The Respondent criticised the Claimant for not engaging with redeployment. I do not find that criticism reasonable. She responded to the emails sent to her. It was the Respondent which did not properly communicate with her about the process and the vacancies. The decision to dismiss with a very brief redeployment process in the notice period did not help the redeployment process.

*Was there an unreasonable breach of the ACAS Code of Practice by either party? Should any award be adjusted to reflect this?*

82. The Claimant was not really able to particularise a breach of the ACAS Code. From my findings the Respondent did not investigate the medical position fully, and also introduced the issue in relation to the relationship with Ms Kirby during the proceedings and did not make it clear this was an issue being considered. However, the Respondent was attempting to follow a fair process in good faith. Errors were made but I do not consider these unreasonable breaches of the ACAS Code that would merit an adjustment to the award.
83. The Respondent argues the Claimant should be penalised for electing to lodge a grievance rather than an appeal. Again, whereas technically the Code requires

an appeal, the Claimant fully aired her grievances and there was a detailed investigation as a result. By this time the Claimant did not wish to return to work for the Respondent which is why she elected to follow the grievance process. This would not have prevented the Respondent attempting to remedy the unfairness in the dismissal or process through the grievance process. Again I do not consider this breach unreasonable or justifying any decrease of the award.

**Next steps**

84. It follows from my decision that the Claimant was unfairly dismissed and a remedy hearing is now required to decide upon the appropriate award. At that hearing the parties should be prepared to address the issue of when a fair dismissal might have occurred had errors due to carelessness continued after the Claimant's surgery.

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Employment Judge Corrigan  
9 January 2018