

EMPLOYMENT TRIBUNALS



Claimant
MRS. C. OKIYA

V

Respondent
SECRETARY OF STATE
FOR JUSTICE

Heard at: London Central

On: 12, 13 & 14 September 2018

Before: Employment Judge Mason

Representation

For the Claimant: Ms. R. Hewitt, Public & Commercial Services Union.

For the Respondent: Ms. A. Carse, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

The Claimant was not unfairly dismissed and her claim for unfair dismissal is dismissed.

REASONS

Background and procedure at the Hearing

1. In this case Mrs. Okiya (“the Claimant”) claims that she has been unfairly dismissed. The Respondent denies that she was unfairly dismissed.

Issues

2. The Respondent had prepared a List of Issues and Ms. Hewitt agreed at the Hearing that this was a fair and complete list:
 - 2.1 What was the reason for the Claimant’s dismissal? The Respondent relies on capability which is a potentially fair reason pursuant to section 98(1)(a) of the Employment Rights Act 1996 (“ERA”).

- 2.2 Did the Respondent act reasonably in all the circumstances in dismissing the Claimant (s98(4) ERA)? The Claimant alleges that her dismissal was unfair for the following reasons:
- (i) The Respondent failed to carry out an adequate assessment of her performance;
 - (ii) Her line manager Ms. Samantha Dine (“SD”) failed to take account of feedback from previous line managers.
 - (iii) SD failed to provide clear and timely feedback during the performance management process.
 - (iv) The Respondent failed to carry out a mid-year review for the year 2016/2017.
 - (v) The Respondent failed to comply with the Managing Poor Performance Policy, in particular:
 - a. SD failed to supply evidence of poor performance ahead of the first meeting;
 - b. At the second meeting, the Claimant was informed that she could not supply evidence after the meeting.
 - (vi) The Respondent failed to carry out the appeal process correctly in that the review of the Claimant’s performance was restricted to a four week period.
 - (vii) The Respondent failed to act on the recommendation by Occupational Health (“OH”) that an individual stress assessment was undertaken.
 - (viii) SD’s judgment was clouded by her view that the Claimant was aggressive, sarcastic and had changed her demeanour to SD.
 - (ix) On 23 January 2017, the Respondent withdrew an offer of an alternative post to the Claimant on the basis of the performance management process and this was different treatment to other candidates.
- 2.3 If the claim of unfair dismissal succeeds:
- (i) Should an order for re-engagement be made pursuant to s116(2) & (3) ERA? Alternatively:
 - (ii) Should the Claimant be awarded compensation taking into account:
 - a. any uplift for any failure by the Respondent to comply with the ACAS Code of Practice;
 - b. if the procedure was defective, any reduction to reflect the likelihood that she would have been dismissed in any event; and
 - c. any reduction to reflect any contribution by the Claimant to her own dismissal?
3. I agreed with the representatives that I would hear evidence and determine liability and, if the Claimant was successful, determination of the Claimant’s losses would be dealt with at a separate Remedy Hearing. However, I would also determine at this stage, if appropriate, any adjustments to compensation as set out in para. 2.2 above.
4. Ms. Carse provided a Chronology and I was provided with an extensive joint bundle of documents running to 3 volumes: vol. 1 pages 1-392; vol. 2 pages 393 to 819; and vol. 3 pages 820 to 1152. Any reference in this Judgment to [x] refers to page [x] in the bundle.
5. On the first day of the Hearing, having established the issues and identified the key documents, I retired to read the relevant documents and witness statements and allow time for lunch. I then heard from the Respondent’s witnesses: Mr. Alex Scott

who heard the Claimant's appeal against a final written warning and Mr. Ed Heardman who heard the Claimant's appeal against her dismissal. On the second day, I heard from Ms. Samantha Dine, the Claimant's line manager, who took the decision to dismiss the Claimant. On the third day I heard from the Claimant. All the witnesses adopted their respective witness statements as their evidence-in-chief. At the conclusion of the evidence, I listened to submissions from Ms. Carse and Ms. Hewitt. I then reserved my decision which I now give with reasons.

Findings of fact

6. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities. The relevant period spans over two years during which time there has been very extensive interaction between the Respondent and the Claimant with regard to her performance and I have been required to analyse this in order to determine the issues. However it is generally not desirable to rehearse all the evidence and set out below is therefore a (chronological) summary of the key facts.
7. I have adopted the following acronyms as used by the parties:
 - “**CSL**”: Civil Service Learning.
 - “**DV**”: Domestic violence.
 - “**DVE**”: Divorce Fee Exemption (legal aid in family cases where DV is shown).
 - “**EYR**”: End-of-Year Review in accordance with the PMP.
 - “**FRMP**”: Flexible Resource Management Policy.
 - “**HR**”: Human Resources department.
 - “**MoJ**”: Ministry of Justice.
 - “**MPPP**”: Managing Poor Performance Policy and Procedure [1128-137].
 - “**MYR**”: Mid-Year Review in accordance with the PMP.
 - “**OH**”: Occupational Health.
 - “**PAP**”: Performance Action Plan put in place where performance is judged to be below the minimum standard
 - “**PMP**”: Performance Management Policy and Procedure [1138-1152].
 - “**PMR**”: Performance Management Record prepared for each performance management/reporting year (1 April to 31 March).
 - “**PPM**”: Poor Performance Meeting.
 - “**PQ**”: Parliamentary Question.
 - “**PROUD**”: The MoJ Black & Minority Ethnic staff network.
 - “**PSED**”: Public Sector Equality Duty (section 149 Equality Act 2010).
 - “**SMART**”: Specific, Measurable, Achievable, Realistic and Timed.
 - “**SoPEs**”: Statement of Performance Expectations.
8. Key people involved in this case (in alphabetical order) are as follows:
 - Tom Bainbridge** (“**TB**”): Claimant's acting supervisor 21 December to 4 January 2017.
 - Samantha Dine** (“**SD**”): Claimant's line manager from 30 June 2015 until the Claimant's employment ended.

Karen Finlay (“KF”): Claimant’s line manager in 2014.

Steve Gill (“SG”): Investigated Claimant’s grievance regarding withdrawal of an alternative internal job offer.

Anthony Green (“AG”): Heard the Claimant’s grievance regarding withdrawal of an alternative internal job offer.

Edward Heardman (“EH”): 9 May 2017, EH heard the Claimant’s appeal against her dismissal.

Belinda Lock (“BL”): Claimant’s mentor for project management issues.

David Martin (“DM”): SD’s line manager.

Jean McMahon (“JM”): Claimant’s line manager in 2014.

Joe Parsons (“JP”): Claimant’s supervisor in 2015, prior to SD.

Justin Russell (“JR”): On 7 June 2017, JR heard the Claimant’s appeal against AG’s decision not to uphold the Claimant’s grievance in respect of withdrawal of job offer.

Alex Scott (“AS”): On 2 February 2017, AS heard the Claimant’s appeal against a final written warning issued on 13 December 2016.

Dominic Smales (“DS”): Claimant’s official mentor for drafting issues.

John Wallis (“JW”): Claimant’s acting supervisor in 2015, prior to SD.

9. On 18 September 1991, the Claimant started work for the Civil Service in the (former) Department of Social Security and joined the MoJ in 2007. At the date of termination of her employment (14 June 2017) she was a Legal Aid Policy Adviser, (Band C) in the Legal Aid Policy Team, Access to Justice Policy Directorate. She started in that role on 10 October 2013 (PMR 2013/2014 [33A]) having been transferred in accordance with the FRMP. Prior to transfer she was in the Reoffending Team (Band C); I have not been given any information about her duties in that position. It is accepted that there were no issues with her performance until she was transferred. Her final gross weekly pay was £629.99 (£489.00 net).
10. Managing employees’ performance
 - 10.1 Expectations of employees are set out in a number of documents:
 - (i) The Civil Service Competency Framework sets out the competencies expected at each Band including Band C [173-176].
 - (ii) SoPEs build on the Competency Framework to ensure that staff at each grade are fairly and consistently assessed against a common framework of standards and expectations. They are a tool for evaluating performance at MYR and EYR. On 24 November 2015, revised SPEs for Bands A-E were circulated [35-37, 177-179].
 - (iii) Employees are expected to meet the standards of behaviour set out in the Civil Service Code which are based on the Civil Service values of honesty, integrity impartiality and objectivity.
 - 10.2 The PMP [1138-1152] provides a framework for managing employees’ performance throughout the reporting/management year (1 April to 30 March). In the Policy summary [1141] it states the PMP “provides a framework for managing performance throughout the year, laying the foundations of expected standards of performance and facilitating employee engagement.”

“Performance is evaluated against both the “What” (delivery of objectives) and the “How” (demonstration of behaviours, competencies and Civil Service values) with equal weighting. Objectives must be set at the beginning of the performance management year and reviewed at regular

performance discussions throughout the year. The end-of-year process consists of an agreed validation or consistency check process to confirm the distribution of performance ratings. Employees who are part of the validation process will be assessed against their peers in groups agreed by departments.”

- 10.3 Employees are required to bring to MYRs and EYRs examples of their performance against objectives and how they have demonstrated the required competencies; the line manager should also provide examples to support their assessment of the employee’s performance [PMP 10.3 **1147** and 11.3 **1148**]. At MYRs and EYRs At the mid-year and end-of-year reviews each employee’s performance is rated “Outstanding”, “Good” or “Must Improve”, and these markings are then moderated across the division and the Directorate to ensure consistency.
- 10.4 The PMP provides information about “Objective Setting” [**1143-1144**] which includes:
- 5.1 The line manager holds overall responsibility for setting objectives at the start of the performance year. The line manager and employee have joint responsibility for ensuring objectives are discussed and understood, and where possible the employee should produce the first draft of their objectives, with support from their line manger if required.*
- 5.2 The line manager is responsible for ensuring the objectives are relevant to the job role as well as [SMART]. Objectives should be succinct so that the employee is clear about what is expected of them. Individual needs should be considered and reflected in the objectives and practical adjustments made where appropriate. There is a guide called “How to: set SMART objectives” available on My Services.*
- 5.3 Whilst objectives may be set that go beyond the end of year, clear achievements and deliverables for the year-end must be agreed. This enables employees to have relevant and SMART objectives at all times and in the event that there is a delay between the performance year end and the setting of new objectives.*
- 5.4 Objective setting should not be a one-off activity. They should be reviewed throughout the year particularly when objectives are achieved, amended or new objectives are required.”*
- 10.5 The PMP also gives information under the headings: Regular performance discussions; Recognising and managing poor performance; Rating performance; MYR; EYR; Confirming final performance rating; and Disagreements.
- (i) Under the heading “Recognising and managing poor performance” it states [**1145**]
- “8.4 Where normal, practical support has been provided in line with the “how to” guide but performance remains at an unacceptable level, the line manager must start formal procedures in accordance with the [MPPP].”*
- (ii) Under the heading “Disagreements” it states [**1149**]:
- “13.2 Where disagreements cannot be resolved between the manager and member of staff, the countersigning manager will be consulted and will have the authority to decide the rating by reviewing the evidence presented by both the manager and the employee. If the disagreement remains unresolved then it may be appropriate for the employee to follow the departmental grievance process”*
11. The Claimant explained in oral evidence that she had two mentors she could go to with concerns or queries, DS for drafting and BL for project management. DS was her “official” mentor with whom she was matched when she applied for a mentor; BL was a colleague who she went to on an informal basis.
12. Managing poor performance
 The MPPP [**1128-1137**] provides a framework for managing employees’ poor performance. The MPPP Summary [**1131**] states:
“Poor performance is when an employee’s performance falls below the expected performance required to carry out their role effectively. These performance expectations may vary depending on the role but they will be specified in a combination of: agreed work objectives; competency frameworks and job descriptions.

Key areas covered by this policy include:

- first written warning
- final written warning
- dismissal decision.

After each written warning there is a review period in which employees are supported to improve their performance. There is also the facility to appeal decisions. Managers and employees are advised to keep written record of discussions. In instances that result in dismissal it is expected that, where line managers have robustly managed performance, the procedure should take no longer than six months.”

13. PMR: 1 April 2013 to 31 March 2014 [33A-33T]:

In October 2013 the Claimant's then line manager KF conducted a MYR [33A] and the rating given to the Claimant was “Must Improve” [33K]. Particular concerns recorded include not working to pace, not seeking feedback and not improving on drafting skills. On 16 April 2014 her then line manager JMcM conducted an EYR and again gave the Claimant a final rating in June 2014 of “Must Improve” [33T].

14. PMR: 1 April 2014 to 31 March 2015 [33U-33KK]

In November 2014 JMcM conducted a MYR and the Claimant was given a “Must Improve” rating [33FF] but in April 2015 JMcM conducted an EYR and this time the final rating given to the Claimant on 20 April 2015 was “Good” [33KK], JMcM having noted that the Claimant had improved her drafting skills.

15. On 30 June 2015, SD became the Claimant's line manager and started to hold 1-2-1 meetings with her. For a period before this, the Claimant was without a line manager and then JP was her line manager for a short while followed by JW. It is not in dispute that neither JP nor JW raised concerns about her performance and in an email from JP to the Claimant dated 6 October 2015 [202] JP makes positive comments about the Claimant's performance.

16. June to September 2015

16.1 In July 2015, the Claimant and SD exchanged emails regarding the Claimant's draft objectives [107 & 108]. On 23 July 2015, SD emailed the Claimant setting out actions for her to take forward in the subsequent two weeks and giving pointers on how to carry out each action [108-109]. One of the tasks was to update the team's briefing and “lines to take”. SD explains: “*This is an important document because team members refer to it when providing replies to parliamentary questions or requests for ministerial briefing on our area of work, and such requests must be dealt with quickly and accurately. “Lines” are a succinct statement of the departmental position and policy concerning key issues and must accurately reflect ministerial preference and government position*” [SD w/s 14].

16.2 From 19 August to 22 September 2015, the Claimant was on annual leave.

16.3 By 28 September 2015, the Claimant had not finished updating the team's lines and team briefing and SD gave the Claimant feedback accordingly.

17. PMR: 1 April 2015 to 31 March 2016 [45- 66]

17.1 The Claimant's MYR was due to be held on 6 October 2015 but the Claimant had not updated her objectives; SD gave the Claimant feedback and the MYR was postponed to allow the Claimant more time.

- 17.2 On 29 October 2015, a “progress meeting” took place between SD and the Claimant:
- (i) SD identified that a number of items of work remained outstanding including the team’s lines and briefing pack. SD raised the issue of performance with the Claimant and advised her that she needed to increase her pace, asked her to bring a list of her activities to 1-2-1s, and advised her that she needed to take more ownership of tasks and ensure that they were taken to completion [88].
 - (ii) On 2 November 2015, SD emailed the Claimant a summary of the meeting [110-111]. This states (relevant extracts):
Under the heading “Progress”:
“You had not completed the list of protection orders for DV but would do so. The team briefing remained outstanding. You had been working on the family legal aid information and lines. You agree to bring a print-out of your progress to our next 1-1”.
Under the heading “Performance”:
“You felt that your performance was ok but that work was a bit sketchy. I advised that you needed to pick up the pace of your delivery and take things to completion. You were disappointed that you had not had any feedback on your note from the APPG”.
Under the heading “Development”:
“We discussed developing your drafting skills, including taking ownership of your work and taking it to completion.”
It was agreed that SD and the Claimant would have a 1-1 every Tuesday.
The same day the Claimant confirmed SD’s email “covered all the points” [110-111].
- 17.3 On 3 November 2015, the Claimant and SD met; SD says she was still concerned about the quality and accuracy of the Claimant’s work. The same day, the Claimant emailed SD with a summary of their discussions [111-112]; relevant extracts include:
“Progress”: *“I have started the compilation of the list of DV protection orders.... You asked that for future reference you would like to see draft documents before they are sent to other teams for feedback”.*
“FW Objectives”: *“Once you have finalised your objectives, I will use guidance on the intranet to align my objectives to yours”*
“Performance”: *“You said I had picked up pace and encouraged me to keep it up. We both agreed that unlike before I now have specific work to do”*
- 17.4 SD’s view was that the Claimant was underperforming and her indicative rating at the MYR point was “Must Improve” [SD w/s 18]. She advised the Claimant of this on 6 November 2015 and on 10 November 2015 explained to the Claimant her reasons for this at a 1-2-1 meeting; the Claimant emailed SD the same day [113-114] summarising the 1-2-1 and asking for written feedback to help her understand why she had dropped from “Good” to “Must Improve” *“despite being without a manager for at least four months, and more importantly help in constructing the development plan”* [114]. On 17 November 2015 SD emailed the Claimant [114-115] giving an overview of the moderation process and feedback on how her MYR indicative rating was reached specifically based on the Claimant’s performance against her objectives and her performance compared to the standards required of a Band C. SD concluded her email as follows: *“I understand that this must be disappointing but I would like to encourage you to take this opportunity to work with me to ensure that your end of performance rating is firmly in “good”.* The Claimant in oral evidence said she was unable to recall the discussion but that she was *“trusting it was accurate”* and accepted that the final comment was encouraging.
- 17.5 The Claimant did not lodge a grievance or challenge the “Must Improve” rating through the PMP procedure.

18. November/December 2015

18.1 On 14 November 2015 revised SoPEs for Bands A-E were circulated [34-37].

18.2 Regular 1-2-1 weekly meetings continued between SD and the Claimant and SD continued to give the Claimant feedback on her performance including the need to increase pace, improve drafting and ensure that tasks were completed. It was agreed that the Claimant would: re-draft her objectives; complete a self-assessment of her strengths and weaknesses using the on-line CSL self-assessment tool to assist in a development plan and assess her performance against the Band C SoPEs.

18.3 On 21 December 2015, the Claimant sent to SD a completed self-assessment [117] which showed three areas for improvement: “Changing and Improving”; Making Effective Decisions”; and “Managing a Quality Service” [C w/s 14].

19. January/May 2016

19.1 On 13 January 2016, SD and the Claimant met again and went through the results of the Claimant’s self-assessment. SD gave her feedback and “*signposted some online resources and asked her to look into training opportunities such as project management*” [SD w/s 24].

19.2 On 18 January 2016, the Claimant sent SD an email [119-120] summarising the Development Plan. In her witness statement, the Claimant says the Development Plan “*identified where the areas of work I was responsible for fitted in relation to the competencies indentified as areas for development, and also added new areas of work to enable me to demonstrate improvement in relation to “Managing a Quality Service”*” [C w/s 15]. The Claimant records in her email that specific areas for improvement were identified such as records keeping and access to background information; reviewing what the team does on a regular basis to identify improvements and simplification; using the risk training to set up a risk register for the team covering. SD gave feedback with her comments on the Development Plan.

19.3. On 9 February 2016, SD held a “performance discussion” with the Claimant and gave her examples of concerns which included “*tasks in general being delivered late or not at all, drafting being submitted with substantial errors, and the continuing failure to complete the team’s briefing and lines*” [SD w/s 26]. The notes [40] record that SD “*provided examples to clarify concerns*”. The Claimant says in her witness statement [C w/s 9] that the notes of this meeting [82-83] are not agreed but on cross-examination when asked if they were an accurate summary she replied: “*As far as I can remember, yes*”.

19.4 On 13 April 2016, the Claimant emailed SD [121-122] with feedback on SD’s performance for SD’s own EYR:

The Claimant stated:

“What worked well

- *Regular 121s – and you gave feedback to me directly with specific examples... and have provided constructive feedback. We have discussed and set objectives for the week ahead prioritising work as necessary and where appropriate, you have suggested solutions to foster long-term success of my work, for example by providing specific objectives to improve/build skills.*

- *You have not dwelt on the past enabling us to look at the future at what is expected going forward which has helped me get motivated and look to the future.*

- *You have recognised my different skills and you have encouraged me to use these skills which has enabled the whole team to function more effectively, for example encouraging me to create*

a shared drive, preparing the financial research paper and the background paper on experts work.

- *You actively participate in the Action Plan Team meeting for Legal Aid, and you have suggested ideas which create a work environment that encourages inclusion and excludes bullying, harassment and discrimination.*

Where I think a different approach behaviour would have worked better

- *Tolerating honest mistakes*
- *Accepting that there are lots of different ways to accomplish a task.”*

In oral evidence, the Claimant agreed that at that meeting she and SD “*met and discussed things honestly*” and that in general at 1-2-1s SD had given her constructive feedback and set objectives.

20. PMR: 1 April 2015 to 31 March 2016

SD gave the Claimant a “Must Improve” marking at the MYR and at the EYR [PMR **45-66**]. SD identified areas of the Claimant’s work which still required improvement with examples and concluded that the Claimant needed to “*deliver more work, on time and to a good standard, and take a much more proactive approach*” [65]. In oral evidence, the Claimant confirmed that SD was telling her what was needed to meet performance expectations. The Claimant did not take steps to formally challenge this marking either under the PMP policy or by lodging a grievance.

21. June to August 2016

21.1 During the reporting year 2016/2017, the Claimant was project manager for the DVE project which was “*important and urgent work*” [SD w/s 33]; the Claimant confirmed this to be the case in cross-examination. The Claimant also confirmed that she had lead responsibility for the team briefing pack to include ensuring that all entries were up to date.

21.2 SD continued to have 1-2-1 meetings with the Claimant and they exchanged emails. SD gave the Claimant detailed feedback on her objectives including links to materials on the MoJ intranet. On 27 June 2016, the Claimant sent to SD her revised objectives [125] which SD was confident “*reflected the competence framework and performance expectations for a Band C*” [SD w/s 32]. SD gave the Claimant guidance and feedback on the DVE project which was running behind; SD was unhappy that the Claimant’s approach did not reflect the responsibilities of a project manager and indicated to her relevant online learning modules. SD also asked the Claimant to check that the briefing pack was up to date and in a usable format. In oral evidence, the Claimant accepted that SD was giving her advice on what was to be done in the next two weeks (when SD would be on annual leave) and had directed her to resources which might help her with the DVE project plan.

21.3. SD then went on leave and on her return from leave, on 15 August 2016, SD emailed the Claimant with detailed comments on the briefing pack the Claimant had sent to her for comment [130-162]. SD told her it still needed “*quite a lot of work*”, that there was a lot of duplication and the flow needed to be improved. SD was also concerned that the Claimant had not delivered on the project management role;

21.4 On 17 August 2016, SD discussed the Claimant’s performance with her at their weekly meeting. The Claimant’s work on the briefing and “lines” were discussed. The Claimant says there are no agreed notes of these meetings [C w/s 9] but on cross-examination she accepted that the notes [67-68] were accurate with the

exception of the penultimate paragraph in which SD records that she felt the Claimant was slightly aggressive; the Claimant denies that she was aggressive and it is accepted that SD did not mention this at the meeting.

22. At this point, SD concluded that it was necessary to follow the formal MPPP; in oral evidence, the Claimant agreed that 1.4 of the PMP provides that if an employee's performance is below expectations, managers must move to the MPPP.
- 22.1 On 23 August 2016, SD sent the Claimant a letter dated 22 August [73] inviting her to a Poor Performance Meeting ("PPM") on 12 September 2016 (subsequently postponed to 22 September 2016) to discuss her work performance;
- (i) SD set out in that letter four areas of concern:
- *" Performance is not at the level that would be expected of an employee at the level of Band C, as set out in the Civil Service Competence Framework and the Statements of Performance Expectations.*
 - *Objectives are not being met.*
 - *Tasks are being delivered late or not delivered.*
 - *Work submitted routinely requires substantial amendments."*
- (ii) SD encouraged her in the letter to prepare for the meeting and advised her of her right to be accompanied. The Claimant said in oral evidence that she understood that "preparing" for the meeting meant making sure she was accompanied and on time.
- (iii) SD enclosed with the letter a copy of the MPPP and notes of their 1-2-1 meetings on 9 February 2016 and 17 August 2016.
- 22.2 The Claimant accepted in oral evidence that the letter told her what was to be covered at the meeting.
23. HR advised SD to offer the Claimant a referral to OH. SD did so and on 26 September 2016, the Claimant attended an OH assessment [**report 187-189**]. OH recommended that an "Individual Stress Assessment" be carried out.
24. 22 September 2016: First formal PPM
- 24.1 This was conducted by SD. The Claimant was accompanied by a colleague. The Claimant confirmed in oral evidence that the notes [**216-223**] are accurate.
- 24.2 The Claimant had sent in documents she wished to rely on [**78-105**]; in oral evidence, she accepted that she did not put forward her case about her performance at this meeting.
- 24.3 This was a difficult meeting and in view of the Claimant's assertions that (i) there was no evidence of poor performance and (ii) she could not find any written feedback from SD, SD adjourned and agreed to provide such evidence.
- 24.4 The following day, on 23 September 2016, SD wrote to the Claimant providing "a compilation of emails and other written feedback [SD] had provided between July 2015 and August 2016 [**106-172**]" [**SD w/s 46**]. SD also provided "an overview of the feedback in the form of a timeline leading up to the adoption of the poor performance procedure [**180-186**]" and "brief summaries of the feedback set out against the competencies which were particularly relevant for her role [**173-176**] and against the performance expectations for Band C [**177-179**]" [**SD w/s 46**]. The Claimant accepted in oral evidence that by doing so, SD had provided her with evidence of her performance concerns.

- 24.5 SD tried to reconvene the meeting on 28 September 2016 [186,190-2] but agreed to postpone to 3 October 2016 to allow the Claimant's companion to attend. However on 30 September 2016, the Claimant emailed SD stating she was "declining" the meeting [197]; the same day SD replied [197] pointing out: "*The meeting is intended for your benefit in order that you can raise any issues, beyond those already conveyed, that I should take into account when deciding whether or not to issue a formal warning. Relevant matters to raise would include evidence that performance is good, or personal circumstances that may have had an adverse impact upon performance. You have already confirmed that there are no health issues to be taken into consideration*".
- 24.6 The Claimant was off work for about two weeks with stress and SD put matters on hold. After the Claimant returned to work, SD emailed the Claimant on 21 October 2016 [204] offering her the opportunity to provide "*any further relevant information*" by 28 October; this email was not received by the Claimant until 31 October 2016. The Claimant responded [205A] stating only that she did not have any further comments.
25. First written warning: 2 November 2016,
- 25.1 On 2 November 2016 SD met with the Claimant and issued a first written warning of the same date [224-225]. The letter states:
- "We have discussed the issues relating to your performance which were as follows:*
- *Performance is not at the level that would be expected of an employee at the level of Band C, as set out in the Civil Service Competence Framework and the Statements of Performance Expectations.*
 - *Objectives are not being met.*
 - *Tasks are being delivered late or not delivered.*
 - *Work submitted routinely requires substantial amendments.*
- I provided you with detailed supporting evidence that demonstrates the level of support that has been provided and the extent to which performance standards are below those expected. In order for performance to meet the required standards, work will need to be completed on time and at a quality level such that extensive amendments are not required. The volume of work delivered needs to be sufficient and completed with a greater degree of independence, as appropriate for a Band C level policy official. The competencies set out in the Civil Service Competence Framework will need to be met along with the minimum standards for "good" performance set out in the Statements of Performance Expectations. As the Statements of Performance Expectations have recently been revised I have attached a copy.*
- I will continue to provide support to you in the form of weekly one to one discussions, written and verbal feedback and ad-hoc advice. If you require further support or assistance please do not hesitate to let me know.*
- Your work performance will be reviewed over a four week period, which will commence on Thursday 3rd November and end on Wednesday 30th November.*
- We will meet during the review period every week to discuss your progress. You are expected to take full advantage of this opportunity to improve your performance. If you demonstrate the required improvements during this period you will enter into a 12 month Sustained Performance Period. I must warn you that if your performance falls below the expectations required in this review period you will move to the next stage of the [MPPP] which could ultimately lead to your dismissal."*
- The letter goes on to explain that a review meeting would take place on 30 November 2016 and that the Claimant had the right to be accompanied at that meeting. It also explains that she had the right of appeal (to DM) within 10 days of receiving the letter.
- 25.2 The Claimant did not appeal this first warning.

26. A MYR review for 2016/2017 did not take place; SD says (and I accept) that this is because the formal MPPP process had been started.
27. Review period: 3-30 November 2016
- 27.1 Regular 1-2-1 meetings with SD continued together with support from SD and occasionally DM. SD continued to discuss with the Claimant the DVE plan, team briefing pack, response to a PQ and draft PSED and to generally give her feedback on her performance and action required.
- 27.2 On 16 November 2016, it was agreed that the Claimant would complete an individual stress assessment which SD would then review to assess whether anything further could be provided *“to alleviate the stress of the formal poor performance process”* [395]. The Claimant did not pursue this.
- 27.3 21 November 2016: in an email from HR to SD [300-301], the HR case worker records that she asked SD if there were any alternative roles the Claimant could be considered for should the poor performance process progress to Stage 3 and that SD had advised that there were no other roles; SD adds a comment: *“I was advised that these would have to be in the immediate area, which [the Claimant] has repeatedly stated that she does not want to work in, and this would require agreement by the recruiting manager to fill a vacancy – this is unlikely given the extent of the performance issues”*
- 27.4 25 November 2016: SD emailed the Claimant [307] pointing out that her *“project management and equalities lead roles”* *“just hadn’t been delivered”* and reminding her that the formal PPM was due to take place on 30 November 2016 and that this was an opportunity for her to demonstrate her achievements over the past four weeks especially things that she felt she had done particularly well.
- 27.5 23-25 November 2016: The Claimant had been instructed to draft an urgent response to a PQ and liaise with SD, DM and others [277-297]; the deadline for a response was missed. DM expressed in an email to SD his frustration with the Claimant [285] and said he was *“dumbstruck”* by the way the Claimant had dealt with it.
28. 30 November 2016: 2nd formal PPM
- 28.1 SD conducted this meeting; the Claimant was not accompanied. The Claimant accepted in oral evidence that the notes [311-315] are accurate.
- 28.2 The Claimant did not bring with her anything to demonstrate that her performance had improved. The Claimant says she thought that as SD had adjourned the previous PPM (22 September 2016), this PPM would also be adjourned but the HR adviser present told her she could not provide evidence after the meeting which the Claimant says was unfair and disadvantaged her.
- 28.3 SD details in her witness statement [SD w/s 59-61] her particular concerns with the Claimant’s work: including the response to a PQ; Team’s briefing pack and *“lines to take”*; PSED analysis for proposed changes to DV evidence requirements for legal aid. In verbal evidence, SD also referred to paragraphs 2, 16, 17, 19 and 22 of the notes which set out examples of poor performance.
- 28.4 SD decided at the end of the meeting to issue a final written warning

28.5 SD was then off sick at the beginning of December 2016 as was the note-taker; as a result the notes of the meeting [311-315] were not sent to the Claimant until 20 December 2016 [459]

29. Final warning: 13 December 2016

29.1 13 December 2016: SD emailed the Claimant [316] attaching a letter issuing a final written warning [317-318]. The letter advised that a review meeting would be held on 6 January 2017 following a review period of 1 December 2016 to 6 January 2017. The Claimant was advised of a right of appeal to DM. The letter states:

"We have been meeting regularly to review your performance and have discussed the following issues:

- *Performance is not at the level that would be expected of an employee at the level of Band C, as set out in the Civil Service Competence Framework and the Statements of Performance Expectations.*
- *Objectives are not being met.*
- *Tasks are being delivered late or not delivered.*
- *Work submitted routinely requires substantial amendments.*

Issues that we have discussed include: project management skills, which are required for a Band C level policy role; drafting skills; ability to usefully input to policy development; and ability to lead on the areas of work for which you have responsibility and to deliver quality outputs on time. I have also discussed with you that you are not delivering a satisfactory volume of work and that you need to deliver with a greater degree of independence, as appropriate for a Band C level policy official. You will be required to demonstrate improvements in these areas and to deliver your related objectives in order to demonstrate the necessary competences of your current role. The competences set out in the Civil Service Competence Framework will need to be met along with the minimum standards for "good" performance set out in the Statements of Performance Expectations.

I will continue to provide support to you in the form of one to one discussions (which will be on the telephone during this time), written and verbal feedback and ad-hoc advice. If you require further support or assistance please do not hesitate to let me know.

Your work performance will be reviewed over a further period, which will commence on Thursday 1st December and will end on Friday 6th January [2017]. We have previously discussed that the second review period must end at this date in order to accommodate your request for three weeks leave commencing Monday 9th January [2017].

During this period you will have regular opportunities to discuss progress with myself or the covering manager. You are expected to take full advantage of this opportunity to improve your performance. If you demonstrate the required improvements during this period you will enter into a 12 month Sustained Performance Period. I must warn you that if your performance falls below the expectations required in this review period you will move to the next stage of the [MPPP] which could ultimately lead to your dismissal."

The letter goes on to explain that a review meeting would take place on 6 January 2017 and that the Claimant had the right to be accompanied at that meeting. It also explains that she had the right of appeal to DM within 10 days of receiving the letter.

29.2 In oral evidence the Claimant accepted that she knew what was going to happen next. She also said that she understood - from this letter and from other meetings and documents - the areas of performance that SD was unhappy about but said she did not understand how to "improve" her "mistakes" in specific areas. .

29.3 On 20 December 2016, the Claimant received by email [460] a letter inviting her to a "Final Decision Meeting" to be held on 6 January 2017 [461-462]. The letter makes it clear that at this meeting her performance during the period 1 December 2016 to 6 January 2017 would be reviewed again; that this was "a serious matter that could result in dismissal"; and that if there was any further information the Claimant wished to provide she would have the opportunity to do so at the meeting and could also

provide written details in advance if she wished; she was advised of her right to be accompanied; she was reminded that this was her final opportunity to state her case before SD made a decision.

30. Review Period (final): 1 December 2016 to 6 January 2017 (extended to 27 February 2017)
- 30.1 Due to SD's absence (sickness) DM was the Claimant's line manager from 1 to 11 December 2016; SD then actively managed the Claimant from 12 to 21 December 2016; due to SD's absence (annual leave) TB managed the Claimant from 21 December 2016 to 4 January 2017. During this period, the Claimant was on holiday from 23 to 27 December 2016 (inclusive) and on 2 January 2017.
- 30.2 The Claimant felt that there was no longer any interest in her performance during this period but the documentary evidence shows:
- (i) 6 December 2016: the Claimant emailed SD [349-350] with her PMR; updated DVE shared plan; draft team briefing pack; and draft PSED. The Planning Document she attached [397-397] lists the Claimant's tasks under 6 headings: "Task", "How", "What", "Skills", "Progress" and "Action by".
 - (ii) 14 December 2016: SD emailed the Claimant regarding: adjustments to her draft objectives and details of her training [319]; regarding the DVE report [334-346] which SD commented still needed a lot of work; and with notes of the 1-2-1 on 16 November 2016 [348-349].
 - (iii) 15 December 2016: SD emailed the Claimant [386-387] regarding the team briefing pack.
 - (iv) 15 December 2016: SD emailed the Claimant three times [355, 398 & 371] regarding the DVE Shared Project Plan [356-370 & 372-385].
 - (v) 16 December 2016: DM emailed the Claimant [663-664] regarding the team briefing pack; he comments that it has "*clearly improved*", makes points on content/drafting; and concludes "*Good job though! It's well on it's way.*"
 - (vi) 16 December 2016: SD and the Claimant exchanged emails regarding the C's planning document [393], the PSED [399-400 & 453] and the briefing pack [402].
 - (vii) 19 December 2016: DM emailed the Claimant [453].
 - (viii) 21 December 2016: Prior to going on leave, SD emailed the Claimant [467] with a draft planning document for the activities that the Claimant was working on [468-471]. SD states: "*This is intended to make sure that both you and Tom are clear of what you are currently working on, it looks like a lot but none of this is newly commissioned work, I have just set it out in one document for the purpose of clarity*". This was then discussed later that day at a meeting (by telephone) with SD, the Claimant and TB; SD followed up with a lengthy email the same day [472-473]. In oral evidence the Claimant accepted that this email accurately reflected the discussion and that it made clear what she was currently working on.
 - (ix) 23 December 2016: TB responded to the Claimant's request for examples of project management work by others in the team [474].
 - (x) 29 December 2016: TB held a 1-2-1 with the Claimant which he followed up with a detailed email on 30 December 2016 [496-497] and they exchanged further emails on 3 January 2017 [495]. Also on 3 January 2017, the Claimant sent to TB an updated DVE shared project plan including an Equality Statement.

- (xi) 4 January 2017: the Claimant had a 1-2-1 meeting with SD which SD summarised in an email to the Claimant the same day [539-540]. The Claimant says this meeting was not productive and refers to her email to SD dated 6 January 2017 [539] in which she stated the meeting was unconstructive and that she found SD's behaviour at that meeting "*unacceptable*". SD acknowledges that the meeting was "*problematic*" because the Claimant was defensive; SD did not think the meeting was constructive and suggested it was discontinued. SD says the Claimant objected to this and "*used the opportunity to convey all the shortcomings she perceived*" in SD and her work [SD w/s 64]. SD left the meeting which the Claimant describes as walking out [534].
- (xii) On 6 January 2017, the Claimant emailed SD [544] the briefing pack [545-587].
- 30.3 On her return from leave (31 January) the Claimant says she was effectively under different line management. During the period 31 January to 27 February 2017, DM had a 1-2-1 "catch-up" meeting with the Claimant on 1 February 2017 [851]. SD and the Claimant only had one 1-2-1 meeting during this period [852] as SD took the view there was no reason to do so, the poor performance process having been completed and the Claimant having been moved to a "*non-time critical piece of work*".
31. Appeal against final warning: 2 February 2017
- 31.1 On 29 December 2016 the Claimant lodged an appeal against the Final Warning [486-492]. The basis of her appeal was SD's failure to follow the PMP and MPPP and that SD had not been clear or provided sufficient evidence.
- 31.2 DM was initially appointed to hear the appeal; Ms. Hewitt objected [454] as DM was not outside the Claimant's reporting chain. In the event, AS was appointed to hear the appeal in view of DM's absence on holiday [480-481]. In oral evidence, the Claimant said she had no objection to AS conducting the appeal.
- 31.3 On 5 January 2017, AS invited the Claimant to an appeal meeting to be held on 1 February 2017 [536] and advised her that she had the opportunity to give any further information and advised her of her statutory right to be accompanied.
- 31.4 AS heard the appeal on 2 February 2017. The Claimant was accompanied by Ms. Hewitt. The Claimant accepted in oral evidence that the notes [605-612] are accurate.
- 31.5 Prior to the hearing, AS read the PMP, the MPPP and a large lever arch file of documents which took him almost 4 hours to read. He also spoke to HR who had prepared a Case Analysis Submission [598-600]. AS considered that his role was "*to review all the evidence and decide whether, given all the circumstances, it was reasonable for [SD] to issue the final written warning*" [AS w/s 15]. AS was advised by HR that the Claimant had not appealed the first written warning and therefore the focus of the appeal was on the review period following that warning (3-30 November 2016). However, he did read and consider notes of 1-2-1 meetings and email exchanges in which SD had provided feedback as he "*considered they were relevant to whether the Claimant understood what was expected of her*" [AS w/s 17].
- 31.6 The Claimant acknowledged in oral evidence that at the appeal hearing she did not talk about what she had done well or provide any examples.
- 31.7 At the end of the appeal hearing, AS gave the Claimant a further opportunity to add any evidence she wanted him to take into account; she replied "*I don't think so, everything should be there*" [611-612].

- 31.8 AS did not uphold the Claimant's appeal. He concluded that she had been given "a *significant amount of feedback stretching back more than a year*" and that SD "was in a position to be confident, given the steps she had taken, that the Claimant knew what was required of her" [AS w/s 27]. He did not consider that there were any procedural issues which undermined the decision.
- 31.9 On 8 February 2017, AS wrote to the Claimant [621] rejecting her appeal for the reasons set out in the appeal form [618]. There was no further right of appeal.
32. Final review meeting: 6 March 2017
- 32.1 On 19 February 2017, SD wrote to the Claimant [630] inviting her to a final Review Meeting on 27 February 2017 to discuss her performance during the review period. The Claimant was advised of her statutory right to be accompanied and SD enclosed with that letter a "*brief management summary for the period 1st December – 6th January*" [632-634]. The Claimant was advised that although the review period was 1 December 2016 to 6 January 2017, she could also use examples in support of her performance since her return from leave (9-31 January 2017) and that it would be helpful if she could send any examples of improvements since 31 January in advance of the meeting.
- 32.2 The final review meeting eventually took place on 6 March 2017. The Claimant was again accompanied by Ms Hewitt. The Claimant accepted in oral evidence that the notes [651-660] are accurate.
- 32.3 In oral evidence, the Claimant accepted that this was her opportunity to show improved performance
- 32.4 Each area of the Claimant's work and feedback was discussed in detail.
- 32.5 The Claimant having suggested that DM did not agree with SD's assessment of her performance, after the meeting, SD asked DM about this. DM emailed SD on 6 March 2017 [663] to "clarify" his assessment of the Claimant's performance over the review period. He concludes: "*... I have throughout the performance process, been in agreement with [SD's] appraisal of [the Claimant's] performance. In particular I do not think that [the Claimant's] level of initiative, her drafting skills, her project management skills and her ability to deliver at pace are at a level I would expect as a Band C*".
33. Final Decision Meeting: 15 March 2017
- 33.1 On 7 March 2017, SD wrote to the Claimant [672-674] inviting her to a Final Decision Meeting on 15 March 2017. The Claimant was advised of her statutory right to be accompanied. The Claimant was informed that DM agreed with SD's assessment of her work and reminded that this was her final opportunity to state her case and to provide any further information before SD made her decision, which could be dismissal. In oral evidence the Claimant confirmed that she had understood this.
- 33.2 The Final Decision Meeting duly took place on 15 March 2017. The Claimant was accompanied by Ms. Hewitt. In oral evidence, the Claimant said she could not remember if the notes [689-692] are accurate.
- 33.3 The notes record that SD informed the Claimant that "*this was her final opportunity to mention anything that may have impacted on her ability to meet performance expectations*". The Claimant accepts she provided no further evidence about her

performance. She was offered time to provide any further evidence later that day but declined and said she wanted the decision - "*the sooner the better*" [691].

33.4 SD concluded at the meeting that the Claimant should be dismissed and advised her of this decision at the meeting; she subsequently confirmed this in a letter dated 17 March 2017 [693-694]. The Claimant was given thirteen weeks' notice and advised the termination date would be 14 June 2017; she was not required to work during the notice period.

33.5 In oral evidence, SD confirmed there was no discussion about other options at the meeting and said this is because none were available; when she made enquiries about possible Band D alternative position, she was advised by HR that the Claimant could only downgrade within the same division. She asked about other positions in general as the process was going on.

34. Appeal against dismissal: 9 May 2017

34.1 On 2 May 2017 the Claimant formally appealed against her dismissal [802-819].

34.2 The Grounds of Appeal [803] state:

"The decision to dismiss was unfair in that neither the process for managing performance nor the process for managing poor performance was followed; and as a result of this the dismissal was unfair and unreasonable ..."

The Claimant also provided a detailed statement of her grounds of appeal [809] and a schedule of documents A1-25 [957]. The Claimant summarises in her witness statement the reasons why she appealed as follows:

"I felt that the poor performance [process] had been very stressful and that this had led me to perform at under my best. The process should never have been followed. [SD] had never raised the question of my performance informally until August 216. She then gave me no time to improve and issued the first warning at a meeting which did not follow the policy" [C w/s 50].

34.3 EH was appointed to hear the appeal. The Claimant expresses concern about EH's independence given that he knew that the Claimant had lodged a grievance about withdrawal of a job offer (para. 35 below); however, in oral evidence, the Claimant said she had no reason to doubt EH's impartiality.

34.4 Prior to hearing the appeal, HR advised EH that his role was to review SD's decision to dismiss the Claimant and that he should review all the evidence on which that decision was based and "*in particular to assess the evidence of the Claimant's performance, the training and support which had been provided and the fairness of the procedure which had been followed*" [EH w/s 9]. EH was provided with a large case file which included all written notes relating to the case including emails and documents going back almost two years and notes of 1-2-1s. He also read a case analysis document prepared by HR [847-849] but was "*not greatly influenced by the summary on its own*" [EH w/s 10].

34.5 The appeal was heard on 9 May 2017. The Claimant was accompanied by Ms. Hewitt; the notes are in the bundle [832-841]. The Claimant says she felt EH listened to her concerns more than AS.

34.6 After the meeting, EH spoke to SD to ask her about any steps taken to consider the Claimant for other posts with the MoJ. EH says SD told him that she had considered and investigated this "*but there had not been any suitable vacancies so it had not been mentioned at the original dismissal meeting itself*" [EH w/s 13]. He also spoke

to HR about the Claimant's complaint that she did not have a MYR in 2016-2017. HR advised him *"that employees who are under the Managing Poor Performance Policy are not aligned to the MYR process, and a Mid-Year Review was not required as focussed 1-1s occur more frequently under the MPP procedure [856]" [EH w/s 14].* He spent considerable time reviewing the documents.

34.7 EH concluded:

- (i) Three months was a sufficient period for SD as the Claimant's line manager to initially judge the Claimant's performance.
- (ii) With regard to the Claimant's complaint that the process was flawed because evidence had not been prepared and supplied properly for the first meeting, EH considered the material supplied with the invitation letter [40,67], the Claimant's documents submitted to the meeting [78-105] and further material SD provided after the meeting was adjourned [106-185]. He concluded:
"In my view, [SD] had set out expectations quite clearly and given more explanation and steering than I would expect a Band C to need, even an inexperienced one. She had then provided feedback on draft documents. Although further material was supplied after they met on 22 September 2016, [SD] made several attempts to reconvene and complete the meeting, which the Claimant declined. In any event, [SD's] communications stretched back over a period of more than a year before that first formal performance meeting, so I did not consider that her concerns would have come as a surprise to the Claimant" [EH w/s 19].
- (iii) The Claimant struggled with tasks he would have expected a Band C to work with without much detailed supervision.
- (iv) He considered the Claimant's work for PROUD but did not consider that this outweighed *"her significant difficulties with the day-to-day requirements of her policy role" [EH w/s 21]* and said (in verbal evidence) that he considered that "in the round" the Claimant was not achieving her objectives.
- (v) He was satisfied that the Claimant's performance during the review period had been assessed and that regular 1-2-1s took place. He noted that SD had been off work for some of that period during which time the Claimant had reported to DM or TM; he also noted that it included the Christmas/New Year period but this was why the period was extended to five weeks. He accepted that at the end of the period some of the Claimant's tasks had been transferred to other members of staff and as a result *"she did not receive the kind of feedback she had received while she was working on them"* [EH w/s 23].
- (vi) He considered whether SD lacked objectivity. He noted that the Claimant and SD *"had had a couple of difficult meetings, and in one [SD] had noted that she felt the Claimant was being slightly aggressive" [EH w/s 24].* He explored this with the Claimant at the meeting. He concluded that SD *"had been very professional in her written communications and the Claimant had given some very positive feedback for [SD's] own end of year review [121-122]" [EH w/s 24-25].* In verbal evidence he said it was clear the relationship between SD and the Claimant was *"not 100%"* but he had no suspicions that SD was marking the Claimant down.

34.8 EH concluded that the decision to dismiss the Claimant would stand [871-873] and summarises his key reasons for this as follows [EH w/s 26]:

- (i) He was satisfied that the Claimant was aware of the expectations of her grade and had been underperforming for a considerable period before the MPPP process was started. He accepted (in verbal evidence) that a MYR did not take place in 2015/2016 but says it was clear SD raised issues with the Claimant around this time.
- (ii) Although formal agreement on objectives was confirmed later than it should have been, the Claimant had been given clear tasks to complete and provided with sufficient detailed instruction in relation to those tasks. She had not completed them or not completed them to the required standard.
- (iii) The Claimant had been given significant management support, including explanation of the Civil Service competencies, feedback clearly setting out deficiencies in work outputs and signposting to training opportunities.
- (iv) There had been no demonstration of sustained improvement during the MPPP process.
- (v) There were no flaws in the procedure which had disadvantaged the Claimant and she had been given every opportunity to engage in the process and to provide additional evidence.
- (vi) The possibility of alternative posts and/or a re-grade had been explored but no suitable positions were available; however, EH acknowledged that it was “*unfortunate*” that this had not been discussed in the final decision meeting.

34.9 On 15 May 2017, EH wrote to the Claimant [872-873] advising her of his decision not to uphold her appeal and enclosing the notes of the appeal meeting.

34.10 On 16 May 2017, Ms. Hewitt contacted NG (director) by email [883] to complain about EH having had contact with SD before the appeal and SD sharing information about the Claimant’s grievance (para. 35 below). Ms. Hewitt’s email was forwarded to DM who replied on 24 May 2017 [890A-890B]. The Claimant says DM’s account of how EH knew about the grievance is inconsistent with EH’s explanation; the Claimant says she felt “*extremely let down by this*”. EH says he knew about the withdrawal of the job offer because it was mentioned in a letter on the file of evidence [EH w/s 15] and in verbal evidence said he recalled vaguely seeing an email; but in any event he did not take this into account in reaching his decision and denies unconscious bias. I accept this.

35. Withdrawal of alternative internal job offer:

35.1 In November 2016, the Claimant applied for an alternative role (Band C) in the ALB Governance Team. On 11 January 2017, she received a letter confirming completion of pre-employment checks and offered the role. On 23 January 2017, she then received a letter [590] informing her that the offer had been withdrawn due to performance issues, a number of similarities between her current role and the alternative role in terms of skills having been identified. The Claimant accepted in oral evidence that the alternative role required some of the same skills/competencies as her existing job.

35.2 On 22 February 2017, the Claimant lodged a grievance on [635- 637] on the basis the job offer was unconditional and withdrawal was potentially a breach of contract, not in accordance with “departmental policy” and possibly a data protection breach. I have been provided with but not taken to: MOJ Resourcing Policy [999-1021]; Vacancy

- Manager Guide [1022-1077]); Civil Service Recruitment Principles [1111-1127]; and Grievance Policy and guidance [1078 -1110].
- 35.3 On 8 March 2017, Steve Gill was appointed to investigate and on 4 April 2017 prepared an Investigation Report [739-744]. AG was appointed to hear the grievance. Prior to the grievance hearing, HR provided him with a Case Analysis [766-770].
- 35.4 The grievance hearing took place on 24 April 2017. In addition to AG and the Claimant, Ms. Hewitt and a HR case worker attended. AG sent a note of the meeting [787] to Ms. Hewitt on 27 April 2017 [786].
- 35.5 On 25 April 2017, AG did not uphold the Claimant's grievance for the reasons set out in Part C of the grievance form [793 & 919]. He concluded that the actions taken by the ALB team were reasonable and appropriate. He also concluded that there was no breach of the Claimant's terms and conditions or breach of data protection as the exchange of information was appropriate.
- 35.6 The Claimant appealed and JR heard her appeal on 7 June 2017. Ms Hewitt attended as the Claimant's representative. JR did not uphold the appeal on the basis it was reasonable for the ALB Team to withdraw the offer once they were aware of the performance issues although he also acknowledged that applicants are not required to declare whether they are currently under poor performance procedures and the Claimant was not asked about this during the selection process. He recorded his reasons in Part F of the grievance form [925]

The Law

36. Section 94 ERA

An employee has the right not to be unfairly dismissed by his or her employer

37. Section 98 (1) ERA:

37.1 In determining 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.

37.2 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, ...
"capability" in relation to an employee means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

38. Section 98(4) ERA:

38.1 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 reasons 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.

38.2. The starting point should always be the words of section 98(4) themselves and in applying the section the Tribunal must decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted. The Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. In many (though not all) cases there is a band of reasonable responses within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine, in the particular circumstances of each case, whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

38.3 **Alidair v Taylor [1978] ICR 445**: the Court of Appeal said that the test of a fair capability dismissal (aside from procedure) has two elements:

(a) Does the employer honestly believe the employee is incompetent or unsuitable for the job?

(b) Are the grounds for that belief reasonable?

A Tribunal has to decide whether there was sufficient material in front of the employer which satisfied him of the employee's competence or unsuitability and for which it was reasonable to dismiss.

However, it is not the Tribunal's function to substitute its own view of the employee's competence for that of the employer.

"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 and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent." [Lord Denning]

Where the nature of the job is such that it is difficult to produce clear evidence of incompetence, considerable weight may be attached to the evidence of the views of the employee's managers about the incompetence of the employee providing those views are honestly held. **Cook v Thomas Linnell & Sons Ltd [1977] IRLR 132**

38.4 **James v Waltham Holy Cross UDC [1973] ICR**: An employer should be slow to dismiss an employee for incapability without first telling the employee of the respects in which he was failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance. In other words, there should be:

(a) Proper investigation/appraisal of the employee's performance and identification of the problem;

(b) Warning of the consequences of failing to improve; and

(c) A reasonable chance to improve.

38.5 An employer will not be expected to create a new post for an employee but it may be unreasonable not to investigate alternative employment as an alternative to dismissal depending on the size and administrative resources of the undertaking. However, the correct test is not whether a reasonable employer would have considered alternative

employment/demotion rather than dismissal, but whether dismissal fell within the range of options available to a reasonable employer in the circumstances (**Bevan Harris Ltd (t/a The Clyde Leather Co) v Gair [1981] IRLR 520**).

38.6 The **ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009** (“the ACAS Code”) sets out basic principles of fairness the tribunal may take into account when assessing the reasonableness of a dismissal on the grounds of capability (S. **200 TULR(C)A 1992**).

39. Remedies

39.1 Reinstatement and re-engagement

- (i) Reinstatement under s.113A ERA is the first remedy a tribunal should consider and if it decides that reinstatement is not a suitable remedy, it should go on to consider the alternative remedy of re-engagement (s.116(1) and (2)). At the hearing before me, the Claimant told me she was seeking re-engagement but not reinstatement.
- (ii) Re-engagement must be on terms which are, so far as is reasonably practicable, as favourable as an order for re-instatement, in employment comparable to that from which the employee was dismissed or other suitable employment.

39.2 Compensation

- (i) In addition to a basic award (**section 119 ERA**), **section 123(1) ERA** provides for a compensatory award: “... *the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*”.
- (ii) The amount of any basic award and compensatory award may be reduced if the Tribunal considers that any conduct of the complainant before the dismissal contributed to the dismissal (**section 122(2) and 123(6) ERA**).
- (iii). Mitigation:
Section 123(4) ERA requires a claimant to mitigate their loss and a claimant is expected to explain to the tribunal what actions they have taken by way of mitigation.
- (iv) Polkey:
Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted and in such cases the full compensatory award should be made. In others, the tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the tribunal must make a percentage assessment of the likelihood that the employee would have been retained.
- (v) ACAS Code:
Compensation may be subject to an uplift of up to 25% if the employer has unreasonably failed to comply with the ACAS Code (s 2017A **TULR(C)A 1992**).

Submissions

40. Respondent's submissions

- 40.1 The Respondent relies on capability as the reason for the Claimant's dismissal, which is a potentially fair reason (s98(1) ERA). The Claimant has not suggested an ulterior motive, only that incapability has not been made out.
- 40.2 The Respondent had an honest belief in the Claimant's underperformance and that belief was based on reasonable grounds:-
- (i) The Claimant received "Must Improve" ratings in 2013/2014 and 2014/2015.
 - (ii) 2015/2016: SD was trying to help the Claimant to meet her objectives and provided feedback; regular 1-2-1s took place; the Claimant herself said on 13 April 2016 [122] that SD had given constructive feedback with examples. The Claimant received a "Must Improve" rating again in 2015/2016 [45]. SD gave the Claimant guidance on what needed to be done in order to improve [65].
 - (iii) 2016/2017: The Claimant continued to receive informal feedback e.g. on 22 July 2016 [126] when the Claimant was referred to online resources. SD gave input into the Claimant objectives on 16 June 2016 [123]. The Claimant had the opportunity to work with two mentors.
- 40.3 The procedure followed was fair:
- (i) When the formal MPPP was started, the Claimant was invited to a meeting and given the notes of previous meetings.
 - (ii) On 22 September 2016, the meeting was adjourned to give SD the chance to provide the Claimant with evidence regarding her performance. It is accepted that the Claimant was then off sick around the end of September/beginning of October 2016 but the Respondent says she did not engage with the process and although she was given further time, she had no comments. The Claimant did not take a proactive approach to demonstrating how her performance had improved but rather challenged SD's management and focussed on SD's allegation that the Claimant had behaved aggressively on one occasion.
 - (iii) Feedback continued after the process had started (e.g. 264 & 394).
 - (iv) It was reasonable to give the Claimant a Final Written Warning as she had failed to improve her performance.
 - (v) The final review period was extended to allow her more time to give examples of improvements in her performance and prior to the final review meeting, she was given a letter dated 19 February 2017 [630] with documents attached [632] setting out examples of the problems and the improvements required. At the final meeting on 15 March 2017, the Claimant was asked if she wanted to provide further evidence regarding her performance and declined. There was no attempt by the Claimant to demonstrate improved performance.
 - (vi) The appeal process was fair.
 - (vii) With regard to other possible jobs within the MoJ, SD considered this but there was no option for a managed move and there were no Band D positions available. SD had supported the Claimant's application to join the ALB team but it was reasonable for the Respondent to withdraw that offer given the similar competencies required.
- 40.4 If the Claimant is successful, **Polkey** should apply and there should be 100% reduction to any award given the Claimant's failure to engage with the process

properly and her failure to demonstrate that her performance would have improved. The Respondent does not plead or make any submissions regarding contributory fault. With regard to the ACAS code, the Respondent complied but the Claimant failed to engage with the process; Ms. Carse says this a “neutral submission”

41. Claimant’s submissions

- 41.1 With regard to Ms. Carse submission that the Claimant failed to provide evidence to demonstrate that her performance had improved, the Claimant was unrepresented at the start of the process and there is no guidance on the MoJ intranet; the only documents available to the Claimant were the policies. The policy says specific evidence must be provided at the meetings but the letter inviting the Claimant to the meeting set out general issues. People do not expect to go armed with evidence. Specific areas/examples were “not there” to justify the warnings. The Respondent provided no evidence of the Claimant’s shortcomings at the first meeting; then after the meeting, the Respondent provide and overview/summary but not all of these issues had been flagged up at the meeting.
- 41.2 There is evidence of “*many, many 1-2-1s*” but these tend to be a list of discussions focussing on action going forward with no indication of how the Claimant’s performance fell short. There were no clear guidelines against which the Claimant was assessed.
- 41.3 The “Must Improve” rating at the MYR 2015/2016 was determined by a panel without an overview of the Claimant’s work. The Claimant had an unblemished record until she went into the Legal Aid department. It is accepted that JMcM had given the Claimant three previous “Must Improve” ratings but then this was raised to “Good” when the Claimant’s performance reached an acceptable level. The “Must Improve” rating for the EYR 2015/2016 was not provided until 17 August 2016 – 4.5 months after the end of the reporting year. The Claimant was not then given a development plan to pick up the issues.
- 41.4 EH’s appeal decision was based on his assumptions about what SD did and policy was not followed with regard to the scope of the appeal.
- 41.5 The Claimant applied for an alternative role in 2016 but SD said she could not be released due to resourcing issues but she is inconsistent on this point [104]. IN November/December 2016, the Claimant applied for and was offered an alternative position but this was withdrawn when information was sought regarding her capability; the Claimant then followed the grievance procedure but was unsuccessful.
- 41.6 The Claimant made four complaints about SD’s conduct but her complaints were not investigated.
- 41.7 Failure to follow policy has made the dismissal unfair.
- 41.8 The Respondent failed to follow the ACAS code by failing to provide specific examples of alleged poor performance at the formal meetings.
- 41.9 With regard to Polkey, Ms. Hewitt submits that it would have been sensible to move the Claimant to an alternative position with a trial period although she accepts that the Claimant has not provided evidence of any vacancies.

Conclusions

42. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions.
43. The Respondent has shown that the reason for the Claimant's dismissal was a potentially fair reason, specifically her capability (s98(1) ERA). The Claimant has not suggested or provided evidence that her dismissal was for any other reason.
44. I have therefore gone on to consider whether the Respondent acted reasonably in all the circumstances in dismissing the Claimant (s98(4) ERA) having reminded myself that I must not substitute my own decision as to what was the right course to adopt for that of the Respondent; I must determine whether the decision to dismiss and procedure lay within the range of conduct which a reasonable employer could have adopted.
45. The Claimant was sufficiently aware of what was required of her:
- 45.1 In general terms, what was expected of her was set out in various documents (para 10 above).
- 45.2 With regard to her specific duties, the Claimant was responsible for drafting her own objectives, she was (or should have been) sufficiently aware of what was required of her:
- (i) Whilst in 2015, the Claimant's objectives were still not finalised, SD gave the Claimant advice on what was required of her including updating the team's briefing, "lines to take", completing a list of DV protection orders and gave her feedback on these tasks and in general the need to increase her pace, improve her drafting skills and take more ownership of tasks. She was therefore sufficiently clear as to what was required of her as evidenced by her confirmation that the email to her from SD dated 2 November 2015 [110-111] "*covered all the points*" [110-111].
- (ii) In 2016, the Claimant also understood what was required of her as evidenced by the Claimant's email to SD in January 2016 [119-120] and para. 15 of her witness statement (para. 19.2 above). In April 2016, the Claimant emailed SD [121-122] with feedback on SD's performance for SD's own EYR and stated "*We have discussed and set objectives for the week ahead prioritising work as necessary and where appropriate, you have suggested solutions to foster long-term success of my work, for example by providing specific objectives to improve/build skills*". In oral evidence, the Claimant agreed that at that meeting she and SD "*met and discussed things honestly*" and that in general at 1-2-1s SD had given her constructive feedback and set objectives.
- (iii) On 21 December 2017, SD emailed the Claimant with a draft planning document showing the activities that the Claimant was working on [468-471]. This was then discussed later that day at a meeting (by telephone) with SD, the Claimant and TB; SD followed up with a lengthy email the same day [472-473] and the Claimant accepts that this email made it clear what she was currently working on.

46. SD carried out a careful appraisal of the Claimant's performance prior to instigating the MPPP in August 2016; by this point:-
- 46.1 Regular 1-2-1 weekly meetings had taken place between SD and the Claimant for more than a year and the Claimant agrees that, in general at 1-2-1s, SD gave her constructive feedback and set objectives and there were frequent exchanges of emails regarding objectives and performance.
- 46.2 The Claimant had received "Must Improve" ratings at the MYR and EYR 2015/2016. She says this was unfair but did not challenge this either under the PPM policy or by lodging a grievance.
- 46.3 The Claimant had completed a self-assessment of her strengths and weaknesses [117] showing three areas for improvement: "Changing and Improving"; Making Effective Decisions"; and "Managing a Quality Service" [C w/s 14].
- 46.4 In January 2016, SD and the Claimant had discussed the Claimant's Development Plan and on 9 February 2016, SD held a "performance discussion" with her; the notes [40] record that SD "*provided examples to clarify concerns*" and the Claimant has agreed that these notes are accurate.
47. SD continued to appraise the Claimant's performance:
- 47.1 Prior to and at the first formal PPM on 22 September 2016 her performance was appraised following which she was ultimately given a first written warning on 2 November 2016
- 47.2 Prior to and at the second formal PPM on 30 November 2016 her performance was carefully appraised:
- (i) During the first review period of 3 to 30 November 2016, regular 1-2-1 meetings with SD continued together with ad hoc support from SD and occasionally DM. Various emails were exchanged which show that the Claimant's work and action required were discussed. On 25 November 2016 DM expressed in an email to SD his frustration with the Claimant [285] and said he was "*dumbstruck*" by the way the Claimant had dealt with an urgent request to draft a PQ response.
- (ii) At the second formal PPM on 30 November 2016, she was given the opportunity to show improvement in her performance but did not do so. I do not accept that this was because she was unaware of how she was required to improve.
- 47.3 The Claimant's performance was then appraised during the second (final) review period of 1 December 2016 to 27 February 2017. It is regrettable that SD had two periods of absence in this time which meant the Claimant effectively had 3 managers. I also accept that her performance was not appraised from 9 January onwards as she was on annual leave 9 to 31 January 2017 and on her return she was under different management. However, I do not accept her claim that there was no longer any interest in her performance during this period as the documentary evidence shows that there was considerable interaction with SD, DM and TB during this period (para. 29 above) and the degree of appraisal during this period fell within the range of reasonable responses of a reasonable employer.
- 47.4 The Claimant's performance was again appraised at the final review meeting on 6 March 2017; the notes show that the Claimant's work and feedback was discussed. DM then emailed SD on 6 March 2017 [663] to say that he did not "*think that [the*

Claimant's] *level of initiative, her drafting skills, her project management skills and her ability to deliver at pace are at a level I would expect as a Band C*".

- 47.5 Therefore by the time SD took the decision to dismiss, SD had adequately appraised the Claimant's performance on a consistent basis for a period of about 21 months during which time she had provided frequent, timely and sufficiently clear feedback. I place no significance on the lack of an Individual Stress Assessment as the Claimant agreed on 16 November 2016 that she would complete an Individual Stress Assessment; it was therefore incumbent on her to pursue the Individual Stress Assessment and she elected not to do so; this was not the Respondent's failing..
48. In view of the above, I have no hesitation in concluding that SD's views of the Claimant's ability to do her job were honestly held and based on reasonable grounds. I do not accept the Claimant's contention that that SD's judgment was clouded by her view that the Claimant was aggressive, sarcastic and had changed her demeanour to SD. There was ample objective material before SD to justify SD's view of the Claimant's abilities.
49. The procedure followed, whilst not perfect in every respect, was not so flawed as to render the dismissal unfair based on the objective standards of a reasonable employer in these particular circumstances and overall fell within the range of reasonable responses of a reasonable employer:
- 49.1 The Claimant accepts that SD was obliged to instigate the MPPP in August 2016. The Claimant says the Respondent failed to carry out a MYR review for the year 2016/2017 but I accept that this was unnecessary having been superseded by the MPPP process.
- 49.2 First PPM :22 September 2016:
- (i) The Claimant was advised beforehand [73] of matters to be discussed at the first PPM on 22 September 2016; she was encouraged to prepare; she was advised of her right to be accompanied; she was provided with a copy of the MPPP and notes of 1-2-1 meetings. The Claimant sent in documents she wished to rely on [78-105].
 - (ii) In oral evidence, the Claimant accepted she did not put forward her case about her performance at that meeting.
 - (iii) SD adjourned the meeting and the following day, SD provided the Claimant with detailed evidence of feedback previously given. The Claimant accepted in oral evidence that by doing so, SD had provided her with evidence of her performance concerns. SD tried to reconvene the meeting but the Claimant declined to attend. SD gave the Claimant further opportunities to provide any relevant information but the Claimant said she did not have any further comments and did not ask for further time. SD then issued the final written warning on 2 November 2016.
- 49.3 First written warning: 2 November 2016 [224-225]
This explains: why the warning was being given; about the review period and the review meeting on 30 November 2016; and advises the Claimant of her right of appeal. The Claimant in oral evidence accepted that this letter complies with the provisions of the MPPP [3.1 1135]. The Claimant did not appeal this first warning.
- 49.4 Review period: 3-30 November 2016

As rehearsed above (para. 47.2), the Claimant was appraised and given feedback and guidance during this period. She had been advised in the letter of 2 November 2016 that she was “*expected to take full advantage of this opportunity to improve ... performance*”.

49.5 Second PPM: 30 November 2016:

- (i) The Claimant was advised beforehand [2 November 2016 **224-225**] of matters to be discussed; she was advised of her right to be accompanied; she was provided with SoPEs.
- (ii) Again, the Claimant did not put forward her case about her performance at that meeting. I do not accept that she failed to do so because SD had not provided details of examples of her alleged poor performance prior to this meeting which limited her ability to prepare; she was fully aware by this stage of the nature of SD’s concerns. I also do not accept on the balance of probabilities that she was disadvantaged by the decision not to allow her to submit evidence after the meeting; she had ample warning and opportunity to submit evidence at the meeting and had failed to adduce evidence at the first PPM; furthermore she subsequently failed to do so at the hearing of her appeal against the final warning issued following this meeting.
- (iii) It is regrettable that the notes of this meeting were not sent to the Claimant until 20 December 2016 due to SD’s absence but again I cannot see any disadvantage to the Claimant. She was present at the meeting when the areas of her work which caused concern and the improvements required were discussed; this is reflected in the notes [311-315] which the Claimant confirmed she agreed with.

49.6 Final warning: 13 December 2016 [317-318]

This explains why the warning was being given; about the final review period; and advises of her right of appeal. In oral evidence the Claimant accepted that she knew what was going to happen next and that she understood from this letter, other meetings and documents the areas of performance that SD was unhappy. I do not accept that she did not understand how to “improve” her “mistakes” in specific areas given the large amount of consistent feedback and guidance.

49.7 Final Review period: 1 December 2016 – 27 February 2017

- (i) As rehearsed above (para. 47.3), the Claimant was appraised and given feedback and guidance during this period. She had been advised in the letter of 13 December 2016 that she was “*expected to take full advantage of this opportunity to improve ... performance*”.
- (ii) The Claimant received a letter on 20 December 2016 [**461-462**] regarding the Final Decision Meeting; the letter makes it clear that at this meeting her performance during the review period would be reviewed again; that this was “*a serious matter that could result in dismissal*”; and that if there was any further information the Claimant wished to provide she would have the opportunity to do so at the meeting and could also provide written details in advance if she wished; she was advised of her right to be accompanied; she was reminded that this was her final opportunity to state her case before SD made a decision.

49.8 Appeal against final warning: 2 February 2017

- (i) The Claimant’s objection to DM hearing her appeal is understandable but this falls away as in fact AS was appointed and in oral evidence, the Claimant said she had no objection to AS conducting the appeal.

- (ii) On 5 January 2017, AS invited the Claimant to an appeal meeting to be held on 1 February 2017 [536]; AS advised her that she had the opportunity to give any further information that may help him to reach a decision and advised her of her statutory right to be accompanied.
- (iii) AS heard the appeal on 2 February 2017. He took care to prepare beforehand and correctly surmised that his role was “*to review all the evidence and decide whether, given all the circumstances, it was reasonable for [SD] to issue the final written warning*” [AS w/s 15]. I do not accept that AS limited the scope of the appeal to the final review period, as he read notes of 1-2-1 meetings and email exchanges in which SD had provided feedback as he “*considered they were relevant to whether the Claimant understood what was expected of her*” [AS w/s 17]. Again, the Claimant did not provide any examples at the appeal hearing to demonstrate improvement in her performance. At the end of the appeal hearing, AS gave the Claimant a further opportunity to add any evidence she wanted him to take into account; she replied “*I don’t think so, everything should be there*” [611-612]. AS concluded that SD’s decision to issue a final written warning had not been unreasonable nor was it contrary to the MPP Policy and did not uphold the Claimant’s appeal.

49.9 Final review meeting: 6 March 2017

- (i) On 19 February 2017, SD wrote to the Claimant [630] inviting her to a final Review Meeting to discuss her performance during the review period; she was advised of her statutory right to be accompanied and SD enclosed with that letter a “*brief management summary for the period 1st December – 6th January*” [632-634].
- (ii) In oral evidence, the Claimant accepted that it was for her to show improved performance and that she could have provided examples up to 27 February 2017. However, she did not do so.
- (iii) Each area of the Claimant’s work and feedback was discussed in detail.
- (iv) After the meeting, DM emailed SD on 6 March 2017 [663] to “clarify” his assessment of the Claimant’s performance over the review period; his response was critical and negative.

49.10 Final Decision Meeting: 15 March 2017

- (i) On 7 March 2017, SD wrote to the Claimant [672-674] inviting her to a Final Decision Meeting on 15 March 2017. The Claimant was advised of her statutory right to be accompanied and reminded that this was her final opportunity to state her case and to provide any further information before SD made her decision, which could be dismissal. In oral evidence the Claimant confirmed that she had understood this.
- (ii) The notes record that SD informed the Claimant that “*this was her final opportunity to mention anything that may have impacted on her ability to meet performance expectations*”. The Claimant accepts she provided no further evidence about her performance. She was offered time to provide any further evidence later that day but declined.

49.11 Appeal against dismissal: 9 May 2017

- (i) On 2 May 2017 the Claimant formally appealed against her dismissal. The Claimant has no objection to EH hearing the appeal.
- (ii) The focus of her appeal was very much on the procedural aspects. EH reviewed all the evidence on which the dismissal decision was based and did not confine his review of the Claimant’s performance to only the final review period.

- (iii) After the meeting, EH spoke to SD about alternative positions and SD said there were no suitable vacancies.
- (iv) EH then spent considerable time reviewing the documents and upheld the decision to dismiss and advised her of this on 15 May 2017.

49.12 In summary, SD raised her concerns with the Claimant promptly and did not unreasonably delay. The Claimant was informed of the basis of the problems; she was told and was aware of the respects in which she was failing to do her job properly and was given a reasonable opportunity to improve her performance and was provided with adequate training and supervision and had the benefit of two mentors. The Claimant was given the opportunity to put her case in response before any decisions were made and the opportunity to be accompanied at the formal meetings. She knew her job was in jeopardy. She was given the opportunity to appeal against any formal decisions made and indeed could have invoked the "disagreement" procedure under the PMP and/or lodged a grievance at any time. The only potential flaw I can identify in the procedure was the limited enquiries into alternative positions and I have factored this in in reaching my overall conclusion (para. 51 below).

50. With regard to the withdrawal of the alternative job offer; the Claimant's dismay at this turn of events is entirely understandable. However, the Respondent's position is also understandable; this is an internal position which required some of the same skills which the Claimant's current position required and which she had been found to be failing to carry out to a satisfactory level. Once this became known, it was a reasonable response for the Respondent to withdraw the offer; there is no evidence to support her contention that she was treated differently to other internal candidates

51. In view of the above, I have concluded that the Claimant's dismissal was fair:

51.1 SD honestly believed the Claimant was incompetent or unsuitable for her job and the grounds for that belief were reasonable. There was sufficient material which satisfied her of the Claimant's competence or unsuitability and for which it was reasonable to dismiss. It is not necessary for the Respondent to prove that the Claimant was in fact incapable or incompetent and given the nature of the Claimant's job I attach considerable weight to the evidence of the views of SD as her line manager.

51.2 The procedure followed fell within the range of reasonable responses of a reasonable employer. Efforts to investigate alternative positions were limited and this must be seen in the context of an employer with around 70,000 employees and considerable administrative resources. Furthermore, the Claimant had 25 years service she had no issues with her performance or conduct for almost 22 years. However there is no evidence that a suitable alternative position was in fact available and there is evidence to show that, on the balance of probabilities, the Claimant would not have been successful in an internal open competition having had an offer withdrawn because of performance issues. I remind myself that the correct test is not whether a reasonable employer would have made further efforts to find alternative employment, but whether dismissal fell within the range of options available to a reasonable employer in the circumstances; it is the Respondent's conduct which must be assessed, not the unfairness or injustice to the Claimant. It is not for the Tribunal to impose its own standards and I fully accept that another employer may well have

made more efforts to find alternative employment; but as I have concluded that the procedure and decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted, the dismissal was fair and the Claimant's claim of unfair dismissal must fail. The Remedy Hearing provisionally listed for 13 November 2018 will be vacated.

Signed by: _____
Employment Judge H. Mason
3 October 2018

Judgment sent to Parties on
4 October 2018
