THE EMPLOYMENT TRIBUNAL

Claimant: Ms Anaar Sajoo

Respondent: Guy's and St Thomas; NHS Foundation Trust

Heard at: **London South (Croydon)**

On: **10, 11 & 12 July 2018**

Before: **Employment Judge John Crosfill**

Representation

Claimant: Mr Leong a Solicitor

Respondent: Mr Young of Counsel

Judgment

1. The Claimant's claim for unfair dismissal is well founded.
2. There will be a further hearing to determine some aspects of remedy.

Reasons

1. The Claimant was employed by the Respondent NHS Trust from 1 November 2004 latterly as a Principle Genetics Counsellor. With effect from 10 November 2016 the Claimant was dismissed. The Respondent says that the reason for the Claimant's dismissal was her failure to meet the standards it required. The Claimant says that that dismissal was unfair.

2. The Claimant presented her ET1 on 19 April 2017. Her claim, as originally formulated, included only a claim of unfair dismissal. A preliminary hearing took

place before Employment Judge Sage on 8 September 2018 which was listed in order to deal with the issue of whether the claim of unfair dismissal was presented within the time limit imposed by Section 111 of the Employment Rights Act 1996. EJ Sage decided that it had not been reasonably practicable to present the claim in time and that it was presented in a reasonable time thereafter. As such the claim of unfair dismissal was allowed to proceed. It is clear from the case management order that a proposal was made to amend the claim to include a claim brought under Section 26 of the Equality Act 2010 alleging harassment related to race. The Claimant is a dual national holding Canadian nationality and is of Indian origin. EJ Sage ordered the Claimant to provide a proposed amended claim and gave the Respondent permission to file a proposed amended response. EJ Sage's order plainly envisaged that any application to amend would be considered at a later date.

3. The Claimant duly prepared a proposed amendment to her claim and the Respondent had responded to it. The allegations of harassment spanned a decade from 2006 to 2016. At the outset of the hearing I identified that the application for permission to amend the claim had not been dealt with. I pointed out that, presumably based on the assumption that the claim for unfair dismissal was the only live claim, the matter had been listed before me sitting alone. Other than in the circumstances set out in Section 4 of the Tribunals Act 1996 a discrimination claim must be heard by a tribunal composed of an employment judge and two members. The parties suggested that were I to allow the amendment then they would consent to me hearing the matter alone. I expressed a view that that course was not lawfully open to me and that even if I had a discretion to sit alone it would not be appropriate to do so on a fact sensitive discrimination case.

4. I invited submissions from both parties on the application to amend. Mr Young opposed the application. He said that the claims of harassment introduced entirely new causes of action. He argued that even if the claims amounted to an 'act extending over a period' the claims were presented substantially outside the time limit imposed by Section 123 of the Equality Act 2010. He suggested that the last date mentioned in the particulars was August 2016. He suggested that there was no basis upon which it would be just and equitable to extend time. There had been allegations of bullying and harassment during the grievance procedure but no mention of harassment related to nationality until the employment terminated.

5. Mr Leong argued that I should take a benign approach to the ET1 as the Claimant had acted as a litigant in person. He said that the Respondent had been aware of the allegations of harassment on the grounds of nationality during the grievance procedure. He suggested that there had simply been a failure to tick the box suggesting discrimination related to race. He said that when considering the balance of hardship, the scales tipped in favour of the Claimant, as the Respondent would suffer no prejudice at all if the amendment was permitted.

6. I read the witness statements before delivering my judgment on the application to amend. It was common ground that the proper approach to an application to amend was that set out in ***Selkent Bus Co Ltd v Moore*** **[1996] ICR 836**. I agree with Mr Young that the harassment claims that the Claimant was seeking to introduce were not found at all in the original ET1 and as such the Claimant was seeking to

introduce new causes of action. This could not be categorised as a clerical error.

7. I had particular regard to the timing of the application. Taking an approach generous to the Claimant the application was first made by the Claimant in September 2017 at the hearing before EJ Sage. All of the facts now relied upon by the Claimant must have been known to her in 2016 as she raised them in her grievance. There was no explanation, or at least no good explanation, why those facts were not included in the ET1.

8. I accept the point made by Mr Young that the last possible date where reference to harassment is made in the particulars provided by the Claimant was August 2016. The ET1 was not presented until 19 April 2017. As such the claims would have been presented later than the primary limitation period of 3 months' even if they had been included in the claim form.

9. The fact that an additional claim would have been 'out of time' is not fatal to any application to amend but it is a matter which I should have regard in the exercise of my discretion. In this case the Claimant would have to avail herself of the 'just and equitable' extension permitted in discrimination claims. That is a veery brouad discretion but a factor in the exercise of that discretion is whether or not any good reason has been shown for the delay. I found that the Claimant had no explanation of why she had not included the claims in her ET1 originally. Again that need not be fatal to an extension of time but it is a matter to be taken into account.

10. I had regard to the particulars given in the proposed amendments. There were no less than 29 alleged instances of harassment spanning a period from March 2006. Some of these allegations were very old indeed and there is a real risk that recollections would have faded or be coloured by more recent events. I considered some, but not all of the allegations, were very vague. For example, allegation 18 referred to cancelling or moving meetings 'between 2009 and 2016'. That had prompted only bare denials from the Respondent.

11. Whilst the matter had been listed for 4 days the inclusion of 29 further claims would inevitably extend the cross examination of the Claimant and of Dr Patch who she said harassed her. There was at the least an increased chance that the matter would go part heard. I took into account that the matter was listed before me siting alone. I do not consider that Section 4 of the Tribunals Act 1996 permitted me to sit alone even with written consent even if it did I considered it would rarely be appropriate, even with the consent of the parties, for an employment judge to sit alone on a fact heavy discrimination case.

12. I had regard to the fact that the Respondent had prepared to meet the harassment claims on a contingency basis. Dr Patch's statement did deal with the allegations although unsurprisingly given the lack of particularity, complained of a lack of context and occasionally resorted to bare denials.

13. Bearing all of the above in mind I considered that to allow a substantial amendment at a late stage of claims which spanned almost a decade was not in the interests of justice. I therefore declined to permit the amendment.

14. I was provided with a bundle which had been agreed between the parties. In the

course of the hearing further documents were added. The parties had agreed between themselves that the Claimant would give evidence first and whilst that would not usually be the case in a claim of unfair dismissal I was content to permit this. I heard evidence from:

14.1. The Claimant on her own behalf; and

14.2. Dr Christine Patch who at all material times was the Consultant Genetic Counsellor and the Claimant's line manager; and

14.3. Dr Sheila Mohammed, a Consultant Clinical Geneticist and the Head of Service for the Genetics Service and the person who took the decision to dismiss the Claimant; and

14.4. Dr Adam Fox who had roles including Deputy Medical Director and was the person who heard the Claimant's appeal against her dismissal.

15. At the conclusion of the evidence I heard submissions from both representatives. Mr Young spoke to some written submissions and Mr Leong gave oral submissions. I shall not set out those submissions in full but have addressed the competing arguments below. One issue that arose in the course of submissions is the extent to which I should determine any 'in principle' issues of remedy and in particular whether I should evaluate the possibility of the Claimant being redeployed into some other role. Mr Young preferred to reserve his position pending any remedies hearing. I have set out below my reasons for agreeing with this course of action.

16. Whilst the matter had been listed for 4 days as I have set out above Mr Leong was uncertain what time he could attend on the last day. When submissions closed on the third day of the hearing I indicated that in the light of that uncertainty and due to a shortage of judges to cover other cases on the Friday I would reserve my decision. I apologise for the length of time it has taken to provide these reasons.

The findings of fact

17. Having heard the evidence, I made the findings of fact set out below.

Background

18. The Claimant holds both British and Canadian nationality. She obtained a BSc from McGill University in Human Genetics before going on to study for an MSc in Genetic Counselling from McGill's Faculty of Experimental Medicine. She started working as a genetic counsellor in the Canadian Health System and worked in Canada as a geneticist for around 10 1/2 years at the Credit Valley Hospital.

19. In 2004 the Claimant moved to the United Kingdom and obtained employment with the Respondent. She initially worked as a full-time specialist Genetic Counsellor. It appears that she made a good start to her employment. In March 2006 she was promoted to the role of Principal Genetic Counsellor. This was a band 8a role and

her promotion involved an increase in pay and an increase in responsibility. Dr Christine Patch was one of three people on the interview panel.

20. The Claimant suggested that when Dr Patch told her that she had got the job she said *'I have grave concerns about you, I would never have hired an American'*. Dr Patch denies that this was said. For the reasons I set out below, I do not accept that Dr Patch expressed any concerns about the Claimant at this stage or expressed any view suggesting that she was adverse to employing Americans. It would be inconsistent with the fact that the Claimant was promoted that any member of the interview panel 'had grave concerns'. Even if they did, it seems even more unlikely that they would express those concerns to the person appointed. The bundle contained a record of some notes taken by Dr Patch during the interview. They show that Dr Patch recognised a number of positive matters and do not in any way suggest that she had any concerns about the appointment. Finally, in reaching this conclusion I have had regard to my findings below that the Claimant, deeply hurt by the criticisms made of her work by Dr Patch (which she does not accept), believes that she has been unfairly singled out for personal reasons. I have no doubt she honestly believes what she says but her memory is distorted by her perception of subsequent events.

21. In the Claimant's role as a Principal Genetic Counsellor she was expected to work autonomously and was accountable for the supervision and training of more junior team members and in particular the band seven Genetic Counsellors. The Claimant's work entailed her assessing patients to establish whether or not they were at a particular risk of contracting a particular condition. Dr Patch said in her witness statement that: *'she was responsible for assessing pathological reports, obtaining and interpreting family history data, ordering and interpreting genetic test results, arranging prenatal diagnostic tests and arranging long-term cancer surveillance (such as colonoscopy or breast cancer screening). Because of the types of patients and our had clinical responsibility for, it was absolutely imperative that all trust processes and procedures were followed to ensure that each patient was monitored or treated in accordance with their needs to ensure correct testing was performed promptly according to the clinical situation'.* I did not understand the Claimant to disagree with that summary of her role. An important feature of the role was the need to take family histories in order to identify any genetic predisposition to any condition. Such histories were recorded using paper records which were then stored in any given patient file. The ability to keep accurate records was essential to the job that the Claimant had to do.

The Capability Policy and Procedure

22. The Respondent, in common with many employers has a formal procedure to deal with performance management. The procedure is entitled 'Capability Policy and Procedure' and appears to have been last updated in 2010. The first page shows that it is a document approved by the Joint Policy Forum. In other words, it was the product of agreement between the management and trade unions.

23. The policy has an informal stage and two formal stages. Where a manager has concerns about the performance of an employee they would ordinarily but not exclusively start informally. The policy suggests that the starting point would be

informal discussions about the perceived shortfall during which the requisite standards would be explained and an action plan discussed, developed and agreed to encourage and facilitate improvement. A realistic timetable should be used and there should be clarity about the appropriate methods of monitoring performance. The date for improvement should be set and should be no longer than 3 months. Consideration should be given to a referral to occupational health. At the end of the review period a meeting should be held to decide whether the performance is now acceptable or whether it is necessary to move to the formal stages.

24. The first formal stage of the policy initially resembles the informal stage. It requires a meeting with the employee with the policy making it clear that there is a right to be accompanied. The manager is required to set out 'as comprehensively as possible' the areas where there is a shortfall in performance. The action plan against which the employee has been evaluated and any difficulties encountered at the informal stages. The policy introduces at this stage the requirement to consider any suitable alternative employment. The meeting should conclude with any new objectives being agreed, timescales for any monitoring being established and a decision being taken on review periods.

25. In common with the informal process regular reviews should take place during the monitoring procedure. Paragraph 8.13 reads as follows:

> *'Where there has not been an improvement in performance and there is no reasonable prospect of one and a suitable alternative role is available, the option to transfer to the alternative role should be discussed with the employee and recorded. This may be a lower grade post.'*

26. At the end of the Stage 1 monitoring procedure a further meeting should take place. If there has been a satisfactory improvement the employee can expect to revert to informal monitoring of their performance. The policy provides that if there is either a lapse within 3 months or if the employee has not made the required improvement then Stage 2 of the procedure will be invoked.

27. Where the employee is invited to a stage 2 meeting then the manager who undertook the first formal stage is expected to present their findings to a more senior manager. The employee will have the right to be accompanied. The policy provides only for outcomes of redeployment, demotion or termination which <u>will</u> be considered. It is however implicit within the policy that the involvement of a more senior manager will include a review of the decision of the original manager as to whether their assessment of the employee's performance was justified. That was certainly the approach of Dr Sheila Mohammed in the present case.

28. Paragraph 9.6 of the policy gives any employee a right to accept demotion if offered by the Stage 2 hearing manager provided that an appropriate vacancy exists. Redeployment is treated distinctly from demotion and is dealt with in paragraph 9.8. (and subsequent paragraphs) that provides:

> *'In cases of redeployment the timescale for finding another post will be no longer than three months. Appropriate assistance in finding a post will also be agreed and explained to the employee. The trust wide redeployment process will apply where there are no suitable alternative vacancies identified for the individual at*

the outcome of the Stage 2 meeting. During the Trust wide redeployment process, suitable vacancies will be brought to the attention of the employee as part of the redeployment search.'

The issues raised in relation to the Claimant's performance

29. In 2008, concerns were raised by her colleagues about the Claimant's performance including, in particular, inadequate documentation produced by her. On 8 August 2008 Dr Patch sent an email to the Claimant with a heading '*Discussion with Sheila re notes'*. The reference to Sheila, was a reference to Dr Mohammed. In that email Dr Patch refers to the being a *'recurring issue'* about notes. She says *'I am worried that you are getting distracted and not fully taking on the responsibilities of your own role. As you know have been a number of occasions where I other people have had concerns'.* She goes on to list the expectations of the band eight post and includes *'Evidence of a high standard of clinical expertise fully complying with standards of record keeping and communication'*. From the evidence I heard it was clear that the concerns were not only those of Dr Patch but of other clinicians within the team. In her witness statement the Claimant categorises the actions of Dr Patch at this time as being *'vague but destructive'*. She suggests that Dr Mohammed has responded to an issue in an unbalanced way. I find that the concerns that were held about the Claimant arose from a genuine belief that she was not performing to a standard commensurate with her senior position. It was not just Dr Patch who had raised these concerns but other members of the team.

30. From 2008 until June 2012 no further performance issues were identified. Dr Patch has suggested that the Claimant was able to *'disguise her performance shortcomings through autonomous working practices'*. On this occasion I think Dr Patch is using the benefit of hindsight. Had the Claimant being significantly underperforming it is difficult to imagine that this would not have come to the attention of her line manager. The inference that I draw is that the Claimant was at least performing to an adequate standard during this time.

31. In June 2012 the Claimant did make a significant error. To her credit she accepts this was a mistake made by her. What happened was that she had sent out correspondence to a patient's family indicating that they were deceased. This appears to have occurred because of an error in record keeping by the Claimant. On 7 June 2012 a Consultant Genetic Councillor Chris Jacobs wrote to Dr Patch setting out her investigation as to what had occurred. The Claimant describes her involvement in this investigation as making her feel as if she was a criminal. Whilst I am sure that this was her perception, objectively it was unsurprising that the Claimant's error led to an investigation to find out what had gone wrong and to ensure that there was no repetition. These events led to a meeting between the Claimant and Dr Patch. The notes of that meeting suggest that the Claimant fully accepted that she had made mistakes and attributed them to her workload and responsibilities. The Response of Dr Patch is recorded as permitting the Claimant to block out appointments to reduce her workload, permitting more flexible working and accessing counselling. A decision was taken to review matters in 6 weeks but to have meetings every 2 weeks to 'see how things are going'. The Claimant suggests that she was given 'no support'. I cannot accept that this was the case.

What is recorded by Dr Patch is a sensible plan to reduce the Claimant's immediate workload and to monitor matters going forward.

32. Dr Patch's actions were being consistent with the Respondent's capability policy's informal stages. What took place at that time was that there had been errors by the Claimant and supervision and support was given to ensure that standards improved. I cannot accept the Claimant's suggestion that this was targeted bullying or harassment. On 15 October 2012 the end of the review period there was a meeting between Dr Patch and the Claimant. The Claimant was offered the opportunity to be accompanied but did not or could not take that up. The Claimant was only given notice of the meeting on the Friday before it took place (the following Monday). Dr Patch drew up a *'Performance Improvement Action Plan'*. The particular focus of that plan was on record keeping. An 8 week monitoring period was proposed. At the end of that period Dr Patch was satisfied that the Claimant's performance was reaching the required standards and this concluded the informal process.

33. There was a further minor incident in June 2013 when a Senior Consultant Adam Shaw suggested that the Claimant had not referred a cancer patient for the correct testing process. Dr Patch conducted a review of the files in the Claimant's room. She listed a number of failures to follow process. These included delay in dealing with correspondence and several instances where notes were not clear. This led to a meeting with the Claimant on 7 June 2013. Dr Patch produced a file note of that meeting which read as follows:

> *'I recognise that Annar is really trying hard to follow systems and make notes more legible and clear with clear action plans. Workload has increased necessitating more efficiencies which she recognises. It is unfortunate that there was a series of events that led me to be concerned. Before her next holiday I would like Anaar to put as many notes back to file as a clinically safe. I also want to make sure that actions and plans are clearly documented in the notes to avoid miscommunication. I will keep a record of this will not be starting any informal capability procedure'*

34. From the approach evidenced by the file note above I find that the Claimant's suggestion that Dr Patch was 'out to get her' is wrong. Dr Patch could at this stage quite reasonably have reverted to the capability procedure but chose not to. She clearly recognised that there had been an increase in workload and on this occasion she was prepared to cut the Claimant some slack. I reject the suggestion made by the Claimant that Dr Patch was bullying or harassing her.

35. In November 2013 two further complaints about the Claimant's performance were received by Dr Patch. The first was from the Histopathology Team and related to incorrectly completed forms. The second suggested that the Claimant had sent an inaccurate letter to a patient and had poor listening skills. On 27 November 2013 the Claimant met with Chris Jacobs to discuss these issues. In respect of the first matter the Claimant accepted that she had not completed the forms correctly. In respect of the letter to the patient Chris Jacobs's notes show that she thought that the Claimant had made errors confusing the medical histories of the patient's mother and father. The Claimant at this time had been to see her GP and was

'signed off with stress' but nevertheless continued to work. The Claimant says that she told Chris Jacob that she was being bullied by Dr Patch and complains that that was not recorded. The notes do record that the Claimant said that she felt 'under scrutiny' which was in fact broadly accurate given the complaints that had been received. Chris Jacob does record that the Claimant was upset and records asking why these problems were arising. The response is recorded as being that the Claimant did not know. I find that the notes appear balanced, I note that they were sent to the Claimant. I conclude that the Claimant did not go any further than saying that she felt 'under scrutiny'.

36. On 27 November 2013 the Claimant met with Dr Patch to discuss the concerns that had been raised. Dr Patch says, and I accept, that she was getting concerned about the Claimant's ability to manage her workload. Dr Patch noted that the inaccurate letter had been written 10 weeks after the consultation and attributed the errors to the Claimant failing to recall exactly what had been said during the consultation. Dr Patch concluded that it was appropriate to return to the capability process and wrote to the HR department seeking guidance. On 28 November 2013 Dr Patch invited the Claimant to a meeting to address concerns about her performance in line with the informal stages of the Respondent's capability procedure. The Claimant was offered the opportunity to bring a companion or trade union representative.

37. The meeting took place on 6 December 2013 and the outcome was recorded letter sent by email on 17 December 2013. In the course of the meeting Dr Patch set out her concerns and proposed a formal action plan. That read as follows:

> *"Objectives:*
>
> *1. To achieve a minimum rating of three against all competencies in the ratings grid attached*
>
> *2. To comply with all departmental policies and protocols including test requests, patient triage and patient management. Any deviation from policies and protocols will need to be justified and accepted as reasonable by the clinical team. The target will be 100% compliance.*
>
> *To be assessed by case review, clinical discussion at team meetings and clinical supervision for which all staff includes monitoring of issues brought to the manager and clinical leads attention."*

38. The Claimant complains that a target of '100% compliance' was unreasonable. I cannot accept that. All the Claimant was being asked to do was follow established protocols and procedures. It is plain from the wording of the objective that there would be some circumstances which might justify a deviation provided that was clinically reasonable. Given the nature of the work I cannot see that it was unreasonable to expect the Claimant only to depart from established protocols where it was reasonable to do so. Attached to those objectives was a matrix setting out the competencies of the role. I find that document to have been quite clear and useful. It explains what is expected. A rating of '3' did not require perfection but simply that the Claimant was meeting the required standards. Again I see nothing wrong with such an approach.

39. In order to assist the Claimant Dr Patch asked Mrs Sally Watts a Lead Genetic Counsellor to mentor the Claimant. The Claimant met Mrs Watts on a number of occasions between December and February 2014. That gave rise to some improvement in the Claimant's record-keeping abilities but both Mrs Watts and Dr Patch remained of the view that improvement was needed. The Claimant considers that that was unreasonable.

40. In January 2014 a decision made by the Claimant on testing for a cancer was reviewed by a Consultant Louise Izatt. She concluded that the Claimant had made an error in triaging the patient and organised an inappropriate test. The Claimant, who acknowledges she made an error, has complained that this matter was reported to Dr Patch rather than support being offered for her. I note that email from Louise Izatt includes the sentence *'I thanked her for bringing it to my attention, let her know I had concerns and wanted to discuss this with those supporting her in best practice at present to ensure we were all working together on this'.* I find that this was a reasonable and sincere attempt to identify the errors that the Claimant was making and to assist her to avoid making them in future. On 30 January 2014 Chris Jacobs sent an email to Dr Patch in which she raised two further minor issues that she had with the Claimant's work.

41. Dr Patch referred the Claimant to the Respondent's Occupational Health service in order to ascertain whether there were any health factors contributing towards the performance issues. The report which was completed in February 2014 confirmed that the Claimant was suffering from symptoms of stress and anxiety and suggested a reduction in workload. The Claimant was told that she should relinquish her mentoring responsibilities in order to reduce her workload in order to concentrate on her own professional development. The Claimant decided not to do that as she particularly enjoyed that part of her work.

42. The Claimant was invited to a first stage meeting under the formal capability procedure. She was informed that she was entitled to be accompanied by a trade union representative or fellow employee. The meeting took place on 21 March 2014 having been rearranged at the Claimant's request. The Claimant attended that meeting accompanied by Ray Thompson a trade union representative from Unite the Union. During the meeting the mentoring by Sally Watts was discussed at length including a report that she had produced. The outcome of that meeting was recorded in a letter dated 27 March 2014. Dr Patch decided that there ought to be a formal monitoring period lasting two months with a formal review meeting to take place at the end. During that period the Claimant will be provided with mentoring from Sally Watts. The outcome letter refers to agreement being reached as to a set of objectives for improvement. I find that it is perhaps overstating it to suggest that there was "agreement" as the Claimant had little choice but to accede. However, the outcome letter fairly notes that the Claimant had made *' efforts to improve her documentation and processes'* and *' had good feedback from the course you are involved in as a clinical lecturer and curriculum adviser'*. I accept that Dr Patch genuinely believed that there was still a need for improvement. She had reasonable grounds for that belief because there were continued complaints about errors made by the Claimant and Sally Watts had not been satisfied that the required standards were met. In the light of that I find it was entirely reasonable to monitor the Claimant for a further two months.

43. At the conclusion of the formal monitoring period there was a further meeting that took place on 3 July 2014. The outcome of that meeting was that Dr Patch expressed herself as being satisfied with the improvement in the Claimant's performance. In an outcome letter dated 8 July 2014 Dr Patch said as follows:

> '*You have had regular mentoring meetings (six in total) with Sally Watts with review of cases and case notes. You have had regular monitoring meetings and myself to review process. In the review. There have been no examples of failure to follow protocols and in the final report from Sally [she] comment[s] upon the marked improvement in record-keeping and file management. Your letters are of a higher standard and Sally also comments that you have listened to feedback and implementing change.*
>
> *I explained that this represented a significant improvement in your work performance which meant that you had met the objectives I had set you.*
>
> *I was very pleased that you achieve this. Your improved work performance is very important in terms of ensuring we can deliver a good service to the Trust. Your efforts in achieving this improvement are appreciated.*
>
> *You will revert to be monitored under the informal stage of the capability procedure for three months. During this time you will maintain a full clinical caseload and be responsible for students and trainees commensurate with your role."*

44. At the conclusion of the informal review period Dr Patch met with the Claimant again and informed her that she had met all of the performance objectives. In the outcome letter dated 21 October 2014 the Claimant was informed of this and told that henceforth her performance would be monitored through the standard performance management review process by use of appraisals. However, she was told that should the required performance not be maintained any further performance management process would recommence at 'Stage I', which is the formal process.

45. Shortly after the completion of the performance management process some further concerns were raised by the Claimant's colleagues about her performance. In this instance Dr Patch decided to take no action other than to discuss these concerns with the Claimant. In June 2015 Dr Patch completed a standard appraisal of the Claimant and gave her an overall score of 3 which suggested that she was an "effective performer". For almost one year after that there was no evidence to suggest that the Claimant's performance was causing any significant concern.

46. In May 2016 a concern about the Claimant's performance was brought to Dr Patch's attention by Alison Lashwood, a Consultant Genetic Counsellor. She complained that the Claimant, who had seen a patient later referred to her clinic, had failed to keep proper notes and records. She recorded that she had had to ask the Claimant to update the notes. In an email to Dr Patch she complained that had the Claimant not been available necessary information would have been incomplete.

47. A further complaint was raised by Dr Deborah Ruddy a Consultant Clinical Geneticist. Dr Ruddy, had seen a cancer patient in her clinic who had been seen by the Claimant. In Dr Ruddy's opinion the normal protocol would have been to refer the patient for testing in the 'BRCA 1 and 2 genes and the TP53 genes. This had not been done. Dr Ruddy raised this at a meeting with the cancer team on 11 May 2016. Dr Patch met with the Claimant on 20 May 2016. The Claimant took exception to the manner in which Dr Ruddy's concerns had been raised in a meeting in front of her colleagues. Dr Patch decided that the issue of how the matter was raised was distinct from whether or not there were real concerns about the Claimant's performance. She decided that the information that she had received did suggest that there were further concerns about the Claimant's performance and that these should be addressed through the formal capability procedure starting at stage I as she had indicated in her letter dated 21 October 2014. In respect of the Claimant's concerns about the manner in which Dr Ruddy had spoken in the clinical meeting Dr Patch suggested that the Claimant's remedy was to invoke the Respondents dignity at work procedure.

48. On 20 May 2016 the Claimant was invited to a formal stage I capability meeting. That meeting took place on 11 June 2016 and the Claimant attended with the assistance of her Trade Union representative Ray Thompson. At the outset of that meeting Dr Patch explained that she had decided to start the performance management process at Stage I because of the previous stage I process and informal ongoing concerns. The notes of that meeting record that the Claimant said that the standards expected of her band 8a post were still not clear to her. The notes of the meeting make it clear that she did accept that there had been some deficiencies in her performance. The notes further record the Claimant being advised that if she had any issues with her colleagues then she should raise them formally. I find that this was a response to the Claimant complaining about the manner in which Dr Ruddy had raised her concerns in front of her colleagues.

49. Dr Patch set out the outcome of that meeting in a letter dated 3 June 2016 she said:

> *' We discussed;*
>
> *My concerns regarding standard of documentation, verbal and written communication and abilities demonstrate effective leadership skills which form part of previous capability procedures and suggest a recurring problem.*
>
> *The specific incident uses evidence for this is a recent case which has been datixed. In this case policies for testing appear not to have been followed and documentation was poor. This represents a failure to maintain the standards which form part of the previous capability procedure. Another case was discussed which concern a prenatal case where the clinician could not follow your notes and had to ask you to update notes in preparation for the clinic.'*

50. Dr Patch once again set out the objectives which she expected to be met within six weeks from the date of her letter. These included standards for documentation and written communications. These are expected to meet the Respondents departmental standards. These were to be monitored by spot checks. The

Claimant's verbal communications were also subject to monitoring and in accordance with a suggestion made by the Claimant herself would be monitored by one of the Consultants. Finally the Claimant was asked to finish a task that she had started designing new leaflets for distribution to patients.

51. A review meeting between the Claimant and Dr Patch took place on 14 June 2016. The Claimant became distressed during the meeting but later sent an email thanking Dr Patch for the meeting. In her reply Dr Patch expresses her sympathy for the Claimant going through what she describes as a '*very difficult process'*. She asked the claimant to look at the objectives she had been sent and raise any queries she had. She records that had offered to review the Claimant's workload but that the Claimant had said that she did not want to do that at this time. She does warn the Claimant that if the objectives are not met the process would progress to the next stage. Dr Patch followed up that e-mail exchange with a reminder to the Claimant to raise any queries she had with the objectives that had been set. There was no response from the Claimant at that stage.

52. During the review period Dr Patch met with the Claimant and reviewed some of her case notes. Dr Patch thought that the documentation that the Claimant was producing continued to be unsatisfactory and pointed this out to the Claimant.

53. On 27 June 2016 a junior genetic counsellor supervised by the Claimant made a complaint about the manner in which the Claimant had conducted an appraisal. On 22 July 2016 Dr Adam Shaw a consultant in clinical genetics and lead for cancer genetics wrote a formal letter of complaint about the Claimant's competence. That letter does not suggest that any particular incident had triggered the complaint. It seems to me, more likely than not, that the timing of this letter is not coincidental and that Dr Shaw was aware that the Claimant's performance was under scrutiny. He is to a degree at least advocating for her dismissal. That said, he raises similar complaints to those raised by others over a number of years and in particular a failure to follow departmental protocols and failures in respect of documentation and record-keeping.

54. On 2 August 2016 Dr Patch conducted the First Formal Review Meeting with the Claimant. At this meeting Dr Patch stated her view that the Claimant was still falling short of the objectives that she had been set. Dr Patch did accept that there had been an improvement in the Claimant's communications with others and had met the standards in that regard. The Claimant did not accept that that was the case. Towards the end of the meeting the Claimant suggested that she had been the subject of bullying. She was not specific and it was not entirely clear who she was accusing of bullying have. Dr Patch is recorded in the notes of the meeting as telling her that bullying is a serious allegation that she should provide evidence of it. At this juncture the Claimant referred back to being shouted at, a reference I understand to be to Dr Ruddy.

55. The Claimant was informed by Dr Patch that she had not met two of the objectives that she had been set (clarity of notes/records and the task of producing leaflets) and that the matter would proceed to a stage 2 capability hearing. Dr Patch decided that she should double check whether there was any health issue which might underlie the performance concerns. She made a further reference to the

Respondent's Occupational Health service. An occupational health report was produced dated 18 August 2016. In her witness statement of Dr Patch quoted from this report saying that *"I have no evidence to suggest any florid physical or psychological illness"*. That is in my view a selective quotation earlier part of the occupational health reports make it plain that the occupational health physician was told by the Claimant that any shortfall in her performance was due to the strain of the job and lack of managerial support and even bullying. The report contains the following paragraph:

> *'It would help me considerably, if I could have precise evidence about [the claimant's] alleged shortcomings, as I could then go through the evidence and look for a potential pattern, that could guide me in the search for potential medical reason behind any shortcomings.'*

56. After Dr Patch had decided that the Claimant would be referred to the Stage II Capability Hearing she decided to visit the Claimant's office when she was not there. She noted approximately 180 sets of notes in piles on boxes some dating back as far as 2014. In her view there is no logic to the way in which the documents had been filed. She told me in evidence that ordinarily notes would simply be updated and then returned to be stored centrally. Whilst some notes might be held in a clinician's office that would be the exception and not the norm. The bundle contained photographs taken of the Claimant's office and these would support Dr Patch's conclusion that the office was disorganised.

57. Dr Patch carried out a review of several sets of notes. Her analysis was found in the bundle. Dr Patch believed that the notes showed poor documentation and mishandled cases. She is particularly critical of the legibility of some of the notes. Whilst it is not for me to substitute my view for that of the employer looking at the notes for myself I would concur with the view that they are extremely difficult to understand. Three files were of particular concern to Dr Patch. These all concerned cancer patients and she asked the Consultant Genetic Counsellor to review them. That review was conducted by Dr Vishakha Tripathi who, having reviewed a selection of the notes came to the conclusion that there were errors which gave rise to a serious risk of clinical mistakes. I accept that Dr Patch's concerns were genuinely held. That said, I find that the visit by Dr Patch to the Claimant's room was partially motivated by patient safety as she suggested but also partially motivated by the fact that Dr Patch knew that the matter was progressing to Stage 2 of the performance management process. She was gathering additional evidence which supported the view she had by then formed that the Claimant was seriously underperforming in her role. What she found confirmed the view that she had already formed.

58. Dr Patch produced a management statement of case in advance of the Stage 2 capability hearing which was to take place on 17 August 2016. That hearing was to be chaired by Dr Sheila Mohammed. The management statement of case produced by Dr Patch set out the history of the performance management of the Claimant and annexed documentation referred to. At the conclusions of the report it included a recommendation that the Claimant was redeployed or dismissed. She said in her witness statement, and I accept, that she had lost all trust and confidence in the ability of the Claimant to practice autonomously.

59. The Claimant has suggested that Dr Patch has bullied her and subjected her to harassment because of her nationality. She has invited me to find that Dr Patch's concerns were not genuine or that she was making a mountain out of a molehill. I have declined to permit the Claimant to bring her 29 separate allegations of harassment as claims under the Equality Act but those suggestions are material to the question of whether Dr Patel's actions during the performance management process and in particular in gathering and presenting the information in her management statement of case were motivated by any animosity towards the Claimant and/or whether any of Dr Patch's actions impeded the Claimant affecting her performance.

60. It is not necessary or proportionate to make findings of fact on each individual allegation of harassment in order to determine whether Dr Patch instigated and pursued the performance management process for improper reasons. Dr Patch expressed herself as surprised and disappointed to be accused of bullying and harassment. She denied that she had engaged in any such conduct. She accepted on one occasion there had been sharp words and acknowledged that the performance management process was difficult for all concerned. I reject entirely the suggestion that Dr Patch was motivated in any way whatsoever by any personal animosity towards the Claimant in conducting the performance management process. My reasons are as follows:

    60.1. Most of the concerns about the Claimant's performance were not raised by Dr Patch but were raised by others as such Dr Patch's actions are reactive and not offensive; and

    60.2. Where Dr Patch asked other professionals and in particular Sally Watts to review and monitor the Claimant's work Dr Patch's concerns were shared by those other professionals; and

    60.3. In the course of each performance management process Dr Patch was willing to make reductions to the Claimant's workload even when that was resisted by the Claimant; and

    60.4. The objectives set were entirely reasonable and clearly spelt out and the Claimant was given a fair opportunity to discuss these; and

    60.5. In 2014, when the Claimant had made some improvement Dr Patch was able to acknowledge that and ended the formal stage 1 of the performance management process; and

    60.6. When further issues were raised in 2014 about the Claimant Dr Patch 'cut her some slack' and gave her time to improve; and

    60.7. The resurrection of the performance management issues in 2016 was again reactive to complaints of other professionals; and

    60.8. The shear volume of files found upon inspecting the Claimant's office called her performance into question. There was a reasonable basis for believing that some of those notes were very difficult to follow. The bundle

contained examples that the Claimant conceded would not have been easily comprehended by a fellow professional; and

60.9. Dr Patch did not solely rely upon her own judgment of the notes found in the Claimant's office but asked Dr Vishakha Tripathi to review them and she shared the same concerns; and

60.10. Dr Patch had accepted that the Claimant had brought her communication skills up to the required standards during the review period which suggests that she was prepared to be fair to the Claimant; and

60.11. Finally, I considered that Dr Patel gave measured evidence and was prepared to make concessions where necessary. In comparing her account of events with that of the Claimant I find that she was the more accurate. That is not to suggest that the Claimant was deliberately misleading me but only to say that the effect of being told that she was not meeting the required standards of her role has encouraged the Claimant to blame external factors rather than to accept the blow to her self-esteem and to a career that she plainly values. The greatest factor in this aspect of my decision was that the Claimant maintained that her performance was not an issue in the face of a large number of contrary views by a diverse range of more senior professionals. Had she made some more realistic concessions I would have been able to place more faith in her recollection of events.

60.12. I would imagine that over the years Dr Patch would have made reference to the Claimant's nationality or training. I have already rejected the suggestion that Dr Patch was adverse to the Claimant's appointment. I find that it is more likely than not that the fact that it fell to Dr Patch to conduct the performance management process has led the Claimant to see normal social interaction at work as something much more sinister.

61. For similar reasons as I set out above I further reject the suggestion that any conduct by Dr Patch interfered in any significant way with the ability of the Claimant to do her job to the required standard. In particular, I am not satisfied that there was any bullying. I consider that both Dr Mohamed (insofar as it was raised directly) and Dr Fox on the appeal were entitled to reject the Claimant's account of being bullied the Claimant had brought no prior complain until the terminal stages of the capability procedure that is a matter that they could quite properly have regard. In fairness to the Claimant I would accept that this is her honest perception, but one formed through a lack of understanding about the genuine nature of the concerns that had been raised.

62. The Stage 2 Capability Hearing took place on 17 August 2016. The Claimant was accompanied by her trade union representative, Ray Thompson. The Claimant had been warned that one possible outcome of the hearing was her dismissal. There was not a complete minute of that meeting available. The meeting had been recorded only a partial transcript existed. The bundle also included handwritten minutes but they were also incomplete. There was no dispute that after introductions at which the purpose of the meeting was explained Dr Patch went through her management statement of case. The Claimant was then permitted to

ask questions of Dr Patch and to challenge her evidence. In the course of the meeting the Claimant suggested:

62.1. that any shortcomings were due to an excessive workload;

62.2. That it was unfair in 2016 to commence the performance management process at the formal stage 1;

62.3. that the performance objectives were unclear;

62.4. that there had been a failure to follow the advice in the recent Occupational Health Report and conduct a stress risk assessment.

63. Dr Mohammed decided that there was no alternative but to dismiss the Claimant. She considered that the Claimant had been the subject performance management for a considerable time but despite that she had failed to meet the required standards consistently. She considered that role occupied by the Claimant was a senior one which required excellent management and clinical skills together with an ability to work autonomously lead plan and manage conflict. She did not believe the Claimant was able to show that she could do that. She took into account the clinical concerns that have been raised. She placed particular emphasis on the views of Dr Adam Shaw and the failings that he had noted. She was also concerned by the review carried out by Dr Patch of the clinical notes found in the Claimant's office she considered that these not only showed poor documentation but also gave rise to clinical risks. She was particularly concerned that the Claimant did not appreciate the gravity of her errors or that there were any errors at all. She has referred to the Claimant lacking insight.

64. Dr Mohammed did not accept the points made by the Claimant. She did not consider her caseload to be any higher than any other genetic counsellor. She had regard to the reduction in the Claimant's work during the performance management process. She did not consider it unfair to have started the process at a formal stage in 2016 given the past history. She noted that the performance objectives have been given to the Claimant and the Claimant had failed to respond to an invitation to raise any queries. Dr Mohammed rejected the possibility that the performance issues had been caused by workplace conflict. She placed particular weight on the fact that this suggestion had not been raised earlier. Finally, Dr Mohammed considered it important that the Claimant had not shown any insight into the impact of not following departmental protocols or agreed management plans and had no recognition that her documentation was well below standard.

65. Dr Mohammed says, and I accept, that she considered whether there are any similar band 8A roles available. She concluded that there are no resources to create a band 7 post within the genetics department. She came to the conclusion that the Claimant could not work in any role as a geneticist as she believed there was a significant risk to patient safety. Dr Mohammed did not give any consideration to a job outside of the genetics department as it did not occur to her that the Claimant would want to work other than as a geneticist.

66. Dr Mohammed announced her decision that Claimant should be dismissed upon notice at the conclusion of the hearing. The Claimant was not required to work

during her notice period. Dr Mohammed later confirmed that decision in writing and set out her reasons for her conclusions. She informed the Claimant of a right to appeal her decision. Shortly afterwards a report was made to the Claimant's professional body. That remains unresolved. By the time of the meeting Dr Patch had obtained employment elsewhere and her employment with the Respondent terminated shortly afterwards.

67. By an e-mailed letter dated 4 September 2016 the Claimant appealed against her dismissal. Her grounds of appeal were:

    67.1. that Dr Mohammed was not impartial; and

    67.2. that bullying and harassment had led to the initiation of the capability procedure

    67.3. that the capability procedure was not undertaken in good faith in accordance with the ACAS guidelines

    67.4. that there were factual errors in the management case that she had been prevented from discussing

    67.5. that the outcome letter contained factual errors and omissions

    67.6. that the decision to dismiss her was neither fair nor reasonable

    67.7. that the outcome had been reported to her professional registration Board prior to the completion of the trust processes.

68. At the same time as lodging her appeal the Claimant brought a grievance alleging that Dr Patch had bullied her on the grounds of her Canadian nationality.

69. Dr Fox had never met the Claimant before he dealt with her appeal and had no knowledge of the issues in her case. In advance of the appeal hearing both the Claimant and Dr Mohammed prepared written submissions which Dr Fox considered. Those submitted on behalf of management included a response to the appeal by Dr Mohammed and the original management statement of case prepared by Dr Patch. Included within those documents were some photographs of the Claimant's office which did show a vast number of files together with loose documentation.

70. It took some time to schedule the appeal hearing due to clinical commitments of Dr Fox and Dr Mohammed and indeed the Claimant's availability. A hearing initially scheduled for 24 November 2016 did not take place until 16 January 2017. In advance of the appeal the Claimant was provided with the opportunity to access all of the notes referred to in the management statement of case. Whilst she says that she was uncomfortable with how this was handled I find that she given the opportunity to prepare her case in this respect.

71. Dr Fox had read all of the documentation in advance of the appeal. He chaired the hearing but the panel included Robert Cook a General Manager. Dr Fox, following guidance from the HR advisor present invited the Claimant to set out her grounds

of appeal which she did. Dr Mohammad was then able to question her. The process was then reversed. Finally, both parties were asked to sum up their respective positions. The hearing was recorded and the bundle contained a full transcript. That transcript shows that Dr Fox actively participated asking questions of both sides. At the conclusion of the appeal hearing Dr Fox indicated that he would provide his decision within days. Before he did so the Claimant sent him some further documents being mainly testimonials referring to the Claimant's work.

72. The Claimant's appeal was dismissed. Dr Fox's evidence, which I accept, was that:

    72.1. He considered that it had been perfectly appropriate for the Stage 2 meeting to have been conducted by Dr Mohammed. She was Dr Patch's line manager and had not had any direct involvement in the process before that time. He detected no bias or partiality on the part of Dr Mohammed; and

    72.2. He found that the allegations of bullying and harassment made against Dr Patch by the Claimant were not made out. He considered it significant that the Claimant had only raised those allegations at a very late stage in the performance management process. He further noted the accommodations made by Dr Patch during the process including reducing workload.

    72.3. He rejected the suggestion that the performance management process had not been conducted in good faith. He had particular regard to the fact that 9 other clinicians had raised issues with the Claimant's work.

    72.4. He did not consider any of the factual errors said by the Claimant to be contained in the outcome letter to be material.

    72.5. Dr Fox accepted that to a degree the management case included some misunderstanding of the clinical notes that had been reviewed. However, he noted that a number of key procedures had not been adhered to and that there were a large number of files in some disarray. He thought that the Claimant lacked insight into the seriousness of her errors.

    72.6. Dr Fox did not accept that it was improper to draw the issues with the Claimant's performance to the attention of her regulator.

    72.7. He reached the conclusion that given the Claimant's seniority and role it was reasonable to dismiss her. He considered whether demotion into another genetics role would be appropriate but agreed with Dr Mohammed that it would not. He gave no thought whatsoever to a role outside of the genetics department.

73. Dr Fox wrote to the Claimant confirming his decision on 20 January 2017. He informed her that that concluded that internal process.

The legal framework

74. Section 94 of the Employment Rights Act 1996 (hereafter "the ERA 1996") sets out the right of an employee not to be unfairly dismissed by her or his employer.

75. It is for the employee to show that there has been a dismissal. The statutory definition of dismissal for these purposes is set out in section 95 ERA 1996. Here there is no dispute that there was a dismissal.

76. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for "some other substantial reason". "Capability" is a potentially fair reason for dismissal listed in sub-section 98(2) of the ERA 1996.

77. The reason for a dismissal is a matter of fact. The reason for the dismissal of an employee is a set of facts known to the employer, or it may be a set of beliefs held by him, which cause him to dismiss the employee ***Abernethy v Mott Hay and Anderson*** **[1974] IRLR 213.**

78. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

> *'(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> > *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> >
> > *(b) shall be determined in accordance with equity and the substantial merits of the case.'*

79. Where the employer relies upon capability as a reason for the dismissal the person taking the decision to dismiss must believe on reasonable grounds that the employee is incapable or incompetent; proof of actual incapability or incompetence is not required: ***Taylor v Alidair Ltd*** **[1978] IRLR 82**.

80. A dismissal on the ground of incompetence may not be fair unless the standards expected have been made clear, the employee has been warned that they are not meeting those standards: ***Jones v GEC Elliott Automation Ltd*** **[1972] IRLR 111** and that they are given sufficient time and support in order to improve and to meet those standards: ***Tiptools Ltd v Curtis [1973] IRLR 276***. However, each case will be assessed on its own facts and a failure to follow these steps will not always mean that a dismissal is unfair. The seniority of the employee and the nature of the work to be done may be important factors.

81. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself; in many cases there will be a 'range of reasonable responses', so that provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. The range of reasonable responses test applies as

much to any investigation as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**. Where below I refer to 'reasonableness' it is this test that I am referring to.

82. Where an employer has expressly adopted a disciplinary code then a failure to follow the provisions of that code will be a matter that ought to taken into account in assessing whether a dismissal is fair or unfair ***Stoker v Lancashire County Council*** **[1992] IRLR 75**.

83. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

84. The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

85. Where a claim for unfair dismissal is well-founded the Tribunal needs to consider the appropriate remedy following the statutory scheme in Part X Chapter II of the Employment Rights Act 1996.

86. Section 123 provides that where a tribunal make a compensatory award it shall be in an amount that is "just and equitable in all the circumstances". Where the Tribunal conclude that had the Respondent acted fairly the Claimant would or might have been dismissed in any event then the compensation awarded should reflect that finding ***Polkey v A E Dayton Services Ltd*** **[1987] IRLR 503**. The burden of proof is on the Respondent to establish the facts necessary to support such a finding ***Software 2000 Ltd v Andrews*** **[2007] ICR 825**.

Conclusions

87. In reaching the conclusions below I have applied the legal principles above to the facts as I have found them to be above. Where below I make additional findings I do so drawing upon the findings above.

88. The first issue that it is necessary to determine is whether or not the Respondent has shown that the dismissal was for the potentially fair reason of "capability". I am satisfied that the decision to dismiss the Claimant was taken by Dr Mohammed alone. The focus must therefore be on the reasons in her mind when she took that decision. This involves a further finding of fact.

89. It was not a matter of any serious dispute that the fact that Dr Patch had 'performance management issues' with the Claimant was known to Dr Mohammed. It is also correct as the Claimant says that Dr Patch and Dr Mohammed had worked together for a very long time. The Claimant suggests that Dr Patch showed animosity towards her. I ask myself whether it is possible that Dr Patch was able to persuade Dr Mohammed to dismiss the Claimant not because of her performance but simply to accommodate Dr Patch's dislike of the Claimant. I dismiss this

possibility for two reasons. Firstly, I have found that, whatever Dr Patch' personal feelings towards the Claimant, in conducting the performance management process her belief that the Claimant was not meeting standards was not influenced in any way by any personal animosity. Secondly even if that had not been the case I have accepted Dr Mohammed's evidence that it was she and she alone that took the decision to dismiss the Claimant and that she did so because she believed that the Claimant was consistently failing to meet the required standards and was unable to do so.

90. Having accepted that the dismissal was for a potentially fair reason the question then becomes whether or not the dismissal was fair applying the words in section 98(4) of the Employment Rights Act 1996.

91. Any dismissal for reasons of capability will not be fair unless the belief of the person taking the decision to dismiss is based upon reasonable grounds. I remind myself that it is not a question of whether I would reach the same decision as Dr Mohammed but whether there was evidence before her to support her belief that the Claimant had fallen short of the required standards.

92. Dr Mohammed outlined the evidence before her in her witness statement. In respect of the process that had been conducted in 2016 she had a letter from Dr Shaw the Cancer Lead that was robustly critical of the Claimant. She had the review conducted by Dr Vishakha Tripathi. She had the complaint made by Dr Ruddy. She had the assessment and recommendation made by Dr Patch who was amply qualified to comment upon the quality of the Claimant's notes and her ability to follow the Respondent's protocols. She also had her own skills and experience in the same area and was able to form her own view as to whether the Claimant's performance met the required standards. The Claimant did not accept that there was any significant failure to meet the required standards but her opinion was a lone voice in a sea of contrary opinions from qualified sources.

93. I find that there were reasonable grounds for the conclusion that the Claimant's performance was in 2016 significantly below what was expected.

94. As I have set out fairness will ordinarily demand that the employee should have been aware of the standards required. I say ordinarily as it is well established that at more senior levels an employee might be expected to know without being told what might be expected. Whilst it seems to me that clinical record keeping was so fundamental to the Claimant's role that she could not have had any real complaint if standards were not spelt out as a matter of fact it was made quite clear to the Claimant what was required. In respect of her clinical notes the Claimant was mentored by Sally Watts and was told what was expected. In 2016 Dr Patch also reviewed the Claimant's notes and gave feedback upon them. In respect of the other aspects of the Claimant's performance I find that the objectives that were set for the Claimant were entirely clear. The Claimant had an opportunity to comment upon the final set of objectives but did not do so. I consider that the Respondent acted reasonably in its approach to setting standards and relaying them to the Claimant.

95. I went on to consider whether the Claimant had been given sufficient support and

a reasonable time to improve. Again I must not substitute my own view but must consider whether the Respondent acted reasonably. I have found above that insofar as the Claimant suggested that her workload was creating issues with the quality of her work Dr Patch offered to reduce that workload particularly during times when the Claimant was monitored. In terms of support I have found that the Claimant had been offered assistance and mentoring by Sally Watts and by Dr Patch. I have rejected the suggestion that the Claimant's quality of work was adversely affected by bullying by Dr Patch. I consider that the Claimant was given reasonable support during the process.

96. I note that the time given to the Claimant to improve her performance was, at each stage of the procedure, in line with the agreed performance management process. I would accept that in a clinical setting it is not unreasonable to expect shortfalls in performance to be promptly addressed. The Claimant was warned about concerns about her performance off and on from 2013. Dr Mohammed said that she had particular regard to the length of time during which the Claimant's performance was under review both formally and informally. I consider that she was entitled to have regard to that. I find that the approach of the Respondent in respect of this matter was comfortably within the band of reasonable responses.

97. The Claimant has raised specific criticisms of the fairness of her dismissal and for completeness I will deal the principle points although I shall refer to my key conclusions above when doing so.

98. The Claimant says that it was unfair to start the capability procedure at 'Stage 1' in 2016 rather than recommence the procedure at the informal stage. Her point is that at the conclusion of the 2014 process she was deemed to be performing to a satisfactory standard. Whilst that is correct she was expressly informed that were there any further lapse in her performance then any further performance management would commence at the formal stages. I consider that the decision taken by Dr Patch to recommence the performance management at the formal stage was reasonable and was entirely consistent with the Capability Policy. The concerns about the Claimant's performance were clinical concerns and it could reasonably have been thought that these were serious. Paragraph 7.1 of the Capability Policy says:

> *"In handling unacceptable performance the informal and formal stages of this procedure will normally be progressed through. However, depending on the circumstances it may be necessary to progress straight to the first or second stages ….. This will only occur where the unacceptable performance is likely to have serious consequences…"*

99. The Claimant has complained that any failures on her part were contributed to by an overload of work. She gave evidence, which I accept, that she was working long hours. The Respondent does not dispute that workloads had increased. Its point is that others were in the same position and were able to maintain the required standards. Working long hours cannot automatically be equated with an excessive workload. Working long hours can also indicate inefficiency. The Claimant raised this point before Dr Mohammed who considered and rejected it. She had a good knowledge of the demands upon the Claimant and others and was well placed to

evaluate this element of mitigation. There was a reasonable basis for her to conclude that there was nothing in the Claimant's workload that would excuse her standard of work.

100. The Claimant objected to Dr Mohammed being appointed to hear the Stage 2 proceedings. She suggested that she would be biased by reason of her long association with Dr Patch. I find that it was entirely reasonable to appoint Dr Mohammed to take the decision at stage 2 of the procedure. She was Dr Patch's manager. It is unsurprising that there was a good working relationship between Dr Patch and Dr Mohammed but I am satisfied that it did not go beyond that. As I have found above the decision to dismiss the Claimant was taken by Dr Mohammed alone. I am satisfied that had she disagreed with the assessment of Dr Patch she would have said so. Even if there had been any bias by Dr Mohammed, which I do not accept, Dr Fox was entirely unbiased and conducted a comprehensive and fair appeal hearing permitting the Claimant to address all of the concerns about her performance.

101. The Claimant suggested that there had been a failure to follow up on the recommendations of the Occupational Health Physician and in particular the recommendation to undertake a stress assessment. I would agree with the Claimant that Dr Mohammed and Dr Patch were wrong to take from the Occupational Health assessment that there was no medical cause for her lack of performance. A view to that effect was stated but it was plainly provisional and there was a request for additional information before a concluded view could be given. The weight to be given to this point is in my view somewhat limited. It was not the Claimant's position during the disciplinary process that she was ill. It was not her position that she had not met the standards required. Even if there had been a underlying cause for the Claimant failing to meet the required standards it would still have been perfectly possible to consider whether the Claimant could continue in her position. That said I accept that Dr Patch and Dr Mohammed did not follow up on the requests of the Occupational Health Physician and take that into account in my overall assessment below.

102. The Claimant in her ET1 suggested that there were breaches of the ACAS code of practice. I do not agree. Each formal meeting was preceded by an invitation letter explaining the purpose of the meeting. The Claimant was told what the issues with her performance were. She was given the right to be accompanied. After she was dismissed she was afforded a right of appeal.

103. The Claimant correctly says that the Respondent's policy provides that professional regulators will not be informed of performance issues until the conclusion of the internal process. The most natural interpretation of that is that no report would be made until after any appeal. I must ask whether the dismissal was unfair and not whether there was any general unfairness. It seems to me that the report to the Claimant's regulator had no bearing on the fairness of the dismissal. The report was made only after the decision to dismiss was taken. Dr Fox did not dismiss the Claimant's appeal because there was an extant report. He did so because he agreed with Dr Mohammed that the Claimant's performance issues meant that she should be dismissed. As such there was nothing about the breach of policy that impacted upon the decision to dismiss. I would question whether it

would ever be appropriate whether in a contract or policy to fetter the right of any person to report concerns to a regulator.

104. I accept that the Claimant was not afforded as full an opportunity as she would have liked to address the concerns about the notes identified by Dr Patch as falling short of the required standards. I further accept, as did Dr Fox that the Claimant was able to give some explanations for some of the errors identified by the time of the appeal. That said I consider that Dr Fox had a reasonable basis for concluding that even assuming in the Claimant's favour that some of the criticisms of her were misplaced there remained a considerable number of issues with her work over a lengthy period of time. I consider that insofar as the Claimant was disadvantaged initially any disadvantage had been remedied by the time of the appeal.

105. In her ET1 the Claimant took the point that the Respondent had failed to follow its own procedure by not considering redeployment as an alternative to dismissal. I have found above that both Dr Mohammed and Dr Fox gave some thought to demoting the Claimant to a clinical role within the genetics department. Thinking about a possibility is by no means as robust as a process as consultation whereby the matter is discussed with the employee concerned. That said, I consider that the conclusions reached by Dr Mohammed and Dr Fox that the Claimant's performance issues showed that she was unable to work in a clinical setting were conclusions based upon evidence and were reasonably open to them. I do not consider that there has been any failure to consider demotion or that the decision was unreasonable.

106. The Capability Policy not only requires the decision makers to consider demotion it also requires consideration of re-deployment. The two are plainly considered to be distinct. Consideration of both is expressed in mandatory terms. That is not to say that it is mandatory to offer redeployment. There might be occasions where the matter was considered and quite properly rejected.

107. As I have found above neither Dr Mohammed nor Dr Fox gave any thought to redeployment. As such there was a failure to follow the Respondent's own policy. The Claimant told me that she would have been open to any options rather than face unemployment. I shall not at this stage make any findings about that. However I do consider that it is always a possibility that a person told that they are incapable of one role might express an interest in another. Dismissal, where there is no suggestion of wilful default, is usually, if not always a last resort. Where there has been a policy designed to minimise the impact of dismissal from a particular post which has been the subject of negotiation and agreement it seems to me that there should have been no departure from that policy without some very good reason.

108. I ask myself whether, the decision to dismiss the Claimant was within a band of reasonable responses. I find almost no fault with the decision to remove the Claimant from her post it was a reasonable response. I make the same finding in respect of the decision that the Claimant would not be demoted. Such minor errors that I have identified in reaching those conclusions would not by themselves mean that these decisions were unfair.

109. That leaves me with the decision to dismiss the Claimant where re-deployment

had not been actively considered. I note that the Claimant was dismissed upon 12 weeks' notice. That is exactly the same as the maximum period during which the Claimant might have been considered for re-deployment. There would have been no additional cost to the Respondent if they had followed their policy. The Redeployment Policy does not require the Respondent to appoint the Claimant to a role for which she is not suitable. I was not shown any disadvantage to the Respondent in offering the Claimant the possibility of redeployment. The Respondent is a large employer and it is at least possible that there would have been some vacancy which was suitable for the Claimant. The obligation on the Respondent under that policy started with notifying the Claimant of any vacancies. The obligations are not onerous.

110. I am acutely aware that I have found many of the actions of the Respondent reasonable. I am aware that the standard to be applied is not one of perfection and I must not substitute my own view for that of the Respondent. The issue is whether, having quite reasonably decided that the Claimant could not be employed in a genetics role, the decision to dismiss her without consideration of redeployment as an option in accordance with an agreed policy fell outside of the band of reasonable responses. I find that it does. I consider that this was more than a minor departure from an agreed policy. Dr Mohammed's assumption that the Claimant would wish to work in genetics was understandable but somewhat inconsistent with her conclusion that the Claimant was unsuitable to such work and the report to the regulatory body. I do not consider it reasonable to assume that the Claimant would not consider some other role if there was one available when the alternative was to be unemployed.

111. I have therefore concluded that the dismissal fell outside the range of reasonable responses and was unfair.

112. I have considered whether there was any culpable or blameworthy conduct by the Claimant that caused or contributed to the dismissal that means that it would be just and equitable to reduce the basic or compensatory awards. Whilst it is a possibility that a failure to meet performance standards is culpable in other cases it will not be the case. In the present case I find that the Claimant always tried her best in the circumstances. I note that on occasions the Claimant could meet performance standards but that she could not consistently do so. I find that she was willing to try but found the monitoring very difficult and ultimately she was unable to meet the standards despite, and perhaps because of working long hours. I do not find any culpable or blameworthy conduct.

113. The issue of the failure to consider redeployment was flagged in the ET1. Despite this I accept that it was a point which moved from backstage to centre stage as the hearing progressed and other points made by the Claimant fell away. Neither party had sought or provided disclosure of vacancy lists during the 12 weeks from the dismissal. The witness statements did not deal with what decision would have been made had redeployment been considered and/or what roles would have been suitable or unsuitable given the Respondent's conclusions about administrative shortcomings. Mr Young asked that he 'keep his powder dry' on any issue arising under Section 123 of the Employment Rights Act 1996. I permitted him to do so anticipating that I did not have all of the evidence I would need to

evaluate the possibility of the Claimant retaining some employment.

114. Unless the matter is capable of settlement there will be a further hearing to deal with remedy and in particular:

114.1. To evaluate the possibility that the Claimant would have been placed in the redeployment pool; and

114.2. To evaluate the possibility that the Claimant would have found some employment; and

114.3. To evaluate how long that employment might have lasted.

114.4. In general to assess any loss the Claimant might have suffered as a consequence of the unfair dismissal.

Employment Judge John Crosfill

Date: 31 October 2018