EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs E Jolly	**v**	Royal Berkshire NHS Foundation Trust

Heard at: Reading **On:** 19, 20, 21, 22 and 23 November 2018 and (in chambers) 7 December 2018

Before: Employment Judge Gumbiti-Zimuto
Members: Miss SP Hughes and Mr J Appleton

Appearances
For the Claimant: Mr M Green of Counsel
For the Respondent: Mr P Wilson of Counsel

JUDGMENT

1. The Claimant's complaints of unfair dismissal, discrimination on the grounds of age, disability discrimination and breach of contract are well founded and succeed.

2. The Claimant was entitled to a notice period of 12 weeks.

3. The Respondent failed to provide the Claimant with a statement of terms and conditions of employment accurately stating the matters required by section 1 of the Employment Rights Act 1996.

4. A hearing to consider remedy shall take place on the **14 October 2019**

REASONS

1. In a claim form presented on 25 May 2017, the Claimant made complaints of unfair dismissal, age discrimination, disability discrimination and breach of contract. The Respondent denied the Claimant's complaints.

2. The issues to be decided in this case are set out in the case management order which was made on 18 January 2018. The Respondent now concedes that the Claimant is a disabled person within the meaning of section 6 of the Equality Act 2010.

3. The Tribunal heard evidence from the Claimant, Mr Brendan Smith, Ms Jennifer Taylor-Woodley, Mr Michael Eastwell and Mr Daniel O'Donnell. We were also provided with a witness statement from Ms Diane Haskey who did not attend to give evidence before us. We were provided with a bundle containing some 650 pages of documents. We made the findings of fact set out below.

4. The Respondent accepts that the Claimant was unfairly dismissed. The Respondent's admission is limited to admitting that the Claimant was dismissed unfairly because she was not given an appeal and therefore the procedure followed was unfair. The Respondent nonetheless says that the dismissal was justified on the grounds of capability and was otherwise not substantively an unfair dismissal.

Facts

5. The Claimant suffers from a heart condition and arthritis. The Respondent accepted that the Claimant was disabled within the meaning of section 6 of the Equality Act 2010 by reason of her heart condition. The Respondent did not contest the Claimant's evidence that her arthritis amounted to a disability as set out in an impact statement dated 4 April 2018. The Tribunal finds that the Claimant is a disabled person within the meaning of section 6 of the Equality Act 2010 because of her heart condition and also because of her arthritis.

6. The Claimant, who was born in 1930, commenced employment with East Berkshire College of Nursing & Midwifery in 1991 when she was 61 years old. She has been continuously employed by entities that became the Royal Berkshire NHS Foundation Trust, the Respondent, throughout the period from 1991 until her dismissal on 22 January 2017.

7. In 2005, the Claimant commenced working for Mr Brendan Smith as a medical secretary. In 2012, the Claimant was provided with a statement of main terms and conditions (p43). This gave the effective start date of her employment as 6 August 2012 and in clause 10 (p46) it stated that no previous employment with any other organisation will be counted as continuous service with the Trust and that the Claimant's period of continuous employment is the effective date of appointment to the post, i.e. 6 August 2012.

8. We were provided with a document which is dated 2 June 1995 (p52) which shows that the Claimant was working in the medical business unit in 1995. There is also a document which is entitled "West Berkshire Health Authority Notification of Staff Appointment/Variation". This document which is dated 18 June 1995 confirms the Claimant's employment in the medical business unit as a relief medical secretary. We were provided with a copy of a letter dated 30 July 2012 (p71) from the Claimant to Frances

Woodruff. In this letter, the Claimant appears to be making an application for a post medical secretary. A sentence of that letter reads as follows:

"Since April 2005 as a bank and NHSP employee, I have filled the post of medical secretary to the consultant breast disease and reconstructive surgeon and I would now like to apply for this to be made permanent."

9. The Claimant provided a CV. The CV sets out her employment with the various entities in the period from 3 January 1991 "to date". The CV was created in 2012. The Claimant gives her employment as full time bank medical secretary, Department of General Surgery – all with the Royal Berkshire and Battle Hospitals and the Royal Berkshire Hospital NHS Foundation Trust from 1991 until 2012.

10. There is also a letter dated 1 August 2012 from Ifeoma Oboko who gives her title as Data Maintenance Team, NHS Professionals Ltd. The relevant parts of that letter read as follows:

"We have received your reference request for the above mentioned medical secretary registered with NHS Professionals. Unfortunately, we are not in a position to comment on their professional and/or clinical ability as we do not work directly with them. We would suggest that you contact the applicant directly for information regarding alternative referees. I can however confirm that Eileen Jolly commenced working flexibly for NHS Professionals on 02/02/2004 and can still book ongoing assignments with NHS Professionals. We are unable to provide any details in relation to sickness or attendance records. Whilst we are pleased to provide this information, it is given on the understanding that it is done without legal responsibility and the exclusion of legal liability on the part of and in respect of NHS Professionals and the author and without legal liability to the subject of it and the recipient."

11. There is an issue between the Claimant and the Respondent as to whether the Claimant has been continuously employed by the Respondent from 1991, or whether her period of continuous employment with the Respondent commenced in 2012. The Respondent relies on the contents of the Claimant's contract of employment. The Claimant however relies on the totality of the evidence and says there was a continuing relationship between herself and the Respondent in the period since 1991 which was one of employment.

12. We have come to the conclusion that the Claimant's period of continuous employment with the Trust was from 1991.

13. Firstly, the Claimant's evidence is that she worked for the Respondent from 1991. Secondly, there is documentary evidence which shows at various times that the Claimant was an employee of the Respondent or its predecessor entity (e.g. Royal Berkshire & Battle Hospitals NHS Trust) prior to 2012. The Claimant's evidence was that she was a bank employee and also registered with NHS Professionals (NHSP) throughout the period

between 2005 and 2012 when the Claimant worked in the same role as medical secretary for Mr Brendan Smith with whom she continued to work after 2012.

14. The evidence does not tell us who, in this period between 2005 and 2012, paid her wages. There is no evidence that there was a written contract between NHSP and the Claimant: there is no evidence as to what the nature of the contract was between the Claimant and NHSP. Indeed, there is no reference to there being a contract between the Claimant and NHSP other than the letter from Ifeoma Oboko which stated that the Claimant was "*working flexibly for NHS Professionals … and can still book ongoing assignments with NHS Professionals*." There is no evidence as to the terms on which the Claimant provided her services to the Respondent. It is agreed between the parties that throughout this period the Claimant was providing her services to the Respondent.

15. There is reference to the bank. However, there is no evidence as to what the nature of the relationship of the Claimant was to the bank and/or the bank to NHSP. The Claimant's uncontested evidence is that the Respondent had a discriminatory policy that anyone over the age of 70 could not have a permanent contract which led to the Claimant being employed on the bank. In the period from 2005 until 2012 the claimant was aged 75 and over. We note that the Employment Equality (Age) Regulations 2006 came into force on 1 October 2006.

16. In June 2016 the Claimant was given a long service award. The Claimant's long service award marks employment over 25 years. The Claimant was invited to a ceremony at which she was given a certificate which referred to her length of service and her age. It was recorded that at the time the Claimant was the oldest member of staff and she was given a pen. This is consistent with the Claimant's employment having commenced in 1991 as opposed to 2012 as suggested by the Respondent.

17. In 2005, the Claimant began working with the consultant, Mr Brendan Smith, as his medical secretary. Mr Smith undertakes breast cancer surgery and non-urgent surgery. Until 2015, he was the only surgeon who did non-urgent work of this nature for the Respondent.

18. In the time that the Claimant worked for Mr Smith, from 2005 until 2017, Mr Smith describes the Claimant's work as reliable and meticulous. Part of the way that the Claimant and Mr Smith worked together involved the Claimant keeping a list of those people who were waiting for non-urgent surgery. The Claimant and Mr Smith could refer to this document. Mr Smith referred to the list as the non-urgent surgery list. One use for the list was when patients rang in to check they were on the list for surgery, the Claimant could confirm that they were on the list and for what procedure. The Claimant would be able to check their contact details were correctly recorded on the list.

19. This list is to be distinguished from the hospital waiting list. The evidence of Mr Smith was clear: an arrangement was made between Mr Smith and the then Directorate Manager for Abdominal Surgery (FW) that she would manage his non-urgent surgery list. It was agreed between Mr Smith and FW that she would create and manage the list, and she would let Mr Smith know when the patients were getting close to a breach date. A breach date arises when a patient has been waiting 52 weeks from their initial referral for surgery.

20. This system, whereby FW managed Mr Smith's list, continued until FW left employment with the Trust in about 2015. It was Mr Smith's evidence that he did not consider that the Claimant had any responsibility for the non-urgent surgery list. Mr Smith stated that he did not believe that the Claimant believed that she had any responsibility for it. Mr Smith's evidence was that the paper list of patients referred to in respect of his non-urgent surgery list "is a complete red herring" because it was nothing to do with a system that failed or caused breaches of the 52-week rule for surgery. That list was simply a carry-over from the way that Mr Smith and the Claimant used to work, and it was to help the Claimant manage calls in what he described as a chaotic situation.

21. The Claimant confirms that from 2012, FW assisted Mr Smith with the "long waiters". They were managed by Mr Smith and FW. The claimant pointed out that FW or a member of her team would ask her for a copy of her list every so often and the Claimant would send it to them. It was FW who would alert Mr Smith to any patients that were about to breach the 52-week limit and he would put them on his normal cancer surgery theatre list to avoid breaching them.

22. The Claimant states that this process did not change with the introduction of EPR (Electronic Patient Record). In 2015 the Claimant was informed that her role had changed from medical secretary to patient pathway co-ordinator. She was required to attend waiting list training which was given by a colleague. The session was quite short because the trainer could not tell the trainees "how patients go from one part of the system to another". The training had to be re-scheduled. However, that training was never re-scheduled and did not take place.

23. It was in 2015 at about the time that EPR was introduced that FW left the Trust. From 1 June 2015 the Claimant started to work in the role of a patient pathway co-ordinator.

24. In 2015, the Trust redesigned its administrative, clerical processes and structures that supported the patient pathway. The patient pathway is the Trust's way of describing the route that a patient takes from first contact with the NHS – usually with the GP – to completion of their treatment. Patients should wait no longer than 18 weeks from GP referral to treatment.

25. In 2016 Mr Daniel O'Donnell became the patient pathway manager and Mr Michael Eastwell became the deputy patient pathway manager.

26. On 8 September 2016, the Claimant went into work. She was approached by a colleague who told her that she was required to see the Director of Operations. The Claimant met with the Director of Operations accompanied by a colleague. The Claimant was told that she was being investigated. She was told that she was being placed on special leave. The Claimant was told to collect her things and leave the premises.

27. The Claimant describes the way this happened as humiliating; she describes feeling degraded; and she recalls a colleague saying: *"Eileen won't be coming back"*. The Claimant was escorted off the premises and accompanied by a colleague while she waited for a taxi. The Claimant describes how she felt that she was being escorted from premises in case she did something she should not. She described the incident as "*awful*".

28. Although the Respondent refers to special leave, the effect of the Respondent's witnesses evidence was an acceptance that there is no difference between the Claimant being placed on special leave or being suspended save for the name given to it. We refer to it as her suspension.

29. The Claimant received a letter dated 29 September 2016 (p386) from the Director of Operations referring to the meeting that had taken place. It included the following passages:

> *"I informed you at the meeting that we were concerned about your capabilities within your role due to a third serious incident in two years regarding 52-week breaches of the referral to treatment standard in the waiting list. I also told you that our regulators had been informed including the CQC. The breaches currently appear to be the result of the waiting list not being managed effectively and standard processes and procedures not being followed."*

30. When the Claimant received this letter, she had no idea what the first two serious incidents referred to were. No serious incidents had been raised with her previously and the details of the third serious incident were not made clear to her other than the fact that it related to a 52-week breach. It is of note that none of the Respondent's witnesses were able to identify the first two serious incidents – they did identify one previous incident but agreed it was not the Claimant's fault but the thrust of the Claimant being involved in a third serious incident continued throughout the process.

31. About a week after her suspension, the Claimant visited her GP – she was not sleeping. She was prescribed anti-depressants. At the time she was suspended (and later when she was dismissed), the Claimant did not tell her family or friends, including her late husband, that she had been suspended and dismissed. She simply told them that she had retired. She did this because she felt that to tell them what had happened would make the situation "feel more real" and would have led her "to have to re-live the

whole experience" which she considered to be "dreadful". The Claimant felt "a deep sense of shame" that her employment had ended with the Respondent in the way that it had.

32. The Respondent's capability policy and procedure provides that at every stage of the formal procedure, employees are entitled to be represented by an accredited trade union or professional association representative or by a colleague who is an employee of the Trust but not a family member.

33. On 12 October 2016, the Claimant was invited to attend an interview on Friday, 14 October 2016. She contacted her Unison office to obtain representation so that she could be accompanied at the interview. She was advised by her union that this was too short notice for a caseworker to attend with her.

34. On 13 October 2016, in an email, the Claimant requested a postponement and a new date to be provided. She also informed the Respondent of the dates for her pre-booked holiday from 21 October to 7 November 2016. She asked that the interview be scheduled after her return. The Claimant also provided the direct number for the PA to her Unison caseworker.

35. On 14 October 2016 on behalf of the Respondent Mr Eastwell replied to the Claimant by giving her an alternative date of Thursday 20 October at 10.00 am.

36. In an email sent on 19 October 2016 the Claimant informed Mr Eastwell that she was unable to attend on 20 October because she had a pre-arranged medical appointment. She also informed Mr Eastwell that it was too short notice for her to be able to have her caseworker available. She reminded him of her pre-booked holiday and asked that the interview be scheduled after 7 November 2016. The Claimant informed Mr Eastwell the earliest date her Unison caseworker was available to support her at the meeting was 9 November 2016.

37. In an email sent at 14:25 on 19 October 2016 Mr Eastwell's response included the following passage;

"Following our initial arrangement of your interview, it has been advised that you have had ample time to make yourself available and as such we will be continuing with the agreed date and time of 20 October at 10.00 am. If you do not attend the meeting, we will go ahead and a report will have to be submitted without your input due to your absence."

38. Mr Eastwell was asked about his approach to arranging the meeting with the Claimant. At one point in his evidence he said that *"HR was of the view that this was OK"*. This is a reference to arranging a second meeting to take place on 20 October 2016, a day before the Claimant was due to go on holiday. In arranging this, Mr Eastwell said he had not looked at the procedure.

39. Mr Eastwell was questioned on the basis that there was a requirement to provide the Claimant with seven days' notice. However, the procedure does not require the Claimant to be provided the Claimant with seven days' notice of an investigation meeting. The requirement is to provide the employee with seven days' notice of a capability review meeting/hearing. The Claimant was given four working days' notice of the second investigation meeting.

40. Mr Eastwell was unsympathetic about the Claimant's contention that she was required to attend a pre-arranged medical appointment. While he accepted that if the Claimant was at work, she would have been allowed to attend a medical appointment: in these circumstances where the Claimant was suspended he hoped the Claimant would have been able to rearrange her medical appointment. As the Claimant was due to go on holiday on 21 October 2016 it would have meant either making an alternative medical appointment after her holiday or unrealistically expecting her to be provided with an earlier medical appointment. It seems to the Tribunal that this would be a fanciful and unrealistic expectation. Mr Eastwell's approach to this was unreasonable. Although Mr Eastwell could not remember who gave him the instruction, he had been given a date to complete the investigation by and he treated it as a priority to complete the investigation by that date despite its negative impact on the Claimant.

41. Mr Eastwell, at times in his evidence, appeared to suggest that it was not him who was making the decisions but HR: decisions about whether the Claimant had been given ample time and whether the Claimant ought to be given more time. Mr Eastwell was unsympathetic to the fact that the Claimant did not have a Unison representative available for any of the dates he suggested: he felt that the Claimant should have obtained an alternative trade union representative or get someone else to accompany her.

42. The Tribunal found Mr Eastwell's approach to arranging the date for this interview relating to the capability surprising. We also found that his attitude towards the Claimant was unsympathetic and did not take into account that this would have been a stressful time for the Claimant.

43. Mr Eastwell was questioned about paragraph 8 of his witness statement in which he says the Claimant did not turn up for the interview. It was put to him that the way that part of his witness statement was drafted was *"entirely disingenuous*". His response was as follows: *"With additional evidence it should read differently. I am not trying to misrepresent what happened. What I say in the witness statement is not an accurate version of what happened. It is just not true that she just did not turn up."*

44. Mr Eastwell then went on to say that he retracted the suggestion that the Claimant should have rearranged her medical appointment.

45. The Tribunal was troubled by the evidence given by Mr Eastwell. His evidence showed him initially adopting a harsh, callous, approach towards

the Claimant's inability to attend the meeting at the time arranged. He then appeared to be saying that he was actually acting on HR advice. However, when questioned as to who had asked him to carry out the investigation he was unable to recall.

46. The prevailing theme of the capability policy and procedure is to secure an improvement of an employee's performance where it is lacking. In the approach that he took, Mr Eastwell was not approaching this investigation, which was supposed to be about the Claimant's capability and understanding of the role, within the spirit of the capability procedure. His approach was more akin to a disciplinary process where issues relating to conduct were being investigated. Mr Eastwell described his role in the following way: *"my purpose was to decide whether there is evidence it should go to a hearing"*. This is the language of a disciplinary process ("hearing") rather than a capability process ("review meeting"). We note that in his report Mr Eastwell recommended that there be a disciplinary hearing.

47. Mr Eastwell sent an email to the Claimant which attached a series of questions that he wished her to answer. Although he sent the questions before the Claimant left, she did not get the questions until she was on her holiday. The Claimant was not able to respond until 26 October 2016 taking time out of her holiday in order to respond to the questions. The Claimant was left with the overwhelming feeling that Mr Eastwell wanted her out. She felt she had been treated very harshly and that the investigation was only going to lead to one conclusion.

48. On the 11 November 2016 the Claimant was sent a copy of the investigation report prepared by Mr Eastwell together with a letter from Mr O'Donnell inviting the Claimant to a capability review meeting on the 22 December 2016.

49. The Respondent's capability procedure is to be used where there is a genuine lack of capability: where capability issues exist the capability procedure seeks to assist staff to improve their performance. Where poor performance is initially identified, an informal meeting will take place between an employee and their line manager. A performance issue so serious as to create a situation where damage may be done to the Trust's reputation may be addressed immediately at the formal stage. The formal action includes a scale of increasingly serious sanctions where performance does not improve. Formal action will normally begin with the staff member being given a written caution at a first review meeting. Where performance does not improve, and a second review meeting is required this will normally result in a final written caution. Where performance does not improve, and a third (final) review meeting required this will normally result in dismissal.

50. The procedure provides that "should an issue be deemed by the Line Manager to be a catastrophic failure in performance, a higher level of sanction, up to an including dismissal, may be considered at a first or

second formal review meeting".

51. The letter of invitation to the review meeting stated that: "*your actions in relation to managing the waiting list, which have led to multiple RTT patient breaches, and your competency in performing all duties require in the PPC role*." The Claimant was informed that if upheld it could lead to a decision being made to dismiss the Claimant (p540).

52. The Claimant raised a grievance (p536). The grievance was about the way that the Claimant was treated at work and made various points including: that the new process introduced in 2015 did not accord with the way that Mr Smith worked; that inadequate training has been given; that the Claimant was treated as if she was under-performing when in fact the consultant she worked for did not consider she was under performing; that the Claimant's manager was going through a process that will enable them to dismiss her; that they were not taking any account of the work that the Claimant actually did for Mr Smith or the way that he requires her to work; and that the real reason she was being treated this way was because of her age.

53. Mr O'Donnell wrote to the Claimant informing her that; "*the issues raised in your grievance can be raised as part of [the capability review meeting] if you so wish. If there are issues that need to be taken outside of this process, then a decision will be made to do so at the time.*"

54. After the capability review Mr O'Donnell decided to dismiss the Claimant. The witness statement explains his justification for the decision:

> *"I concluded after hearing all the evidence that Eileen's employment should be terminated with notice on the grounds of her catastrophic failure in performance, where damage had been caused to patients as well as potentially the Trust's reputation. I concluded that retraining or down banding Eileen would not enable her to perform in her role as she was resistant to the current models of working and adhering to the Trust's procedures. Even when 2 patients had contacted Eileen directly on several occasions she failed to appreciate the situation they were in or escalate the issues if she was unable to deal with them herself. I did ask her to consider being down banded to band 2 but she declined."*

55. The Claimant's outcome meeting, to deliver the decision on the capability review, took place on 16 January 2017. At that meeting Mr O'Donnell gave the outcome letter (p557) to the Claimant. In this letter the Claimant was told that she was dismissed and that she had the right to appeal the decision to dismiss within seven calendar days of the date of the outcome meeting.

56. The outcome letter dealt with the Claimant's grievance in the following way:

> *"In the hearing we talked about the grievance that you had raised the*

previous day to the hearing. The content of your grievance was outlining the process that you had gone though in your role and so we had said that we could deal with it within the hearing itself. We therefore asked you if you had said everything that you wanted to in relation to your mitigation and you agreed that you had."

57. Mr O'Donnell accepted that there was no provision to suspend the Claimant under the capability procedure, he said that the Claimant had been given special leave. There is no practical difference between suspension and special leave. The Claimant had not asked for leave and was required to be away from the work place.

58. Mr O'Donnell accepted that in the Claimant's case she was not given an opportunity to improve her performance. Mr O'Donnell was the Claimant's line manager. He accepted that he had never told the Claimant of any concerns about her performance. Mr O'Donnell said that what happened in the Claimant's case was a catastrophic failure and therefore the Claimant was not given the opportunity to improve. Mr O'Donnell said that even before the capability review meeting he took the view that the Claimant's case was a potential catastrophic failure case. Mr O'Donnell who is not medically qualified assumed there was actual damage to the patients: the evidence from the Mr Smith, a Consultant, was that the delay had caused no medical damage to the patients.

59. Mr O'Donnell said that he accepted that there was some management role in managing the waiting list. He did not accept that management were managing the waiting list: commenting on the evidence of Mr Smith whose evidence was that management were managing the waiting list his evidence was that he could not comment.

60. Mr O'Donnell agreed that the Claimant had a fundamental misunderstanding of what her role was. Mr O'Donnell concluded that the Claimant had been provided with training by her colleagues, however he could not state what the training consisted of. Mr O'Donnell was of the view that the Claimant's failure was so serious training was not going to be of use. Although Mr O'Donnell admitted that he considered that other staff and consultants need more training on EPR he did not consider that it would be appropriate in the Claimant's case. Mr O'Donnell was questioned about the accuracy of his view about the training that the Claimant had received: in re-examination he explained that at the time from the information he had, he drew the conclusion that the Claimant had been given training and had the opportunity to address her own training needs.

61. Mr O'Donnell accepted that the Claimant's grievance about age discrimination was a serious matter and that it should be dealt with as part of the capability proceeding in this case. It was Mr O'Donnell' s view that the Claimant's age discrimination complaint was dealt with in the outcome letter. Mr O'Donnell felt that the matter had been dealt with when the Claimant was asked at the end of the capability review hearing if there

was anything else she wished to discuss, he accepted that he did not ask the Claimant if the grievances had been resolved.

62. Mr O'Donnell had not read the ACAS code and was not able to recall if he had considered the Trust's grievance procedure before the capability review meeting. Mr O'Donnell accepted that he did not ask the Claimant about age discrimination. At one point in his evidence during cross examination Mr O'Donnell asked rhetorically, "In her grievance why did she not mention age discrimination?" He went on to say that the Claimant had been given ample opportunity to talk about age discrimination and she did not do so: the onus was on the Claimant to speak to her grievance. Mr O'Donnell said "perhaps [it would be] more prudent to be clearer in giving her opportunity to speak about grievance."

63. The Claimant appealed the decision to dismiss her. In her appeal letter of 19 January 2017 (p562) the Claimant stated that: "*I do not believe that my capability has been properly or fairly assessed…I have been singled out and treated as if I am under-performing when in fact the consultant I work for does not feel that I am under-performing at all…I consider that the real reason that I am being treated like this relates at least in part to my age, almost as if the expectation is that at my age I won't be able to cope, which I strongly refute."*

64. The Respondent's appeal procedure provides that the appeal must be made in writing within seven calendar days of the letter confirming the outcome of the hearing, stating the grounds of appeal. Appeals should normally be held within 21 calendar days of the appeal being received or in exceptional circumstances within a time scale mutually agreed between the parties.

65. There was no response to the Claimant's appeal and she wrote a chasing letter on the 13 March 2017 (p565). Mr Don Fairley, Director of Workforce and Organisational Development, wrote to the Claimant on the 29 March 2017 and stated that the Claimant's appeal had been submitted out of time. This was wrong. The appeal had been submitted in time. The Claimant wrote to Mr Fairley on the 21 April 2017 pointing out his error and explaining why the appeal was made in time. The letter was received by the Respondent but there was no action taken on it or response to it.

66. The only explanation for the Respondent's actions has come from Mr O'Donnell who says it was a mistake to view the Claimant's appeal as out of time. He provides no explanation for the failure to address the matter when the error was pointed out. Under the Respondent's procedure Mr O'Donnell is not responsible for the appeal. The appeal is to be made to the second line manager. The Claimant's appeal was correctly directed to Mr Fairley as advised in the dismissal letter.

Law

67. An employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment. An employer discriminates against an employee if because of her age or disability he treats the employee less favourably than he treats or would treat others. Where the employee seeks to compare her treatment with that of another employee there must be no material difference between the circumstances relating to each case.

68. In the case of age discrimination, the employer does not discriminate against the employee if the employer can show the employer's treatment of the employee was a proportionate means of achieving a legitimate aim.

69. An employer discriminates against a disabled employee if the employer treats the disabled employee unfavourably because of something arising in consequence of the employee's disability, and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if the employer shows that the employer did not know, and could not reasonably have been expected to know, that the disabled employee had the disability. The concept of 'something arising in consequence of disability', entails a 'looser connection' than strict causation and may involve more than one link in a chain of consequences.

70. An employer harasses an employee if the employer engages in unwanted conduct related to age or disability, and the conduct has the purpose or effect of violating the employee's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. In deciding whether conduct has the effect referred to, the perception of employee, the other circumstances of the case and whether it is reasonable for the conduct to have that effect, must each be taken into account.

71. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.

72. By section 86 of the Employment Rights Act 1996 the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more is not less than one week's notice for each year of continuous employment if her period of continuous employment is two years or more but less than twelve years, and is not less than twelve weeks' notice if her period of continuous employment is twelve years or more. This provision does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.

73. An employee has the right not to be unfairly dismissed (section 94 Employment Rights Act 1996 (ERA). Section 98 ERA states it shall be for the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2). A reason falls within this subsection if it relates to the

capability or qualifications of the employee for performing work of the kind which she was employed by the employer to do. “Capability”, in relation to an employee, means her capacity assessed by reference to skill, aptitude, health or any other physical or mental quality.

74. Where an employer has fulfilled the requirement to show a potentially fair reason, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.

75. The Tribunal must not substitute its views about the employee's capacity for that of the employer. It is impermissible for a Tribunal to do that since frequently the Tribunal is not in a position to assess work performance or decide whether it falls below the standard expected of employees in a particular job. The test as laid down in *Alidair Ltd v. Taylor [1978] ICR 451G, is: "Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent."* The function of the Tribunal is to decide whether the employer honestly and reasonably held the belief that the employee was not competent and whether there was a reasonable ground for that belief.

76. Sections 122(2) (basic award reductions) and 123(6) (compensatory awards) of the Employment Rights Act 1996 (ERA) set out circumstances in which a tribunal may reduce a basic award and a compensatory award in cases of unfair dismissal.

77. Before making any finding of contribution the employee must be found guilty of culpable or blameworthy conduct. The enquiry is directed solely to her conduct and not that of the employer or others. For the purposes of s 123(6) the employee's conduct must be known to the employer at the time of the dismissal and have been a cause of the dismissal. Once blameworthy conduct causing, in whole or in part, the dismissal has been found, the employment tribunal must reduce the compensatory award by such proportion as it considers just and equitable. It must make a reduction.

78. A finding of contribution under section 122(2) does not require a finding that the conduct is causatively linked to the dismissal. It may be first discovered after dismissal. The wording of section 122(2) grants to the employment tribunal a wide discretion as to whether to make any, and if so what reduction in the basic award on the grounds of the applicant's conduct. Different proportionate reductions are permissible in relation to the basic and compensatory awards.

79. In an unfair dismissal claim, if an employee has been dismissed, but the employer has not followed a proper procedure (such as the ACAS Code), the Tribunal will follow the guidance in the case of Polkey v AE Dayton Services Limited. The Tribunal will consider whether, if a fair procedure had been followed, the Claimant might still have been fairly dismissed, either at all, or at some later time.

80. Section 207A Trade Union Labour Relations (Consolidation) Act 1992 provides that in an unfair dismissal case if it appears to the employment tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, the employer has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

81. Section 1 of the Employment Rights Act 1996 requires, where an employee begins employment, the employer to give the employee a written statement of particulars which contain, the names of the employer and employee, the date when the employment began, and the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

82. Section 38 of the Employment Act 2002 provides that, in unfair dismissal proceedings and proceedings under the Equality Act 2010, the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and when the proceedings were begun the employer was in breach of its duty to the employee under section 1(1) of the Employment Rights Act 1996, the employment tribunal must, unless there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable, increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead. The minimum amount is an amount equal to two weeks' pay, and the higher amount is an amount equal to four weeks' pay.

Conclusions

Continuity of employment

83. That the Claimant worked for the Respondent from 1991 is clear. There is documentary evidence that shows that at various times the Claimant was an employee of the Respondent or its predecessor entity prior to 2012. The Claimant was given a long service award after 25 years of service.

84. The Claimant says that she has been continuously employed by the Respondent and has not been employed by anyone else in the period between 1991 and her dismissal. That has not been dislodged by any

other evidence. The evidence relied upon as showing that the Claimant was not employed by the Royal Berkshire NHS Hospital Trust or another one of its predecessors but by NHS Professionals is only contained the letter of 30 July 2012 (p71) where she refers to herself as a "*bank and NHSP employee*", and in the letter from Ms Ifeoma Oboko (p77). Both of those documents fall short of showing that the Claimant was not an employee of the Royal Berkshire Hospital.

85. The Claimant's evidence is that she was a bank and NHSP employee. Throughout the period between 2005 and 2012 the Claimant worked in the same role as medical secretary for Mr Brendan Smith with whom she continued to work after 2012 until her dismissal.

86. The evidence does not tell us who in the period paid her wages, whether there was a contract between the NHSP and the Respondent to provide the Claimant to the Respondent and if so on what terms.

87. The evidence of the Claimant is that she has been continuously employed by the Respondent has not been dislodged by other evidence. The evidence relied on as showing that the Claimant was not employed by the Respondent but by NHSP is contained in the Claimant's evidence (p71). This is not necessarily inconsistent with the Respondent being her employer. The letter from NHSP (p77) falls short of stating specifically that the Claimant was employed by NHSP and provided to the Respondent in a way which dislodges the suggestion that she was in fact an employee of the Respondent.

88. What the evidence shows to us is that over the years the arrangements made by the Respondent to ensure the Claimant continues to provide her service to the Respondent have changed. The Claimant and the Respondent are not able to provide a clear paper trail to enable us to understand what the precise technical legal arrangements were at each point in time whether for example there was a TUPE transfer at any point or whether the Claimant's employment was terminated at any point, if so why, and how she came to be re-employed and by whom. What is clear is that since 2005 the Claimant has done the same role (medical secretary to Mr Smith) for the same employer (Royal Berkshire Hospital). In 2012 the Claimant was given a new contract of employment.

89. The Claimant's unchallenged evidence is that the Respondent had a rule that no one over the age of 70 could have a permanent contract. This would provide some explanation for why there is an opacity in the Claimant's employment status between 1991 and 2012. We note that the Equal Treatment Directive 2000/78/EC was finally implemented into domestic legislation by the Employment Equality (Age) Regulations 2006 (SI 2006/1031) which came into force of 1 October 2006.

90. In the circumstances we are satisfied that the Claimant was employed by the Respondent from 1991 (when she would have been 61). Since then she has continued to be employed by the Respondent. The precise

arrangements on which she has been employed at any point in time are not always clear. There appear to have been interventions of third party NHSP for some of the time. This arrangement facilitated the Claimant's continuing her relationship with the Respondent, that is to enable her to continue to provide the Royal Berkshire Hospital her services as medical secretary. We are satisfied that in this time the Claimant continued in employment with the Respondent.

91. The conclusion of the Tribunal is that there were clearly arrangements made over the years which altered from time to time. The nature of those arrangements was that the Claimant would be providing the services of medical secretary for the Trust. How that came about is not transparent today, but it is clear from the evidence that the Claimant was intended to be employed as a medical secretary for the Respondent. The Claimant's evidence is that, throughout that time, she was an employee of the Respondent. There is evidence that supports that. We are satisfied in the circumstances that the Claimant's employment with the Respondent in fact has been continuous since 1991.

92. There were submissions made and arguments presented about the possibility of a TUPE transfer having taken place. The Tribunal has not considered it necessary to determine whether in respect of the Claimant's employment there was a TUPE transfer at any particular point. We do not consider that the evidence as presented before us is sufficient for us to be able to determine whether there ever was such a TUPE transfer from one entity to another. The evidence that we have leads us to conclude that throughout the period the Claimant was an employee of the Respondent Trust or one of its predecessors.

Disability

93. It is accepted by the Respondent that the Claimant is a disabled person by reason of her heart condition. Although it was denied in the response it is not contested in the evidence that the Claimant's arthritis amounts to a disability within the meaning of section 6 of the Equality Act 2010. The Tribunal finds that the Claimant is a disabled person by reason of her heart condition and arthritis.

Did the Respondent directly discriminate against the Claimant because of disability? Did the Respondent directly discriminate against the Claimant because of her age?

94. *The manner in which the investigation was conducted*

94.1. Mr Eastwell initially gave the Claimant 2 days' notice of the investigation interview: when the Claimant stated that she could not attend he gave her 4 days' notice. When the Claimant stated that she could not attend because she had a medical appointment and her representative was not available, he refused a postponement and insisted that the investigation meeting would go ahead without her

input if she did not attend. Mr Eastwell then said that on reflection that approach was not reasonable and a list of questions for the Claimant to answer was sent. Despite the fact that the Claimant was due to go on a pre-arranged holiday Mr Eastwell sent the Claimant written questions which the Claimant was required to answer while she was away.

94.2. Explaining some of his actions Mr Eastwell said that the timing of the invitations for interview were in the interests of making the process go smoothly and quickly, so that the Claimant would not have the matter looming over her on holiday. Mr Eastwell said that in retrospect it would have been preferable to have a face to face meeting with the Claimant. A key driver for Mr Eastwell was that he had been given a date to complete the investigation which fell while she was on holiday. He decided that complying with this instruction (although he could not remember who gave it to him) was the priority despite the negative impact on the Claimant.

94.3. Mr Eastwell was aware that the Claimant could not attend to meet with him because she had a medical appointment. Mr Eastwell's position at one stage was that he would have expected the Claimant to rearrange her medical appointment and sort matters out with her union so that she can have representation (even though she had been told her representative was not available). Mr Eastwell subsequently retracted the suggestion that the Claimant should have rearranged her medical appointment and he declined to continue to maintain the Respondent's expressed position that the Claimant "chose not to participate in the process" (p535). Mr Eastwell accepted that his witness statement, where it says the Claimant "didn't turn up for interview", was not complete and therefore was an inaccurate representation of what happened.

94.4. There were a number of points made about the Claimant by her colleagues that Mr Eastwell did not specifically put to the Claimant or offer her the opportunity to comment on. Some comments were recognised as discriminatory and inappropriate by the Respondent. **H** made comments about the Claimant's age and ability to walk the length of the building. **W** made comments about the Claimant which relate specifically to the Claimant's frailty because of her age, her difficulty with walking (from arthritis) and her heart condition. **S** made comments about the Claimant's health. N made comments about having concern about the Claimant working overtime which were related to her health. These comments which were hurtful to the Claimant and inappropriate were stated to Mr Eastwell during his interviews as part of his investigation.

94.5. Mr Eastwell said that he did not take the comments made by **H** into account when he wrote his report. As regards comments made by **W** he said that he "did not make any assumptions" or "inferred anything" he "just reported it". Mr Eastwell said that he disregarded the comments made by **W** when preparing his report and he considered

they were inappropriate. When he produced his report there is nothing in the report to suggest that these comments were not taken into account, they were provided to the claimant as part of the investigation report without qualification. It is the view of the Tribunal that Mr Eastwell took into account the totality of the concerns expressed by the Claimant's colleagues in coming to his conclusions.

94.6. The treatment of the Claimant by Mr Eastwell was unreasonable. In his unreasonable treatment of the Claimant Mr Eastwell was taking into account alleged shortcomings about her performance which were tainted with considerations about the Claimant's age and also about the Claimant's disability. Mr Eastwell took into account the comments by colleagues which included comments about the Claimant's frailty. In his evidence to the Tribunal Mr Eastwell said that he did not take these matters into account in reaching his decision. We do not see this demonstrated in a manner that made it apparent he did not take the comments into account.

94.7. In taking these comments into account Mr Eastwell treated the Claimant less favourably. He would not have allowed the comments of the type made about the Claimant to pass without comment had they been made about a younger person. We consider that if comments about the frailty of younger persons had been made they would have been addressed in a manner which allowed for them to be given the consideration they deserve: dealing with any issues of performance if justified or disregarding any inappropriate and unjustified comments.

94.8. There was unreasonable treatment of the Claimant by Mr Eastwell in the conduct of the investigation. There were comments made about the Claimant to Mr Eastwell reflecting adversely on the Claimant's age and health. Mr Eastwell took these comments into account. We find that there are facts from which we could conclude that the Claimant was discriminated against by the Respondent on the grounds of her age and disability.

94.9. We have therefore had to consider whether the Respondent has been able to prove that the Claimant's age and disability was not any part of the reason for the way that the Claimant was treated by the Respondent. We do not consider that the Respondent has been able to do so. In the manner in which the investigation was conducted the respondent discriminated against the Claimant.

95. *In the failure to properly consider the claimant's grievance* [and] *During the disciplinary hearing*

95.1. The Respondent did not deal with the Claimant's grievance at all. Mr O'Donnell says that the Claimant was given the opportunity to address matters relating to the grievance in the capability hearing. This is not obvious except for the question asked at the end of the meeting. The question asked is "*I received your grievance two days ago. Have you*

said everything you needed to say?" The Claimant's answer is "*yes*".

95.2. In his decision letter Mr O'Donnell deals with the grievance in the following way.

"In the hearing we talked about the grievance that you had raised the previous day to the hearing. The content of your grievance was outlining the process that you had gone through in your role and so we said that we would deal with it within the hearing itself. We therefore asked you if you had said everything that you wanted to in relation to your mitigation and you agreed that you had."

95.3. Mr O'Donnell does not address the Claimant's grievance. The Respondent failed to deal with the Claimant's grievance. The Claimant's grievance was about a complaint of age discrimination. There were a number of comments that Mr O'Donnell himself considered inappropriate that related to the Claimant's age and frailty. In the circumstances we consider that there are facts from which we could conclude that the Claimant was treated less favourably on the grounds of her age in the Respondent's failure to properly consider the grievance.

95.4. We have not been able to find in the Respondent's explanation about the way the grievance was dealt with an explanation that shows that this was not related to the Claimant's age. We consider that in the failure to properly consider the Claimant's grievance the Claimant was discriminated against on the grounds of her age.

96. *In dismissing the claimant*

96.1. In a situation where capability arises and an employer does not give an employee a chance to improve after giving an appropriate warning we consider that an explanation why that was not given is required from an employer.

96.2. In the Claimant's case there was an acceptance by Mr O'Donnell that the Claimant had a fundamental misunderstanding of her role and things that she should have been doing, yet the Claimant was not offered training to address this. The serious incident report concluded that there was further training required for the consultants and admin staff on EPR (p523).

96.3. Mr O'Donnell agreed with the conclusion of the serious incident report that consultants and administration staff need more training on EPR. In the Claimant's case Mr O'Donnell stated that: "*I do not feel it would be appropriate in the Claimant's case*." Mr O'Donnell stated that had he seen this report before he dismissed the Claimant "*I would have ignored it*". Mr O'Donnell stated that he felt that there had been "*ample opportunity for training*" of the Claimant. There was no real justification for such a conclusion when regard is had to the training that the

Claimant in fact had. The Claimant was being considered differently to other staff in respect of the appropriateness of training.

96.4. At the beginning of the capability review Mr Eastwell presenting the management case referred to the Claimant being stuck in "*old secretarial ways*". This was understood as a reference to the Claimant's age by Ms Taylor-Woodley. Mr Eastwell himself accepted that it could be interpreted in that way.

96.5. The Tribunal infers that the reason for the difference of treatment (attitude towards providing training) of the Claimant and other staff is her age. Mr O'Donnell considered that because of her age the Claimant was not going to be helped by training.

96.6. In the decision to dismiss the Claimant there are facts from which the Tribunal could conclude that the Claimant had been treated less favourably because of her age.

96.7. We have gone on to consider whether the Respondent has shown that the Claimant's age was no part of the reason why the Claimant was dismissed. We are not satisfied that the Respondent has proved that the decision to dismiss the Claimant was not because of her age.

97. *In refusing to allow the claimant an appeal* [and] *In failing to respond to the claimant's correspondence outlining (correctly) that her appeal was in fact in time*

97.1. When the Claimant appealed her dismissal, the appeal was not considered by the Respondent. The Claimant was told that she had appealed out of time. This was wrong. Her appeal was in time. The Claimant wrote to the Respondent pointing out the error and her letter was ignored.

97.2. Mr Fairley was Director of Workforce and Organisational Development and he was responsible for the error: he was the one who failed to respond to the Claimant's letter pointing out his mistake. In these proceedings there has been no attempt to explain why when the error was pointed out nothing was done and the Claimants appeal continued to be ignored.

97.3. The Tribunal considers that there are facts from which we could conclude that the reason for the failure to allow an appeal and to respond to the Claimant's correspondence is because of the Claimant's age. The refusal of the Respondent to provide an explanation means that they have not proved that it was not because of age.

Did the Respondent engage in unwanted conduct related to disability that had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for

her?

98. The comments made by **W** were inappropriate, hurtful and related to the Claimant's age and perceived frailty because of her age and disability. Comments by **S** were discriminatory about the Claimant's health. The Claimant's colleague **A** made comments about concern over the Claimant working overtime. When the Claimant read these comments, she considered them hurtful and saw that they were aimed at her age and her health as well as perceptions of her age and health. The Claimant found the report distressing to read: she suffered palpitations and was admitted to hospital with tachycardia.

99. The nature of the comments once communicated to the Claimant, as they were in the course of the investigation, violated the Claimant's dignity in relation to her age and disability and created a hostile and intimidating environment for her.

Did the Respondent treat the Claimant unfavourably because of something arising in consequence of any disability?

100. Section 15 EqA requires that consideration of (i) did the employer treat the employee unfavourably because of an (identified) 'something'? and (ii) did that 'something' arise in consequence of the employee's disability?

101. The Claimant was subjected to unfavourable treatment in the investigation process, in the capability review meeting and decision to dismiss, in refusing the appeal and not considering the Claimant's correspondence about the appeal. The unfavourable treatment in the investigation process was the consideration of the comments made by the Claimant's colleagues about her age and frailty. In the capability hearing and the decision to dismiss reliance is placed on the same matters which arise from the Claimant's age and frailty. The Claimant had not been carrying out the role in the way that the Respondent wished the role to be carried out and had not understood the nature of the role that she was expected to perform by the Respondent. Instead of the Respondent addressing that issue directly and either training her and then requiring her to do the role as directed the Claimant was dismissed. This was because of her age. In refusing the Claimant's appeal the Claimant was treated unfavourably in the first instance because of a mistake about the time for an appeal to be made. In not considering the Claimant's correspondence about appeal the Claimant is treated unfavourably because there was an unexplained unwillingness to deal with her appeal. We have found that it was because of the Claimant's age.

102. There is in our view a symbiosis between the Claimant's age and the Claimant's disability in the way that the Respondent treated her. The treatment that the Claimant received which was unfavourable because of her age was in our view also by reason of this symbiosis therefore because of the Claimant's disability.

103. We have therefore concluded that the Claimant was treated unfavourably because of something arising in consequence of her disability in the case of the manner in the investigation process, in the capability hearing and the decision to dismiss the Claimant, and in not considering the Claimant's correspondence about the appeal.

Unfair dismissal

104. The Claimant's dismissal was tainted by discrimination and was harassment related to age and disability. The Claimant's dismissal was in our view unfair.

105. We would in any event have considered the Claimant's dismissal unfair because of the procedure followed the Respondent, going beyond the failure to grant an appeal, was unfair. Further even if the reason for the dismissal was capability we would consider that the dismissal was not reasonable in the all the circumstances.

106. The Respondent did not follow its own capability procedure. The Claimant's line manager was Mr O'Donnell, he should have investigated and not Mr Eastwell. Mr O'Donnell's manager should have carried out the capability hearing.

107. There was no attempt at all by the Respondent to adhere to the spirit of the capability procedure. The manner in which the investigation meeting was set up was unfair. The way that the investigation was conducted by Mr Eastwell was unfair, the Claimant was not given an opportunity at the investigation stage to make any comment on adverse comments made by others especially given the anecdotal nature of much of the matters considered against the Claimant. Mr Eastwell appears to have considered that he was also considering a disciplinary charge in addition to a capability issue. The Claimant's grievance should have been considered and was not.

108. The decision to dismiss the Claimant was not reasonable. The Claimant did not understand her role the way that her managers understood her role. The role that the Claimant understood she was performing, she was performing competently. There is a suspicion of the Claimant being a scapegoat, the Claimant was not offered training where it might be considered appropriate (remembering that this is a case where an investigation found that consultants and admin staff required more training). There was evidence of the Claimant's training having been inadequate, incomplete and 'on the job' training was ad hoc and not directed. In the view of the Tribunal there is reason to doubt whether the Claimant's failing as identified would have been categorised as a catastrophic failure: there is no context from within the Trust provided for us to understand why this was an appropriate categorisation of the Claimant's failings. The investigation into the Claimant also appeared to have been started on the basis of a list of charges that was in part unsubstantiated, the Claimant was stated to have been responsible for

three 52 week breaches, but this did not appear to be correct and no investigation was ever carried out by Mr Eastwell or Mr O'Donnell to determine whether it was correct or not but remained the factual context in which the Claimant's capability review was conducted.

Polkey/Contributory Fault

109. We do not consider that this is a case where there can be a Polkey reduction. The dismissal in our view was not justified.

110. The Tribunal is not satisfied that the Claimant was guilty of any culpable and blameworthy conduct justifying a reduction of the basic or compensatory award.

111. The Respondent contends that the Claimant would have been dismissed for sending an email to her daughter about her daughter's X-ray. The evidence on this issue is lacking. There was never an investigation at the time. The matter only came to light after the Claimant was dismissed and during the preparation of documents arising after the Claimant had left her employment and had made a Subject Access Request under Data Protection procedure and possibly even after the proceedings in the case had been commenced.

112. The Claimant did not accept that she had acted improperly and while her evidence was not very clear the high-water mark of her evidence is that the she had permission from a clinician to provide the information to her daughter and in any event she was acting within accepted parameters by providing the information she did to her daughter in the circumstances in which she did this.

113. On the material before us we are not satisfied that it has been established on a balance of probability that the Claimant had been responsible for culpable and blameworthy conduct.

Notice Pay

114. The Claimant was dismissed on 16 January 2017. Mr O'Donnell told the Claimant that her notice period ran from the date of the capability review meeting on the 22 December 2016. The Claimant was not informed of dismissal until 16 January 2017. Based on the Claimant's length of service she was entitled to 12 weeks' notice.

Section 1 ERA

115. Section 1 (3)(c) ERA requires the employer to provide the Claimant with a statement of particulars of employment which includes the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period). The statement of main terms and conditions of employment provided to the Claimant did not provide the required particulars (p43).

116. In the light of our conclusions set out above about the Claimant's continuity of employment the Respondent did not provide to the Claimant the statement of particulars of employment compliant with section 1 ERA.

Remedy

117. A remedy hearing shall take place on the **14 October 2019**.

117.1. By 4pm on **25 March 2019** the parties must give to each other standard disclosure of documents relevant to remedy.

117.2. By 4pm on **29 April 2019** the parties must serve on each other copies of the signed statements of all witnesses on whom they intend to rely at the remedy hearing.

_____
Employment Judge Gumbiti-Zimuto

Date: 29 January 2019

Judgment and Reasons

Sent to the parties on: .....

.....
For the Tribunal Office