



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Clive Johnson

v

Whitbread Group plc

Heard at: Watford

On: 29 – 31 July 2019

Before: Employment Judge Bedeau
Members: Mr I Bone
Mr M Bhatti

Appearances

For the Claimant: In person
For the Respondent: Mr M Foster, Solicitor

JUDGMENT

1. The unfair dismissal claim is not well-founded and is dismissed.
2. The claims of direct discrimination because of age are not well-founded and are dismissed.
3. The claim of direct discrimination because of sex are not well-founded and are dismissed.
4. The provisional remedy hearing listed on Monday 16 December 2019, is hereby vacated.

REASONS

1. By a claim form presented to the tribunal on 18 February 2018, the claimant made claims of direct age and sex discrimination, bullying and harassment and unfair dismissal arising out of his employment with the respondent as a Business Analyst.
2. In the response presented to the tribunal on 28 March 2018, it is averred that the claimant was dismissed for capability, in that his performance failed to reach the required standards. It denied that he had been discriminated either because of age or sex.

The issues

3. At the preliminary hearing held on 8 November 2018, before Employment Judge Palmer, the claims and issues were agreed. They are set out below as in the case management orders:

1. Unfair dismissal claim

- 1.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to capability which is a potentially fair reason for dismissal.
- 1.2 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
- 1.3 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?
- 1.4 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event and, if so, to what extent and when?

2. Section 13: Direct discrimination because of age and/or sex

- 2.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely?
- 2.1.1 subjecting the claimant to a Performant Management Process;
and
- 2.1.2 dismissing the claimant for capability.
- 2.2 Has the respondent treated the claimant, as alleged, less favourably than it treated or would have treated his comparator? The claimant relies on the comparator being Ms Doris Rosmann-Begg, who had the same job title as the claimant and who did not perform well but was not put on a Performance Management Procedure.
- 2.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristics of age and/or sex?
- 2.4 If so, what is the respondent's explanation in relation to the allegation of age discrimination, and does it show that the treatment of the claimant relating to his age was a proportionate means of achieving a legitimate aim?

3 Remedies

- 3.1 If the claimant succeeds either in whole or in part, the Tribunal will be concerned with issues of remedy.
- 3.2 There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination,

recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

The Evidence

4. The claimant gave evidence and did not call any witnesses. The respondent called Ms Debbie Tozer, Lead Analyst; Mr Mark Cook, Information Systems Programme Manager; and Ms Lesley Williams, former Group Pensions Director.
5. In addition to the oral evidence the parties produced a joint bundle of documents comprising of 457 pages. References will be made to the documents as numbered in the joint bundle.

Findings of fact

6. The respondent owns and operates several high street brands, such as Premier Inn, Costa, Beefeater and Brewers' Fayre.
7. The claimant was employed in the respondent's Information Technology department which provides IT services throughout the group. He worked as a Business Analyst at the respondent's head office. He commenced employment on 21 October 2014.
8. The respondent has extensive policies on performance development and reviews. (pages 44 – 87 of the joint bundle)
9. It conducts a half yearly career review as well as an end of year performance review. In between these reviews there is also the provision for regular one-to-one meetings between the employee and his or her line manager.
10. Its performance ratings range from 0 to 3. '0' is evidence that the employee did not demonstrate behaviours expected; '1' is they partially demonstrate the behaviours; '2' is they demonstrate the behaviours; and '3' is a role model in demonstrating behaviours (78).
11. Between 0 and 2 ratings there are further ratings such as 0-0, 1-1, 2-1 and 2-2. If an employee is given a rating lower than 2-2, or they are considered as not having achieved, they may be subjected to some kind of performance management. A rating of 2-2 is that the person has achieved the set targets.
12. We were taken to the respondent's performance excellence policy. This is a non-contractual document which is a guide to managers on performance issues. (pages 79 – 87)
13. In the flow chart, if an employee achieves the goals, targets, ways of working, standards, and behaviours set, they are then encouraged to expand their knowledge, develop, energise, motivate and engage, as well as delegate. If they do not achieve, there is a 3-stage performance

improvement process which, ultimately, leads to disciplinary action. The policy differentiates between capability and conduct.

14. Stage 1 of the policy is where the employee has achieved, and it addresses the general management of the team. It gives guidance on planning performance review meetings.
15. Stage 2 concerns an employee whose performance is considered not acceptable. The policy provides that at the first meeting, the line manager should address the issue of re-training, re-educating, and consider a 'buddy' or 'mentor' for the employee. Re-set the goals and/or ways of working. This involves setting SMART objectives. The acronym SMART means Specific, Measurable 'you must be able to measure whether the task has been completed or not', Action orientated, Realistic and Timebound, "all actions should have a deadline."
16. At the second meeting, the line manager is required to explain to the employee that the situation can no longer continue and that he or she would need to consider whether formal action would be appropriate or targets re-set. The line manager is required to get to the root cause of the employee's performance issue; help them to prioritise and focus on what is important; set SMART actions, and set a review date. It advises the line manager to send a capability letter to the employee, Capability letter 'A'. (85 – 86)
17. At the third meeting, if the employee's performance does not improve, the policy states that the line manager should invite the employee to a disciplinary hearing unless there is another way of improving performance that had not been explored. The third meeting is an investigation into whether the targets have been achieved following the line manager's interventions. At the end of the meeting, the line manager could extend the review period for a further period; invite the employee to a disciplinary hearing with another manager; or send Letter E if the employee has improved to the required standard or Capability letter 'B', if not.
18. As soon as the line manager notices that an employee's performance is dropping or they are engaging in unacceptable behaviour, they should engage in an informal discussion with the employee. The policy provides:

"If the situation occurs again, consider whether you think the person just can't get to grips with what you are asking them to do (capability) or whether they just plainly don't want to do what you are asking (conduct). Quite often the situation can be a mixture of capability and conduct – in this scenario – follow the conduct route... .

There is no set number of reviews that should be held before progressing to disciplinary action, as each team member is unique and every situation is different."
19. Ms Debbie Tozer worked for the respondent for about 25 years. For five of those years she was a Business Analyst and in February 2017, she was appointed as Lead Analyst and was the claimant's line manager.
20. The claimant told the tribunal in evidence, and we find as fact, that prior to Ms Tozer becoming his line manager, there were concerns raised about his performance. Mr Lawrence Green, who at the time was involved in the

labour management project, had raised concerns about the claimant's performance. Mr Ash Shah and Mr Yinka Olayomi, the claimant's previous line managers, also had concerns about his performance and gave an underachieving rating in December 2015 and in March 2016 respectively. Mr Rhod Williams, Head of Group Systems, gave him a '0' performance rating in March 2016. On 29 September 2016, at a review meeting, the claimant's performance had improved to "achieving".

21. According to Ms Tozer, prior to her taking over the claimant's line management in February 2017, Mr Rhod Williams awarded him an "under-achieving" rating. She said that the claimant was the subject of a formal Performance Improvement Plan, "PIP", as a consequence of concerns being raised about his performance. This was denied by the claimant who could not recollect having been placed formally on a PIP. We, however, find that the evidence suggests that prior to Ms Tozer taking over his line management responsibility, he had been the subject of performance concerns.
22. The claimant challenged the under-achieving rating of 2.1 given by Mr Williams on grounds that the issues raised were not sufficiently serious to justify that rating and because they were not raised with him in a timely manner. Human resources agreed that as feedback had not been given to him in a timely manner, the rating should be amended to a 'achieving'. Although the claimant had been given this revised rating following human resources intervention, Ms Tozer and Mr Williams, nevertheless were of the view that there were ongoing concerns about his performance.
23. We find that the award of 'achieving' rating was given due to a failure to follow the procedure rather than a recognised improvement in the claimant's performance.
24. On 10 April 2017, Ms Tozer met with the claimant to commence the informal PIP process because there were concerns about his performance. At the meeting the claimant was told that he was required to focus on three main issues:
 1. "To produce documentation that meets quality standards";
 2. "To improve, influencing style and approach in order to have a positive impact on others"; and
 3. "To work at pace in order to accelerate progress on projects (drive)".
25. He did not raise any objections to the requirements set as he stated he expected to have no difficulty in achieving number 1 and he agreed with number 2. In relation to number 3, he said that the problem he experienced was working at pace, which was far greater than the pace of his other colleagues, but as a good team member, he stepped up and did all he could very quickly. The three objectives were to be reviewed on or before 8 May 2017. (106-109)

26. In relation to the first of these, that of producing documentation to meet the quality standards, what was expected of the claimant was set out in the informal PIP, in which it was stated the following:

“Expected outcome – documentation to be (quality standard as defined as)

- Clear and articulate – able to be read and understood by non-technical reviewers.
- Concise
- Accurate
- Delivered on time”

27. The second objective, that being to improve influencing style and approach, the expected outcomes were:

“The ability to influence different people, effectively in a range of different situations:

- Demonstrating active listening in order to ensure objectives and timescales are clear and in order to build rapport;
- Understanding when it is appropriate to take the chair and when others need to lead;
- Adopting style which is concise and positive;
- Being aware of how body language and style can impact on how Clive comes across to others;
- Raise concerns and potential solutions where possible at the appropriate time and place ie one-to-one rather than in open forum.
- Adapting style to fit the individual who Clive is working with;
- Build rapport with stakeholders, consider their influence and style and what will be effective with them.”

28. In relation to the third objective, to work at a pace in order to accelerate progress in projects, the claimant was given set outcomes. (107 – 108).

29. We find that the targets set out were clear and easily understood.

30. Ms Tozer met with the claimant on 18 April, 25 April, concluding on 26 April 2017, and on 2 May 2017, to discuss his progress in relation to the informal PIP. (117, 118 – 119 and 130 – 131).

31. She again met with him on 15 May 2017 to review his progress against the informal PIP and after doing so, she decided on the evidence available, that although he had made some progress, he had not made sufficient progress and decided that he should be the subject of a formal PIP. From the notes of the meeting it records, in relation to documentation, that his notes on the Asset Management Requirements Workshop he attended on 9 May, were useful to Ms Tozer. On ‘Influencing style’, it was noted that he contributed usefully during the meeting but his body language suggested that he was not fully engaged in the Workshop and had to reflect on it to ensure that he was sending out the right signals to others. In relation to ‘Working at Pace’, Ms Tozer acknowledged that he worked at pace to produce the

documentation requested. Her concerns were that he needed to focus on the right things and to take ownership of tasks assigned. (137-138)

32. On 16 May 2017, she emailed him to confirm that she would be moving to a formal PIP and attached a copy of the agreed PIP. She stated that a formal letter would be sent to his home address. She then wrote:

“We discussed at some length again today your feeling that this process is not a fair reflection of your abilities. I explained again that the feedback that has led to this PIP has come from several different sources and that I am concerned that you persistently argue with every element of the feedback provided, rather than listening to it in order to understand and make the change we are looking to see. I do not feel we have moved forward on this point at all over the weeks that the informal PIP process has been in place and this is a concern to me. I hope to see a change in your attitude regarding this moving forward”.

33. The claimant responded the same day stating the following:

“Hi Deb

For the benefit of the process, I would like to add the following:

I have repeatedly engaged positively and with pace to deliver any specific targets which you have given me. I assure you that this attitude will continue.

The reason that we again discussed the original feedback today, was that I pointed out that the targets in my PIP are not measurable and so open to negative interpretation.

You have “persistently” not engaged with my concerns that some feedback points which would be seen as relatively minor against a tide of successful delivery, have been taken out of context, amplified and repeated, and this continues to make it difficult to move forward.

I continue to perceive that you/someone is searching for the negatives in any work I do, and taking no steps to gather positives to balance the negatives.

We agreed that it is always possible to find points of improvement in any document which any of us deliver. I remain concerned that at the end of the PIP process any such points of improvement will be given undue weight against the continued background of delivering what I’m asked.

I asked you if there is a participants’ guide to the PIP process, including what I should expect from it, and if this is not included in my letter home I will be asking again” (139-140)

34. In the letter sent to the claimant’s home address by Ms Tozer, she confirmed the outcome of their discussion of the meeting on 15 May, that he would be moved to a formal PIP. She then wrote:

“As you know, I have some concerns around the quality of documentation you produce, your influencing style and approach, and your drive and ownership of tasks that are assigned to you, which we have discussed informally before and must be addressed.

Going forward, please ensure you:

1. produce documentation that meets quality standards as defined in the PIP document;
2. improve your influencing style and approach in order to have a positive impact on others;
3. demonstrate ownership of tasks and drive and energy to achieve them

You agreed that you would focus your attention on addressing these concerns and that we would have formal reviews of progress starting on Tuesday 23 May.

We also agreed that I would offer you the following support:

- Access to materials on Ashridge Learning Resource Centre on effective business writing and influencing skills;
- Debbie to review and feedback on documentation produced by Clive
- Debbie and Clive to meet ahead of any significant engagement with stakeholders to consider an effective approach to that engagement
- Debbie to liaise with Programme Managers to ensure workload and deadlines are achievable.

I trust the above is clear, however, should you wish to discuss this further please do not hesitate to speak to me.” (141)

35. The claimant was sent a copy of the revised PIP (139-140).
36. In the formal PIP, the three objectives remained the same. Expected outcomes; measures of improvement, and support required, were in the main identical to the informal PIP. (142–143)
37. In the claimant’s e-mail dated 18 May 2017, after having received a copy of the respondent’s performance excellence policy, he alleged that the objectives as set by Ms Tozer, were not SMART compliant and demonstrated his point by referring to the provisions in the policy to which she had allegedly failed to follow. (144)
38. In a further e-mail from him dated 19 May 2017, to Ms Tozer, he referred to the performance excellence policy, in that positive and negative feedback from stakeholders should be considered. He asked whether she would be applying that aspect of the policy. (161)
39. Ms Tozer had earlier responded to his 18 May 2017 e-mail in which she stated in relation to the SMART objectives:

“Please let me know what changes you would like to see to what we previously documented so that we can consider them and incorporate if appropriate.”
40. In relation to seeking feedback, she wrote:

“To clarify: you suggested that you should approach the individuals who had given negative feedback directly. I do think that would be inappropriate. Those individuals have fed back via the line manager route and do not think would expect to be approached directly. I did offer to discuss with HR the option to do this using the 360 feedback process so do let me know if you would like me to discuss with Sanchia.”

Let’s make the focus of our next PIP review on Tuesday around your development plan so that we get this to the next level of detail and make sure we are giving you the right level of support to achieve what we are asking you to do.” (162)

41. The claimant did not respond to Ms Tozer's e-mail by setting out the SMART objectives he would like to be included in the PIP, instead he wrote:

“I will have a look at my objectives later. It is clear that to remain within the Employment Policy, PIP objectives must be SMART, so I will request that any objective which we cannot make SMART should be dropped”. (161)

42. He accepted in evidence that he did not set out his proposed SMART objectives. This was confirmed in Ms Tozer's evidence before us who said that he did not suggest any changes at that time or thereafter.

43. We find that he had failed to take advantage of the opportunity afforded to him by Ms Tozer to amend the SMART objectives.

44. In an e-mail dated 19 May 2017, sent by Mr Imtiaz Ahmed to Ms Tozer in relation to feedback, he wrote the following:

“I have just given Clive feedback on a piece of work he has conducted on the Hyperion project (which I have sent you yesterday).

In summary,

The output was not at a quality that I would expect from a BA for the following reasons:

- The Smartview users list and supporting detail was put together without any real thought
- Formatting was inconsistent
- User information/details were not sufficiently captured, challenged and documented
- Data gaps were not clarified with the business

This has led to Ryan spending time to get the information/spreadsheet to a quality that can be sent to the business and Fujitsu to confirm the deployment approach”. (167)

45. Ms Tozer again met with the claimant on 23 May 2017, during which they discussed the three objectives. She gave, what we find, was a balanced feedback to him, together with constructive criticisms of his performance. (169-170)

46. A further meeting was held on 30 May 2017, to discuss the objectives during which Mr Ahmed's e-mail was discussed. The claimant's explanation was that he was required to complete the task urgently (168–170)
47. They met again on 5 and 13 June 2017, to discuss the PIP. She was not satisfied that the claimant had made sufficient progress to overcome her concerns. She told him that she would move to Stage 2 of the PIP procedure. She said the existing targets were still substantially appropriate but noted that he wished to make some changes. He said that he should be taken off the PIP, to which Ms Tozer disagreed as she wanted him to demonstrate substantial improvement in his performance. They proposed to meet again on 16 June 2017. (176-179)
48. The claimant wrote twice to Ms Tozer on 14 June, raising concerns that in his view, the targets set were not have SMART objectives and were not achievable within the time span set by the process. He emailed her a summary of the meeting on 13 June. (181-182)
49. Ms Tozer emailed him on 15 June attaching a copy of the letter sent to his home address with the agreed targets. She assured him that she would continue to support him to overcome what was understandably a difficult time. In her letter she stated:

“Dear Clive,

I write further to our performance review meeting held on Tuesday 13 June 2017.

As we have previously discussed, your performance has fallen below the standards I have previously outlined to you as confirmed in my letter dated Tuesday 16 May 2017.

The areas of concern, which we have discussed in detail, are as follows:

1. The quality of the documentation that you produce
2. Your influencing style and approach and how it impacts others
3. The degree to which you take ownership of tasks and work proactively

During our meeting, we agreed the targets for you to work towards and these are enclosed with this letter.

I genuinely hope that, by applying yourself to your development areas, you will be able to improve your performance to the required standard. However, it is only fair to warn you that, if having reviewed the situation following our next meeting, I still find that your performance is not up to the standards outlined, I will have to consider either extending the review period of taking formal action against you, in line with the Company Disciplinary Policy. This may include warnings, transfer to a suitable alternative role or demotion (as an alternative to dismissal) or dismissal.

If at our next review meeting on July 14, 2017 at 2 o'clock your performance in these areas has improved to the required standard, no further action will be taken at this time, and I will continue to monitor your performance in the usual way.

I trust that the above is clear and if I or anyone else within the company can provide you with any additional help, please contact me." (186-188)

50. She met with the claimant on 26 June, 3 July and 10 July 2017. On 26 June she confirmed that one-to-one coaching had been arranged with a professional coach for him, to start on 10 July. (195)

51. The meetings on 3 and 10 July discussed his work, particularly in relation to Asset Tracking and the need to use the Requirements Traceability Matrix. (196-197)

52. Ms Tozer emailed him on 10 July 2017 stating the following:

"I have had a quick scan through and I think this needs quite a bit of work still. There are a lot of questions and placeholders and the requirements need to be worded in a clear and consistent way.

Rather than go to the daily stand up tomorrow can you and I spend some time together to review this to see if we can tighten it up a bit please?" (198)

53. A four weeks' review meeting was held on 17 July 2017, as part of the PIP process. It was noted that there were positive comments around stakeholder engagement, however, much of the feedback highlighted areas where there was more to be done to achieve the required standard. In the summary part of the notes it records:

"There has been some encouraging progress around stakeholder engagement but there is more to do to achieve the required standard across the three PIP objectives. Forthcoming holidays, and the work that Clive is doing with the external coach, are also factors to be considered in deciding next steps. In light of these considerations the review period will be extended to September 8 to allow additional time for these objectives to be achieved." (226-228)

54. Mr Williams emailed the claimant on 17 July 2017, commenting on his work on the Business Requirements in Asset Tracking. He noted that the functional and technical requirements were in one and wrote that it should not be the case as approvers should not be expected to approve the technical as well as the functional requirements of the work. He concluded by stating that, "All note, we must have clear comms and deadlines to manage expectations." (224)

55. Ms Tozer spoke to the claimant on 19 July setting out the issues discussed during the meeting on 17 July. She again repeated the three areas of concern and stated:

"During our meeting, we agreed the targets for you to work towards and these are enclosed with this letter. We also referenced the areas of support you have and are continuing to receive to achieve these targets, including:

1. Completion of the BCS Diploma in Business Analysis Modules – all four modules which are pre-requisite for the final oral exam.
 2. One-to-one coaching from an external coach.
 3. Access to Ashridge Learning Resource Centre.
 4. Coaching and support from me.”
56. She enclosed a detailed document setting out the targets and the dates by which they were to be achieved, being by 8 September 2017. (229-234)
57. In responding to an email sent by the claimant complaining about the PIP process, Ms Sarah Yexley, Human Resources Business Partner, on 27 July 2017, wrote to him stating that the process had been properly applied by Ms Tozer who regularly consulted with human resources and had provided support for him. (261)
58. Ms Tozer met with the claimant again on 3 August 2017 to conduct his mid-year review of the PIP process. In light of the on-going concerns she had about his performance, she rated it as underachieving and set out her reasons. She noted that he had achieved deadlines set for project deliverables but not always to a satisfactory quality. She gave, as an example, the BRD for Asset Tracking. It was noted that he failed to spend time considering the impact on business processes in sufficient depth and to incorporate draft process maps in document. In relation to Stakeholder Management, some progress had been made but there was more to do. Project Time Booking and Recording had been achieved. He could be relied upon to make sure his timesheets were done on time and helped the rest of the team to achieve that. It was also noted that he had extended his knowledge of the World of Asset Management. (297)
59. On 1 September 2017, the claimant emailed his proposed Personal Development Plan as suggested, he stated, by his coach. This was in preparation for the meeting with Ms Tozer on 4 September 2017. In his evidence before us he admitted, in answer to questions put to him by a member of the tribunal, that the targets he had set in his Personal Development Plan did not appear to be SMART objectives. He replied that he had put forward his plan as a proposal. He acknowledged that his plan was not put to his coach for her approval and or comment. We noted that this was the claimant’s own proposed Personal Development Plan and not a Performance Improvement Plan and had used the respondent’s proforma Personal Development Plan for this purpose. (299a-307)
60. On 4 September, Ms Tozer recorded the following:
- “Coaching sessions with Susan have now been completed. Susan recommended that Clive summarise his achievements over the last 18 months to support a positive outcome to the PIP process. Clive provided this to DT on Friday 1 September using the Whitbread PDP format as something that we could use as a structure for future one-to-ones. DT noted there were large sections that reiterate

history rather than moving us forward. However, the desire to move the process to a more positive place is also noted and is good to see.

Clive referenced completion of the Asset Tracking BRD on time and with Stake Holder sign off as a success. DT reminded Clive that whilst it is undoubtedly a success to get the BRD signed off and within the deadline, concerns had been raised about the quality of the document by Rhod in particular. DT also flagged that one of Rhod's concerns was lack of business processes which DT had been requesting for some weeks prior to this. Progress on business processes was documented as a key propriety for Clive in August and DT was disappointed to see that these had not been progressed during the month.

DT said that her perception was that Clive had not been fully utilised in August and was therefore surprised that more hadn't been achieved if this was the case. Clive agreed that this was the case but explained that he feels that PIP process saps his energy and prevents him from being as productive as he feels he would be if he was not on a PIP.

Clive had successfully organised a Design workshop for Asset Tracking which took place on Friday 1 September. Clive felt the meeting had met its objectives and had been very successful. DT gave the view that Clive had done well to get the stakeholders together. DT also said Clive had done a good job kicking the meeting off. He had issued an agenda for the meeting, taken care to ensure the meeting room arrangements were appropriate, made a hard copy of the documentation available in case of difficult problems, and arrived early so that he could log-on and present.

However, DT noted that Clive lost control of the Chairmanship of the meeting part way through. The supplier was effectively leading the conversation from that point on. As a result, we did not cover items 3 or 4 on the agenda. It was also not visible to DT how we were covering items 1 or 2. Clive explained that he was comfortable that the demonstration the supplier had given had enabled him to cover items 1 and 2 in the background. He also explained that he had taken a decision not to intervene to take back control of the meeting as he felt that the stakeholders in the room were getting value from the supplier's demo. DT expressed a view that the meeting had therefore not achieved everything we needed it to from a project perspective." (300)

61. The claimant emailed Ms Tozer the following day, 5 September, disputing what she said during the meeting and thanking her for mentioning an increasing number of positives. (301)
62. At the Review Meeting held on 8 September 2017, Ms Tozer summarised the feedback she had received from stakeholders, some of whom were suggested by the claimant. She had also received an email communication from his external coach, Ms Suzanne Izzard, regarding the coaching sessions with him. From the notes of the meeting, it is recorded the following:

“DT expressed a view that Clive had not made the progress that she would have expected this week – for example by drafting the To Be process maps. Clive agreed he had been under-employed but felt that that was not his fault. DT gave her view that this was an indication of the issues identified under point 3 on the

PIP as Clive had not demonstrated drive and ownership of tasks or been proactive in overcoming barriers to progress.

Overall summary of PIP involved:

DT shared the feedback which she had received back and highlighted that whilst there were many positive comments within it, significant areas of concern had been flagged, particularly around style and approach and drive and enthusiasm. DT was also drawing on her own experiences to make the following observations:

1. Quality of documentation

Clive has clearly tried to improve this and we can see progress across the five months of the PIP. Clive met the deadline assigned for the Asset Tracking BRD. However, concerns had been raised around the contextual information included in the Asset Tracking BRD and the failure to include adequate process maps.

2. Style and approach

Clive has been thoughtful in his approach to significant stakeholder engagement such as meetings with senior stakeholders and the progress he has made in this area is evident from the feedback. However, ... the feedback suggests that “day to day” interactions where Clive was less consciously preparing his role and response, problems are still being recorded.

3. Drive and enthusiasm

Clive has not demonstrated sufficient drive or proactivity in his approach to his work. His level of output across August and into September has been minimal.

4. Conclusion

DT confirmed that she does not find Clive’s performance to be up to the standards outlined in his PIP targets. Formal action will therefore now be taken in line with the Company Disciplinary Policy. A letter will be sent to Clive in due course to invite Clive to a disciplinary hearing.” (308-313, 326-327)

63. We find that the decision to refer the matter to disciplinary was taken by Ms Tozer in conjunction with human resources and Mr Rhodri Williams, Head of Group Solutions. Her reasons for doing so were the content of feedback she had received from stakeholders since the Review Meeting on 17 July 2017, and the claimant’s documentation which were below the standards expected and required. In particular, Mr Williams had raised concerns about an aspect of the claimant’ work, namely the Requirements Traceability Matrix. Mr Williams’ final point in his email of 28 July 2017, was to flag up a lack of process maps, which Ms Tozer had been requesting for some time but which the claimant had resisted completing. (235-262)
64. The claimant had also demonstrated a poor work rate during August having regard to the priority set at the meeting on 31 July. Ms Tozer had highlighted her concerns during the meeting on 4 September and explained

them again to the claimant at the formal Review Meeting on 8 September. (264-265, 300, and 326)

65. By the time the decision was taken to progress the matter to disciplinary, the claimant had been the subject of a combination of informal and formal PIPs over a period of five months. Ms Tozer considered ways of utilising his skills by other means, for example, he had previous discussions with her about wanting to work for another year or two before retiring. This was considered a possible way of avoiding the disciplinary process, but the consensus was that this would likely result in issues being transferred elsewhere. Human resources and Mr Williams had particular concerns about the claimant's interpersonal skills, his influencing style and his approach. They were of concern irrespective of the role.
66. We find that Ms Tozer had spent a considerable amount of her management time in ensuring that the claimant improve his performance during the PIP process.

Disciplinary hearing on 25 September 2017

67. Mr Mark Cook, IS Programme Manager, wrote to the claimant on 18 September 2017, inviting him to a disciplinary hearing scheduled to take place on 25 September 2017. He stated that the purpose of the hearing was to discuss potential misconduct in relation to:

“1. Unsatisfactory levels of performance versus the expectation of an IS Business Analysis within Whitbread. This allegation was related to the three areas highlighted and managed as part of your on-going Performance Improvement Plan (PIP) as detailed below:

- Quality of documentation produced not being to the required standard.
- Stakeholder Engagement, meeting management and influencing styles and effectiveness.
- Pace and thoroughness of delivery on project deliverables.

Please find enclosed the following documents to be considered at the hearing:

- Clive Johnson PIP documentation summary

As this hearing may result in disciplinary action being taken against you, up to and including your dismissal from the company, you are entitled to be represented at the hearing. This can either be a fellow employee or an authorised Trade Union representative.

This is a serious matter and you should make every effort to attend.”

(329)

68. At the disciplinary hearing the claimant attended without a companion. Mr Cook was present together with Ms Emma Horton, from human resources, who took notes. At the beginning of the hearing the claimant produced a typed statement in which he challenged the legitimacy of the PIP and the decision to progress the matter to a disciplinary hearing. He complained about Ms Tozer's conduct towards him. He asserted that there was an agenda to get rid of him and that his coach had commented on the case against him as appearing to be "incredibly weak". He alleged favouritism and bias. He asked that there to be a finding of no case to answer and that his grievance be investigated.
69. Having read the statement, Mr Cook decided to seek advice from Ms Horton on how to proceed. After considering the advice, he concluded that the correct approach would be to investigate and consider the grievance before proceeding with the disciplinary hearing. The claimant was informed of the decision and the meeting was adjourned to investigate his grievance. (330-335)

The claimant's grievance

70. There were three allegations Mr Cook investigated: that the management of the end of year 2016/2017 performance rating and process was unfair; the PIP was not followed correctly and was unfair; and his line manager's performance was unacceptable.
71. Mr Cook met with Mr Yinka Olayomi, Programme Manager; Miss Liz Wright, Programme Manager; Mr Rhodri Williams; and Ms Tozer. They were all interviewed on 29 September 2017.
72. Having considered the evidence from the witnesses and the claimant's grievance, Mr Cook's conclusion was not to uphold any of the complaints in the grievance. He also found that Ms Tozer's workload was excessive in view of the fact that she worked part-time and had nine direct reports as well as her own workload. He recommended that her workload be reviewed to enable her to spend more time with her team. He found no evidence of her showing any favouritism to any member of staff and that the claimant's concerns were more to do with her management style rather than any malicious intent. (354-357)
73. The grievance outcome was sent to the claimant on 10 October 2017. He appealed the outcome on 10 October 2017, repeating his concerns about the absence of SMART objectives; the end of year rating; the PIP Process; and Ms Tozer's performance. (359-363)
74. The appeal was heard by Ms Jo Osbourne, Head of PMO, who held a hearing with the claimant on 27 October 2017 and rejected his appeal on 6 November 2017. The outcome letter was sent to him on that day together with her grievance appeal outcome report. (390-394)
75. Neither the conduct of the grievance and the outcomes were the subject of the claimant's claims before this tribunal.

Disciplinary hearing on 13 November 2017

76. Following on from the grievance appeal outcome, the claimant was invited by letter dated 7 November 2017, from Mr Cook, to a disciplinary hearing on 13 November 2017. The content of the letter was the same as the invitation to the disciplinary hearing sent earlier. (396)
77. The claimant attended the hearing without a companion. Mr Cook was present to chair it. Ms Charlotte Hall took notes. It started at 9.20am and lasted for approximately two and a half hours. At the start the claimant read from a prepared document and handed Mr Cook a copy. In it he asserted that there was no evidence presented in support of the assertion that he had not achieved his project deliverables. He stated that his recent project managers had told him that they were happy with his deliverables which had all been delivered in time and within budget. He asserted that this alone should be sufficient for Mr Cook to find that there was no case to answer. He then dealt with the three matters which were the subject of the PIP. (435-436)
78. Mr Cook adjourned for three minutes to consider the claimant's written statement before reconvening. Questions were put by him to the claimant regarding his work. There was then an adjournment at 11.44am for Mr Cook to consider his decision. When it resumed at 4.01pm, he informed the claimant that he had decided to uphold the complaints against him in two respects and would impose the penalty of dismissal. He found that the allegations that he had produced an inadequate standard of documentation, and that he had lacked productive engagement with stakeholders, were substantiated. However, there was no case to answer in relation to the third allegation of unsatisfactory performance regarding pace and thoroughness of delivery on project deliverables.
79. From the notes of the meeting he said to the claimant:
- “I've spent the afternoon going through the evidence again, considering the options available, considering your case this morning, your case from the grievance, mannerisms and feedback and taken some advice from the relevant parties. Based on what I have read I appreciate what you said about the SMART measures and I've fed this into the relevant HR parties. However, there hasn't been significant improvement in the objectives that have been set and that on that basis unfortunately the outcome is dismissal. You will of course have the opportunity to challenge this decision through the appeals process.
- I have based this decision on two factors. Firstly, basing it on how much the evidence shows that your level of improvement to the challenges outlined in the PIP and secondly, although not part of this process, in responding to some of your questions from earlier. In considering the outcome I question if there is a fit issue where the skill set that you have in a BA and the skill set we need in our BAs at Whitbread lie differently. That is my finding, do you have any questions.?” (432)

80. He wrote to the claimant on 14 November 2017, confirming his decision and attached the notes taken at the hearing. He stated that the claimant's last day of employment would be 13 November 2017 and that he would be paid three months in lieu of notice. He was informed of his right to appeal and was given the details of who his appeal should be addressed. (437)
81. The claimant told the tribunal that Mr Cook did a thorough investigation except in the areas where he, the claimant, raised concerns. He said that neither age nor gender was in Mr Cook's mind at the time he came to his decision.
82. In relation to Mr Cook's reasons for dismissing the claimant he, Mr Cook, told the tribunal and we do find as fact, that he had considered whether the claimant could take on a BA role in another team but was of the view that it would not be an appropriate outcome as he had significant concerns about the standard of the claimant's work and his engagement with stakeholders. Many had expressed concerns about the claimant during the PIP process. A number stated that they would not work with him. Mr Cook concluded that the claimant had been given sufficient opportunity during the PIP to turn his performance around but had been unable to do so. He was also aware that the claimant had been the subject of a previous PIP. It seemed to him that transferring the claimant to another team would not resolve the concerns the respondent had but would simply move the problem elsewhere. In his view it was clear that many others shared Ms Tozer's concerns. He concluded that it was not appropriate to move the claimant to another BA position.
83. He then considered whether it would be appropriate to move the claimant to a lower graded role, he, however, believed that the same issues were likely to arise as they had during the claimant's employment as a BA and the concerns were not specific to the role of a BA. He concluded that employing the claimant in a lower graded role would likely to bring the same problems.
84. Having considered and rejected various options to retain the claimant in the respondent's business, he concluded, with some regret, that dismissal was the appropriate outcome.

Dismissal appeal

85. The claimant appealed on 17 November 2017. In his grounds of appeal he repeated his concerns about the PIP procedure and the lack of evidence that he had underperformed. He referred to the conduct of his Ms Tozer as his line manager and that her observations of him had not been balanced. He also raised the issue of discriminatory treatment because of sex as another BA should have been subjected to performance issues was not put on a PIP. He alleged that her work was late, incomplete and not signed off, and that she had to be given considerable assistance up to the level of the Programme Manager. He asserted that his performance was much more satisfactory than his female comparator.

86. In paragraph 8 of his grounds of appeal, he alleged that he had been the victim of age and sex discrimination. He stated that he and another male BA, as the older members of the team and more experienced, were the subjects of performance management.
87. In paragraph 9 he alleged that he had been harassed and bullied by his Ms Tozer. (438-440).
88. By a letter dated 27 November 2017, he was invited by Ms Kate Bellars, Human Resources Business Partner-IT, to an appeal hearing scheduled to take place on 30 November 2017. The hearing, she wrote, would be a re-hearing conducted by Ms Leslie Williams, Group Pension Director, accompanied by Ms Rebecca Hooton, IT Administrator, as note taker. He was reminded of his right to bring a fellow employee or trade union representative. He was informed that the outcome of the appeal could be to overturn the decision; impose a lesser warning/sanction; or uphold the decision. (442)
89. At the appeal hearing the claimant gave a statement described as a summary of recent performance as at 30 November 2017, to Ms Williams. This was his view of his performance and his criticisms of the PIP process and the fact that he felt bullied and harassed by Ms Tozer. He stated that the unfair treatment he was receiving had impacted on him and on his work. He maintained that there was no evidence that he was underperforming and that it appeared that the older male members were the subjects of performance management. (447)
90. Notes of the appeal hearing were given to the claimant who amended and signed them in manuscript form. Of significance was that he did not amend two parts of the notes which the tribunal considered to be relevant. He was asked by Ms Williams:

“Can I just ask if you were clear about what you needed to improve?”

The claimant replied:

“I was clear on what they’d thought I needed to improve, and the reason she put 52 documents in that pack was because she thought they were evidence of me not providing documents of appropriate quality, however at no point did she raise whether she thought those documents were quality because of the purpose or requirement of the project. We explored that in the disciplinary 19 pages.”

91. Further, in the hearing, he was asked:

“LW: So how could it have been SMART?”

CJ: I did tweak it a bit to understand the measures, the initial draft of the PIP said that any feedback was an automatic fail, I specifically asked on more than one occasion I suggested that we do something different to give me a chance of exiting the PIP, document 12A, not included in the pack, I’m concerned that during the first phase my objectives were not in line with the employment policy.

- LW: You were being asked to improve documentation, impacting ownership.
- CJ: Yes, but there was never any measure put on those improvements, there was nothing that anyone could look at saying that Clive has done A, B and C and he is ready to exit the PIP.
- LW: So if you'd had positive feedback, that wouldn't have demonstrated improvement?
- CJ: The word sufficient has been used at each stage which means it's at Debbie's discretion to decide if I had made "sufficient" improvement. I tried drafting a PDP document and I'd be more than happy to change it around, I suggested we could exit the PIP and run the rest of the year as formal monthly written meetings, without Deb bearing down on me and to give me time to go and perform without Deb bearing down on me."

92. In relation to discriminatory treatment, the claimant said at the end of the hearing that there was another BA called Doris, who lived in the same street as Ms Tozer. He was told to use her work as an example. What came out was that her work was incomplete. It was signed off and was not delivered on budget. Doris had been helped a lot by him and by the Programme Manager. He asserted that it was favouritism and that although Doris was not delivering, she was not the subject of performance management. The significant difference between his position and that of Doris was not apparent until "The last few weeks". He said that Ms Tozer seemed "blind to her shortcomings while constantly bearing down on me".
93. Ms Williams said that she would speak to Ms Tozer after the hearing. (449-452)
94. With reference to Doris, this was to Ms Doris Rosmann-Begg, who was employed as a BA and is younger than the claimant.
95. Ms Williams spoke to Ms Tozer on 1 December 2017, putting across the points the claimant made during the appeal hearing. No notes were taken by Ms Williams of their discussion.
96. The reason why Ms Williams spoke to Ms Tozer was to find out whether there was any discrimination as alleged by the claimant and whether Ms Rosmann-Begg's circumstances were similar to his. Ms Tozer's response to Ms Williams was that Ms Rosmann-Begg had missed a deadline in relation to a particular task, which was beyond her control was not the subject of a PIP.
97. Ms Williams also considered a number of additional emails the claimant produced of the hearing. She told us in evidence that the claimant failed to demonstrate to her that he had performed at an acceptable level. She was satisfied that the reasons for his dismissal were his standard of documentation, and poor engagement with stakeholders. She concluded that she would uphold Mr Cook's decision and wrote in her outcome letter to the claimant the following:

- “1.In particular I reference the Performance Improvement Plan (PIP) and the note of your review meetings between May and September 2017, together with the email exchange of 16 May 2017, provided by you, in which Debbie explains her rationale for entering into a PIP. You were given substantial support by Whitbread including weekly review meetings, access to Ashridge Learning Material, feedback form stakeholders and funded external coaching, to help you make those improvements. You were given eight months between the agreement of an informal improvement plan in April 2017 and November 2017, when you were dismissed, to make the improvements require of you. Nevertheless, the documentation produced and your stakeholder engagement did not reach the level required by your manager. This was explained in the PIP Review notes and demonstrated in the stakeholder feedback dated September 2017. As a result of my review, I support the decision to dismiss you because your performance was unsatisfactory verses the expectation of an IS Business Analyst.
2. You do not believe that Whitbread’s employment policies and procedures were followed because you did not feel your objectives were SMART- in particular measurable, and you feel you[r] manager did not demonstrate the leadership qualities required of Whitbread, meaning the PIP process was not followed correctly.

Your PIP was clearly documented and sent to you formally on 19 July 2017 and it included written measures for improvement. You had regular follow up meetings. The notes of those meetings focused on specific areas for improvement and contain examples of activity that was not satisfactory. In my view these documents contain enough information about what was expected of you to guide your future performance. During our interview, you confirmed that you understood what your manager wanted you to improve, which indicates to me that there was no uncertainty on your part about your objectives.

I have found no evidence, and you have not provided any, to support your accusations that your manager did not demonstrate the good behaviours we expect from our leaders at Whitbread.

I am confident that the Whitbread PIP process was followed correctly.

3. You claim that the meeting notes were one-sided and documents from you had been excluded.

You gave me copies of the documents you wanted me to consider alongside the documentation summary dated 8 September 2017. I have read those documents alongside the documentation summary. The documents you provided are a set of emails, which explain that you did not agree that the feedback you were being given was fair. They do not provide any evidence countering the feedback.

Your emails also explain that you did not accept the process that was being followed. As I note above, in my view, the PIP process was correctly followed.

My review of your emails has not changed my decision to uphold the decision to dismiss you.

4. You claim that your dismissal was unfair, discriminatory and that you were subjected to harassment and bullying.

I can find no evidence that you were dismissed for anything other than your performance. There is nothing in the evidence you have presented that indicates discrimination on grounds of age or gender and you have not provided me with any evidence that this is the case. I note that the tone of the emails and the PIP reports written by Debbie Tozer are supportive and encouraging, and that she appointed and funded a Coach for you suggesting a desire to help you improve your performance, rather than harassment or bullying. My views that the payment in lieu of notice was an appropriate settlement under the under the circumstances.

This exhausts your right of appeal and concludes the disciplinary process.”

(454-455)

Ms Doris Rossmann-Begg

98. In relation to Ms Rosmann-Begg, referred to earlier, it was Ms Tozer who made reference to her in her discussions with the claimant, as an example of best practice. Ms Rosmann-Begg was known to Ms Tozer and it was Ms Tozer who had introduced her to the respondent as a potential contact when it was asking managers to identify those outside the business who might be of interest to it. Ms Tozer had discussions with Mr Williams. They agreed that the respondent should offer Ms Rosmann-Begg a role on a short-term contract. Ms Rosmann-Begg accepted the position and later applied for a permanent role when that became available. She was subsequently appointed to the position of BA but Ms Tozer was not involved in her recruitment.
99. From the evidence given before us, we find that Ms Rosmann-Begg is highly regarded in the business and is a lively character who engages well with others, particularly with stakeholders. Her work is of a high standard.
100. The background to the issue raised by the claimant about her was this. On one occasion she missed a deadline but was not subjected to any performance or disciplinary action. The reason being that there were external factors which caused the delay and Ms Rosmann-Begg highlighted those in advance of the deadline when they became apparent to her. The delay was, therefore, outside her control. It was acknowledged by the respondent that she brought the issue of the delay to management's attention as soon as it was known to her.
101. From the respondent's point of view the only issue was that Ms Rosmann-Begg had missed a deadline but it was flagged-up well in advance by her. There were no issues about the quality of the documentation she produced; stakeholder engagement, management and influencing styles and effectiveness; and the pace and thoroughness of delivery on project deliverables.

102. Although the claimant said during the hearing that Ms Williams was not influenced by either age or gender in her decision making, the issues he raised during the appeal meant that her findings were discriminatory because of age and gender.
103. In Ms Williams' outcome letter, paragraph 4, she addressed the issues of bullying and harassment as well as age and gender. (455)
104. At the beginning of the claimant's cross-examination of Ms Tozer, although she said that she had not been a Business Analyst for 25 years but had worked for the respondent 25 years, the claimant asserted that because of his greater experience, his views should prevail over Ms Tozer. He did not appear to us to have a favourable opinion of her as his line manager.
105. Ms Tozer told the tribunal and we do find as fact, that at the time of the hearing she was 52 years of age. In her team were a female in her early 50s; a female contractor who was 49 years; a young female of 32 years; another of 47 years; and a male who was in his early 40s.

Submissions

106. The tribunal considered the submissions by the claimant as well as by Mr Foster, solicitor on behalf of the respondent. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have also taken into account the authorities that they have referred us to.

The law

107. Section 13 of the Equality Act 2010 defines direct discrimination as follows:

“13. Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.”

108. Section 39(2) provides:

“An employer (A) must not discriminate against an employee of A's (B) –

- (a) -----
- (b) in the way A affords B access, or by not affording access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service,
- (c) by dismissing B,

(d) by subjecting B to any other detriment.”

109. A special feature of direct age discrimination is that it can be justified.
110. Another protected characteristic is sex, section 4 Equality Act 2010 and an employer must not discriminate because of sex having regard to section 39(2).
111. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

“There must be no material difference between the circumstances relating to each case.”

112. Section 136 EqA is the burden of proof provision. It provides:

"(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

113. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.
114. In Madarassy v Nomura International plc [2007] IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.
115. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex

and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

116. The Court then went on to give a helpful guide, “Could conclude”, now “could decide”, must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.
117. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.
118. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.
119. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's

apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

120. The tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.
121. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.
122. Unreasonable conduct on its own does not amount to discrimination, Bahl v Law Society [2004] IRLR 799
123. As regards unfair dismissal, section 98(1) Employment Rights Act 1996 "ERA", provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show what was the reason or the principal reason for dismissing the employee. Dismissal for capability is a potentially fair reason, s.98(2)(a).
124. Capability is defined in section 98(3) ERA 1996:

“ “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health any other physical or mental quality..”.
125. Whether the dismissal is fair or unfair having regard to the reason shown by the employer, here the burden of proof is neutral. The tribunal must have regard to the provisions of s.98(4) which states:

“Where the employer has fulfilled the requirements of subsection (1), and 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 employees 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.”
126. The range of reasonable responses test applies to the substantive decision to dismiss as well as to procedural matters, Shreshtha v Genesis Housing Association Ltd [2015] IRLR 399.

127. Capability should be treated as applying those cases in which the incapability is due to inherent incapacity. Where someone fails to come up to standard through his or her own carelessness or negligent idleness, that is not incapability but misconduct, Sutton and Gates (Luton) v Boxall [1979] ICR 67, a judgment of the Employment Appeal Tribunal.
128. What the tribunal has to decide is whether there was material before the employer that satisfied the employer of the employee's inadequacy or unsuitability and on which it was reasonable to dismiss. Had the employer conducted a reasonable investigation into the claimant's performance; was the employee given sufficient time to improve; and did the employer reasonably believe that the employee's performance was inadequate? It is for the employer to produce evidence of unsatisfactory performance and that it was the real reason for dismissing the employee, Alidair Ltd v Taylor [1978] ICR 445, a judgment of the Court of Appeal.
129. It is for the employer to set the standards asked of employees and tribunals must not substitute their views of the employee's competence, Fletcher v St Leonard's School UKEAT/25/87.

Conclusion

Unfair dismissal

130. The claimant commenced employment with the respondent 21 October 2014. Shortly thereafter, in December 2015, there were concerns about his performance as a Business Analyst. He was rated as underachieving by Mr Shah in December 2015 and by Mr Oylayomi in March 2016. At the end of year review in February 2017, there were still concerns about his performance. Although he denied that he was on the PIP in 2016, we were satisfied that there were concerns about his performance in from 2015 to 2017.
131. Ms Tozer met with him on 10 April 2017 to start the informal PIP process. Three targets were set. There were 16 meetings in all to discuss his performance. It is up to an employer to address performance issues and it does not have to follow on from an adverse end of year rating as asserted by the claimant. The formal PIP was extended by one month by Ms Tozer. The claimant had several opportunities to improve. He was supported by Ms Tozer in trying to agree the targets and was provided with a coach, Ms Suzanne Izzard. The targets were agreed between Ms Tozer and the claimant as his amendments were incorporated by her, although some were not accepted as they did not address her concerns. He acknowledged this at his appeal.
132. We were satisfied the targets were sufficiently measurable and essentially were to do with the claimant's soft skills, that being his relationship with stakeholders. As regards feedback from the stakeholders, although some were positive, many were adverse leading the respondent to conclude that

the claimant did not meet the targets. The claimant did not produce separate SMART targets and there was no evidence that Ms Izzard agreed with the content of his Personal Development Plan. His Plan demonstrated what had been the problem in his relationship with Ms Tozer, that being his reluctance to accept criticism from her and her management of the PIP process.

133. Ms Yexley did not question the targets set in her response to the claimant dated 27 July 2017.
134. In relation to the evidence in the possession of Mr Cook, he considered the claimant's work on the various projects, the PIP, feedback from stakeholders and found that his work was below the standard expected and his engagement with stakeholders. Many of whom stated that they could no longer work with him.
135. Mr Cook considered retaining the claimant as a BA or demoting him but was of the view that the same issues would arise. He had spent a day with the claimant during the disciplinary hearing and took time to come to his conclusions. There was no evidence that he was motivated by any ulterior motive other than the claimant's capability.
136. Quite independently of Mr Cook, Ms Williams came to a similar conclusion and dismissed the appeal.
137. It is not our function to substitute ourselves for the reasonable employer. We were satisfied that this respondent had evidence upon which it came to the conclusion that dismissal fell within the range of reasonable responses. Accordingly, the claimant's unfair dismissal claim is not well-founded and is dismissed.

Direct age discrimination

138. It is the claimant's case that being placed on a PIP and being dismissed were acts of direct age and sex discrimination.
139. In relation to the claim of direct age discrimination, prior to Ms Tozer's involvement, there were concerns about the claimant's performance. It is correct to say that he was the most senior member of staff by reason of his age. However, the evidence showed that there were genuine, ongoing concerns which were not abated despite the measures taken by Ms Tozer to improve his performance.
140. Although he compared himself with Ms Rossmann-Begg, she is not an appropriate comparator, as there were no issues about her performance. Quite the contrary, she was considered a much valued member of the team. She forewarned her managers that there would be a delay in delivering her work which was flagged up prior to the due date. It was acknowledged by the respondent that the reason for the delay was beyond her control.

141. In the claimant's case, there were issues about his performance going back to December 2015. There were no external factors which prevented improvement in his performance.
142. The claimant has not satisfied the first limb of the burden of proof, that of a prima facie case of less favourable treatment, Madarassy. Accordingly, this aspect of his direct age discrimination claim is not well-founded and is dismissed.
143. In relation to his dismissal, this decision was taken by Mr Cook supported by Ms Williams. The claimant does not allege that they consciously discriminated against him only that they were involved in an alleged discriminatory process.
144. We were satisfied that the reason for his dismissal was that he had consistently underperformed. Ms Rossmann-Begg was not the subject of a PIP, therefore, not an appropriate comparator. The claimant had not established less favourable treatment to shift the burden on to the respondent. This aspect of his direct age discrimination claim is not well-founded and is dismissed.

Direct sex discrimination

145. We repeat what we have stated in the above paragraphs. The claimant has not established less favourable treatment when compared with Ms Rossmann-Begg, as she is not an appropriate comparator.
146. He was placed on a PIP because of ongoing issues with his performance. Ms Rossmann-Begg had no performance issues. She was also not the subject of a PIP, like the claimant. The only issue was the delay in a project which was beyond her control.
147. There was no less favourable treatment of the claimant. Even if there was, we are satisfied that there is no causal link between being placed on a PIP, his dismissal, and his sex. The respondent has established a non-discriminatory reason for the treatment, namely the fair application of the PIP and disciplinary process. The reason for his treatment was the fair, objective application of the capability procedure. Accordingly, the claimant's direct sex discrimination claims are not well-founded and are dismissed.
148. The provisional remedy hearing date of Monday 16 December 2019 is hereby vacated.

Employment Judge Bedeau

Date:15.11.19.....

Sent to the parties on: ..18.11.19.....

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For the Tribunal Office