



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4102945/2017 & 4105527/2017

Hearing Held at Glasgow on 4, 5, 6, 7,8,11,12 and 13 February 2019

Employment Judge: M A Macleod

Members: Mr P Kelman

Mr P O'Hagan

Mr S Basude

**Claimant
In Person**

Scottish Hydro Electric Transmission plc

**Respondent
Represented by
Ms K Norval
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims all fail and are dismissed.

REASONS

Introduction

1. The claimant presented two claims to the Employment Tribunal, the first (case no: 4102945/2017) on 27 August 2017, and the second (case no: 4105527/2017) on 6 November 2017. In the first claim, he complained that he had been discriminated against by the respondent on the grounds of age, and in the second, that he had been discriminated against by the respondent on the grounds of age and also unfairly dismissed by them.

2. The respondent submitted ET3s in respect of both claims, in which they resisted all claims made by the claimant and denied that they had discriminated against the claimant on the grounds of age, or that they had unfairly dismissed him.

3. Following significant case management, a hearing on the merits was fixed to take place on 4 to 15 February 2019, a diet of ten days' duration. As it turned out, the hearing was concluded on 13 February 2019, and the remaining two days were vacated.

4. At the hearing, the claimant attended and represented himself. The respondent was represented by Ms K Norval, solicitor.

5. The parties helpfully agreed and presented to the Tribunal a Joint Bundle of Productions, to which reference was made throughout the hearing. During the course of the hearing, additional documents were produced, with the permission of the Tribunal.

6. The claimant gave evidence on his own account.

7. The respondent called the following as witnesses:

- Ian Bruce Clark, Lead Project Manager;
- Michael Cowie, Construction Manager;
- Alistair Muir, Project Manager;
- Suzanne Beth Mackay, Project Manager;
- Marie Claire Sullivan, Human Resources Manager;
- Michelle McLeish, Performance Manager;
- Anthony Scott, Project Director;
- David Andrew Mackay, Director of Operations;
- Aileen Elizabeth McLeod, Head of Business Planning and Performance;
- Claire Denise Carrington, Director of Business Services.

8. At the outset of the hearing, the claimant confirmed that he was no longer seeking reinstatement nor re-engagement as a remedy in this case, having secured new employment in March 2018.

9. He also confirmed that he is inviting the Tribunal to make a recommendation that the respondent takes appropriate action against Mr Clark in relation to bullying and harassment under its policy in order to avoid similar situations arising for other employees in the future.

10. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

11. The claimant, whose date of birth is 9 July 1985, commenced employment with the respondent on 9 February 2015. He obtained the degree of Bachelor of Electrical Engineering from the University of Pune, in India, in 2007. Having worked for a business in Mumbai, he moved to the United Kingdom and in August 2010 commenced a Masters degree in Business Administration (MBA) at De Montford University in Leicester. He graduated in 2012. His dissertation focused particularly on project management.

12. The respondent is part of the SSE Group, a large scale energy company

which provides energy and energy management, multi-utility networks, contracting and lighting services and telecommunications for a number of organisations.

13. Having joined the respondent in February 2015, the claimant was moved to a position as Project Manager with the Transmissions team in May 2015, the project upon which he had been deployed having been discontinued. The claimant had advised the respondent that he had project management experience, together with experience of working with overhead lines, and accordingly he was asked to take on the role of Project Manager for the Overhead Line Project, which involved the construction of a new overhead power line between the Dounreay sub-station to the Thurso sub-station, in Caithness, which was then to run to the Spittai sub-station and beyond to Mybster by way of an extension. The project was worth approximately £42 million. The contractors working on the project were Balfour Beatty.

14. The claimant was therefore appointed as the Project Manager for the Overhead Line project, and thereby became responsible for the management of that project. The role of a Project Manager is to manage all aspects of the project, by pulling the team together, understanding the constituent elements of the team, managing the budget of the project, managing the commercial and contractual relationships with the contractor, ensuring that safety and quality are maintained to the necessary standards. Essentially, the Project Manager is responsible for managing the project so that it is completed to the necessary quality standards, to time and to budget.

15. The claimant reported to the Senior Project Manager, Ian Clark. Mr Clark was responsible for the three associated projects in Caithness, which related to the overhead line project to be managed by the claimant; the upgrading work on the Thurso sub-station, which was managed by Alistair Muir; and the upgrading work on the Dounreay and Mybster sub-stations, managed by Suzanne Mackay. All three Project Managers reported to Mr Clark, who in turn reported to the Project Director, Tony Scott. The claimant had one manager reporting directly to him, Michael Cowie, the Construction Manager.

16. The claimant was based in the Glasgow office of the respondent, though was frequently required to attend at the Forss site office, in order to have ready access to the site itself and to the contractors and other workers engaged on the project.

17. Mr Clark was, and remains, based in the respondent's Perth office.

Performance Review

18. As the claimant's line manager, Mr Clark was responsible for carrying out regular performance reviews. The respondent operates a Performance Management policy, with guidelines for managers setting out their obligations under the policy (200ff). The normal schedule was that at the start of each year, a meeting would take place at which objectives would be set for the employee to meet; approximately six months later there would be a mid-year review to determine how the claimant's performance was matching those objectives; and finally at the end of twelve months a review would take place, following which a rating would be given to the employee

depending on the manager's assessment of their performance. The ratings would be as follows:

1. "Unsatisfactory;
2. Requires development;
3. Meets expectations;
4. Exceeds expectations;
5. Outstanding"

19. In the first months of the claimant's employment as Project Manager, Mr Clark was concerned about the number of questions he was asking him about the management of the project. He noted that there were certain aspects of the role with which he appeared to be comfortable, such as ensuring that the weekly and monthly reports were submitted to Mr Clark on time, and he spent a considerable portion of his time in the Caithness site office, which was a positive sign that he had a presence on site. He was, however, concerned at the claimant's management of the financial, commercial and safety aspects of the project.

20. In March 2016, Mr Clark carried out the claimant's end of year review, to cover the first 10 months of his performance as Project Manager for the Overhead Line Project (256/7). He noted the following against the SMART objectives set at the start of his involvement in the project, including in parenthesis at the end his rating from 1 to 5:

- (1) *"Shri has improved his efforts to spend time on site and his contribution to site safety. This includes observing inspections carried out by Michael Cowie and giving advice where appropriate. (3)*
- (2) *Increased engagement with the site supervisors his (sic) started to develop working relationships. PDPs have been established and supported over the last 6 months however no additional safety and environmental aims have been added. Shri needs to consider the development of his site team and ensure they are continually striving to improve through review of targets. (2/3)*
- (3) *Shri has spent time looking at the various project management documents and supported the PAR in January 2016. However, Shri has not proactively managed key documents such as the risk register and the HUB report which are critical to managing the commercial aspects of the project. This will be a focus for 2016-17. (2)*
- (4) *Shri has significantly improved his understanding of the key dates for the OHL works. Shri met with the Cost Engineer for an introduction to the HUB report but needs to spend significantly more time understanding the costs, the value of work done and updating the forecasting. Preparation of SSE resources for tower inspections was not in place and this had the potential to undo a lot of the hard work getting the OHL works ahead of programme. Shri needs to look at the programme and plan for SSE/SHET activities. Monthly spend has frequently significantly exceeded the planned VOWD [value of work done] however the forecast has not been actively adjusted accordingly. (2/3)*
- (5) *The quality improvement initiative has not been developed. (1)*
- (6) *The training course was cancelled for Business reasons. Shri has spent time looking at the NEC3 contract and its constituent parts but needs to improve his understanding of the mechanisms and timescales required by the contract, as well as the significance of the Z-clauses. (2/3)"*

21 . Mr Clark decided to apply to the claimant an overall rating of 2.

22. Mr Clark then assessed the claimant's performance against SSE Values, and again came to an overall rating of 2. Within that assessment, it was noted, under "Sustainability", that *Wo opportunities to promote the project in the local community have been identified. This is key for the perceived success of the project in the local area going forward. (1/2)*"

23. The review permits the employee to add comments, and the claimant did so by stating that he would like to focus on key project and personal development objectives as advised, and that he would "take this as a challenge", being confident that he would lead the Overhead Lines Project to a successful completion.

24. Mr Clark added his own comments:

"Shri has improved in several aspects over the last 6 months and shown signs that he can lead the OHL contract to a successful completion. Take the project 'by the horns' and ensure that other parties are informed and managed to meet the needs of the programme. The Site team have strong attributes that will support Shri, and the delivery of the project, but they need to be led.

A focus in the next 6-12 months on the key project and personal development objectives will help Shri to develop as a Project Manager."

25. The claimant and Mr Clark then signed the review document on 9 March 2016.

26. Mr Clark requested that the claimant produce an "Action Tracker", for the OHL project, in order to ensure that he was not missing actions and deadlines which required to be carried out in the project. The claimant did so. At that stage, Mr Clark did not ask, and had not asked, either Mr Muir or Ms Mackay to produce such an action tracker, on the basis that he did not have the same concerns about their ability to meet targets and ensure actions were carried out. The claimant produced an action tracker (260) on which Mr Clark made comments, in which he advised him to use precision when referring to dates and queried why some of the actions had not yet been carried out.

27. Mr Clark carried out the claimant's performance review for the year 2016/17, following on from the setting of objectives for that year in March 2016. At the interim review in September 2016, he applied an overall interim rating of 2 to the claimant. The claimant's comments on that review were:

"15/09/16 - I have been learning and also enjoying on LT23 OHL project since last year. I have good project team on site and I have built up a good relationship with them which I think is beneficial to the project. However I will focus on resolving matters in a timeous manner as advised. I have been getting more involved in the commercial/contractual aspects of the project. I will continue to focus on the all (sic) aspects of the job I am involved in and I would also like to get involved in substation works and would like to provide support to the substation PMs. "

28. Mr Clark's comments were:

"15/09/16 - Shri has demonstrated progress in understanding his project and in reporting progress on site. In order to fulfil the PM role Shri needs to improve his understanding of the commercial aspects and his application of the Contract clauses. The Dounreay Mybster project offers Shri an

excellent opportunity to develop project management skills, to learn about substations and to experience the role of a Project Manager within a Client organisation. In order to gain this experience and knowledge Shri needs to demonstrate a much higher level of commitment and willingness and start driving delivery at every opportunity. n

Personal Improvement Plan (PIP) - Informal Stage

29. The respondent operates a Capability Policy and Procedure which applies to all employees (1 58ff). The policy sets out, at paragraph 4.1, an Informal Stage, which is noted to be the first step in the procedure, in the form of an informal discussion with the employee about their performance, ability or skill (160). During this discussion, it is said, " *. .the line manager must make clear the areas in which the employee's performance is below expectations (explaining the grounds/evidence for this view) with the aim of identifying any problems or reasons for the under-performance, which could be resolved. Solutions may involve additional training, providing a mentor, coaching or some other method which will support the employee. **

30. It is expected that the employee will be given the opportunity to explain why their performance is below expectation and to raise any concerns about their role, or the support and guidance they have been given.

31 . It is provided that "*Managers will then set a reasonable time frame which will allow the employee to meet the standard of performance required, this must be recorded on the PIP form - Informal Stage.*" An Informal Improvement Notice is to be issued, detailing the type of improvement required, any additional support or training to be provided and any other agreed actions, with a timescale. The line manager must then monitor the objectives/targets within the review period, and a further meeting must be arranged at the end of that period to review the situation. If the employee has not met the required standards, they are to be invited to a formal meeting with their manager.

32. On 25 October 2016, Mr Clark met with the claimant at the Informal Stage to commence the PIP process. He discussed with him the areas of concern, and set out in the PIP report (271 ff) the improvements he expected to see from the claimant. The areas of concern were identified in the report as follows:

- "*Project management of financial and commercial and commercial aspects including managing the Contract*"
- "*Communication and support for the LT23 project team. "*
- "*Safety management and leadership. "*

33. Mr Clark set out the expected levels of performance against the current levels achieved by the claimant. He required, for example, that "Keris" risks and actions (that is, the list of risks on the Keris risk register maintained by the respondent) required to be fully updated by 4 November 2016, with accurate and appropriate dates, on the basis that he had requested on a number of occasions that the Keris risks relating to the OHL project were reviewed and accurate close-out dates applied, but that despite reassurances from the claimant, this was not being done. He also insisted that the claimant required to demonstrate support to the project team by visiting a substation site each week, and carry out more safety inspections on site.

34. A number of objectives were then set out (272), including fully updating the Keris risks and actions by 4 November 2016 with accurate and appropriate dates; all outstanding EWNs (Early Warning Notifications), CENs (Compensation Event Notifications) and PM Is (Project Manager Instructions) to be actioned and closed by 18 November 2016; and validation of VOWD (value of work done) and forecast against budget to be completed by 18 November 2016.

35. Mr Clark was concerned that the claimant was not in a position to demonstrate control and understanding of the project costs, and that he was not fully informed about the value of the work done on the project within budgetary periods to enable assessments to be made by the company as to where spending on the project currently resided. He considered that these were examples of the fundamental obligations of the project manager on a significant project, and that the claimant required to do much more to show that he was in control of the project. He had a particular concern about Compensation Events. A Compensation Event, which is a relatively common occurrence on a project such as this, is a notification by the contractor of an additional charge for work under the contract beyond the agreed price. Each time such a notification is received by the respondent, the contract requires a response, either negative or positive, to be given by the respondent to the contractor within a defined period. Failure to do so means that the compensation sought by the contractor cannot be challenged and is deemed to have been agreed. Mr Clark was concerned that the claimant was not as alive to the risks of failing to meet these deadlines as he should have been.

36. The target dates for achievement of the objectives was 25 November 2016. Attached to the PIP was an Informal Improvement Notice dated 31 October 2016 (317), in relation to which the claimant provided no comments.

37. At this point, Mr Clark decided that it was necessary to maintain an informal log of his interactions with the claimant during the capability process. He would normally record each day what had happened in relation to the matters he had raised as part of the PIP. That log was kept by Mr Clark from 25 October 2016 until 28 September 2017 (278-315).

38. The review meeting took place on 25 November 2016. Following the discussion, Mr Clark noted his conclusions on the PIP report (273ff). He concluded, in relation to the majority of the objectives, that the claimant's performance was not satisfactory.

39. He noted that reviews were required by him in relation to the updating of the Keris risks and reports. Although the claimant had reported that all risks and actions had been updated by 4 November, he found that this was not the case and these were resolved by 7 November. He described a lack of drive and ownership being evident on the part of the claimant, citing a commercial meeting on 26 October 2016 for which the claimant did not prepare and made minimal contribution to a discussion which he should have been leading. Mr Clark felt that the claimant was still unable to explain VOWD and forecast spending to the end of the year, allowing discrepancies to go forward into monthly reporting.

Mr Clark made comments on the review meeting (275):

"In summary of the above, SB has made some efforts to 'tick the boxes' of the targets set but during the review did not appreciate that in focusing on

ticking the boxes he had in fact made little improvement in many cases. It is evident that SB worked longer hours towards these targets however this may have been detrimental towards the quality of his output.

SB is heavily reliant on his Construction Manager for scope, progress and programme issues and this is further detracting from his leadership role. The expectation of setting these targets was to ensure that SB had the opportunity to focus on specific areas such as ownership, preparedness, accuracy, timeliness, self-motivation, etc and SB failed to achieve these. Significant improvements are required in all of these areas in order to properly achieve the targets and as a result the performance has not improved sufficiently. "

41 .The claimant also submitted comments:

"I have given my 100% effort to achieve results as per the set target therefore I strongly disagree with IC's lick the boxes' comment above. I would say that IC has initiated this process which is in fact affecting my normal day to day job and I am going through a tremendous work related stress and that's the reason I had to work a longer hours to cover outstanding staff. Instead of appreciating my hard work IC's comments above are too much disappointing.

Even after completion of most of the target IC is taking this process further to Formal stage, this is in my opinion is not correct and unfair. There has been no appreciation, motivation and little consideration given to SB for all the hard work. In fact after carefully reading all comments above it is apparent that IC has commented on all negative (minor stuff) about me and this is in turn affecting my professional life. In Nutshell, I would say I have done more than what I have asked to do and this informal process should stop here and no requirement to proceed further to Formal stage. "

42. Mr Clark signed the review on 13 December, and the claimant on 14 December 2016.

43. On 9 December 2016, Mr Clark, having discussed his concerns about the claimant's safety inspections, offered to accompany him on site to observe how he went about this task. In his log, Mr Clark recorded the visit as follows (283):

"The inspection started well with SB introducing the Contractor and updating the status of the works, however, his contribution thereafter reduced significantly and the visit was primarily led by IC and the Contractor despite prompting. Following the visit, IC and SB discussed the key points of the visit and the methods used by IC; to support SB's understanding of possible approaches to Inspections. IC also noted that the level of detail in this inspection was closer to that expected of a PM and asked if SB understood this. SB advised that he did. "

44. This was an example of the support which Mr Clark sought to give the claimant in the performance improvement process.

45. On 16 February 2017, Linzi Nicol, of Case Management (part of the Human Resources department) wrote to the claimant (324) to notify him that he had failed to meet the levels required of him in the Informal Improvement Notice dated 31 October 2016. She therefore invited him to attend a meeting under the Formal Stage 1 of the Capability Procedure, to take place on 24 February 2017, and to be chaired by Mr Clark. She offered him the opportunity to be accompanied to the meeting, and pointed him to the policy

on the respondent's intranet.

Grievance - February 2017

46. The claimant was very unhappy to be taken to Formal Stage 1, and submitted a grievance to Human Resources by email dated 27 February 2017 (327).

47. In the email, the claimant stated:

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"It has taken me a long time to find the courage to lodge this formal complaint against my line manager, Mr Ian Clark, he has been continuously bullying me, giving harassment and mental torture since June 2015. The constant pressure from Mr Clark led to the downfall of my self confidence and self esteem. It is becoming very difficult for me to cope with the constant torture. He has given me discriminatory conduct and that left me feeling trapped and vulnerable.

I have expressed my concerns to few key people in our organisation, in Aug 2015 & Feb 2016, they advised me to speak with Mr Clark and try to solve issues informally. However, I was reluctant to speak with Mr Clark on this matter because I am scared of him. The reason for not expressing my concern to him because I knew he would have shout at me and tortured me more. I would request HR and senior management to look into this matter and guide accordingly. . . "

48. On 2 March, Natalie Anton of Case Management wrote to the claimant (329) to invite him to a Stage 2 Formal Grievance Hearing on 9 March 2017, to be chaired by Michelle McLeish, Performance Manager.

49. Ms McLeish worked in a different part of the respondent's business to the claimant and also to Mr Clark and Mr Scott, and had not met any of the individuals involved herself prior to attending to this grievance.

50. The grievance hearing took place, in fact, on 14 March 2017, in the respondent's Perth office.

51. The claimant attended the hearing without representation. He became upset at times during the course of the discussion. He suggested that Ms McLeish speak to a number of individuals in order to investigate the grievance.

52. Following the grievance hearing, Ms McLeish provided the claimant with her decision, at a meeting on 20 April 2017, in the form of a letter dated 19 April 2017 (337ff).

53. Ms McLeish confirmed that she had considered the different points raised by the claimant's grievance, and that she had investigated these matters further.

54. With regard to the overall grievance, Ms McLeish said that *7 asked if you had spoken to Mr Clark about the way he speaks to you and how this makes you feel. You advised that he should have realised how uncomfortable he made you feel by the look on your face however because he is older than you, you respect him and did not react. You confirmed that you had not spoken to him. You advised me that you felt scared to speak*

up. The team consists of yourself and two other members of staff who are older than you and you believe that Mr Clark discriminates against you because you are younger than the others. You advised that Mr Clark shouts at you both over the phone and in person. He frightens and scares you. He has questioned how you could have an MBA at your age. He compares himself at your age, to you. he questions why you are earning more than colleagues who are older than you. He displays insulting behaviour towards you and continuously tries to undermine you. you advised that you were scared to speak to him because he shouts at you. you consider that he is constantly looking for things to trap you. overall his behaviour towards you is affecting your personal life. . . ”

55. She then sought to deal with a number of specific points raised by the claimant. The first point was that he believed that Mr Clark had an issue with his age and experience. She said that she had spoken to Mr Clark about this, and that Mr Clark had confirmed that he had said to the claimant that “*as a project manager, you are young in years*”. This was in relation, she said, to the experience he had referred to in his CV, and “nothing more”. The expectation was that the claimant would be able to manage the project.

56. The second point was that Mr Clark had micro-managed him. Ms McLeish said that Mr Clark’s position was that he was not confident that all parts of the project were being managed appropriately by him, and the Performance Log provides supportive evidence of this.

57. The third point was that he felt that Mr Clark had singled him out in that he had not provided him with a suitable smartphone. Ms McLeish advised that due to “Project Victoria”, an internal cost-saving project within the respondent’s organisation, smartphones are not readily available to all, but that with his own personal smartphone he would be able to have access to an app, known as the “good” app, which would allow him to view emails and other information on that smartphone.

58. On the fourth point, Mr Clark also denied that he had made any reference to the claimant's salary as the claimant's salary was within the appropriate pay band, as were those of the other members of the team.

59. The fifth point was that Mr Clark was said by the claimant to have been contacting other members of the project team to ask them for information before asking the claimant for that information. She said that Mr Clark had said that the Construction Manager had called him directly on one occasion to provide him with the weekly update which is normally provided to the claimant, because the claimant was unavailable at that time.

60. The sixth point raised the claimant’s concern about a celebration day for the project, at which Mr Clark denied him the opportunity to speak, using a prepared speech, in front of the contractors and other members of the project team. Ms McLeish spoke to Mr Clark about this, who explained that he had prompted the claimant to prepare a speech for that day, as he was not confident that he knew what to say. He was not confident that the claimant was well prepared on the day, but as the event was running late, and as Mr Clark had to represent Mr Scott, who was unable to be present, he spoke, and the claimant had no opportunity to present his speech. Ms McLeish noted that the claimant had confronted Mr Clark about this

afterwards and had shown him the speech which he had prepared on his mobile phone.

61. The summary and conclusion by Ms McLeish was that there was no evidence to substantiate any of the complaints advanced in the grievance, and therefore the grievance was not upheld. She pointed out that the claimant had not spoken to Mr Clark about these matters, and therefore he was not in a position to understand what the concerns were and resolve them at an earlier stage. In addition, she pointed out that the role of project manager meant that the claimant should have been in control of all aspects of the project, but that Mr Clark had had cause to doubt this in the claimant's case on numerous occasions.

62. Ms McLeish reached the conclusion that having spoken to Mr Clark and to other members of the project team, though she was unable to remember whom she spoke to, Mr Clark was a fair person who wanted to get the job done. She described him as "SSE old school", by which she meant that he was very focused on the need to deliver the projects under his management. With regard to the allegation that he had shouted at the claimant, Ms McLeish's evidence before us was that "We all shout but it's not personal - there's a job that needs to be done."

63. After reading out the letter to the claimant, Ms McLeish was left in the room alone with the claimant, Claire Kerrigan having departed. She felt that he was "in the wrong job", as this was his first big project to manage. She said to him that if it were her, she might be thinking of another job. The claimant said that if he were on a different project, he may be all right. That conversation went no further.

64. Ms McLeish offered to attend at the claimant's next performance review with Mr Clark in order to allow him to feel that another manager was in attendance and to observe how Mr Clark dealt with the claimant. Both the claimant and Mr Clark were in agreement with this proposal.

Grievance Appeal

65. On 24 April 2017, the claimant submitted an appeal against the grievance outcome by email (349) to the Case Management department. He attached a letter setting out his appeal (351), in which he complained about a number of matters.

66. The claimant reiterated that he was of the view that Mr Clark had mentioned his age several times in discussions since June 2015, and that he had done so with a tone, aggressiveness and body language which left him feeling very bad. He said his main concern was Mr Clark's tone, in his body language and insulting behaviour, and that he had not been treated with respect due to his age.

67. He suggested that every person has his own way of working, and felt that Mr Clark was insisting that he should work the same as he did, accusing him of aggressiveness. He considered that unrealistic deadlines were being set for him, and that Mr Clark put unnecessary pressure on him which seriously affected his personal and professional life.

68. The claimant said that his main concern was that Mr Clark had treated him

differently from two other colleagues, particularly in relation to the provision of a smartphone. He also complained about comments made in relation to salary related to his age.

69. In his summary, the claimant said (354) that *"I raised this formal grievance against my line Manger (sic) Mr Clark, I was expecting I will be offered a good working condition by transferring me into other projects/team but the decision reflects that I should continue with Mr Clark and suffer more. . . Therefore I must say that my issues have not been taken seriously. "*

70. A Grievance Appeal hearing was fixed to take place on 23 May 2017 in the respondent's Glasgow office, to be chaired by Vic Stirling, Head of Performance, Networks Transformation. A letter inviting the claimant to this hearing was sent to him on 5 May 2017 by Lucy Lambert of Case Management (366). As it turned out, that hearing was rearranged and took place on 1 June 2017, chaired by David McKay, Director of Operations (Transmissions). The outcome letter was issued to the claimant on 9 June 2017(479).Mr McKay did not uphold the grievance appeal by the claimant.

72. The claimant alleged that Mr Clark had bullied, harassed and belittled him on the grounds of his age and inexperience. Mr McKay found, having carried out further investigations, that he was unable to find any evidence to this effect. Mr McKay also said that he had not found any basis for the claimant having been treated less favourably than others.

73. With regard to the claimant's allegation that Mr Clark took credit for his work, Mr McKay pointed out that press releases are produced by the Corporate Affairs/Communities teams, and that Mr Clark would have little involvement in writing them. As to the celebration day, he found that *"...it is clear that there was a time constraint which curtailed the time available at the event. This point was discussed at the original hearing and I have no further evidence which would change the original finding therefore this point cannot be upheld. "*

74. Mr McKay found that the working environment in the project did not seem to be different to what would be expected and appeared to be similar to other projects. The nature of projects means, as he put it, that the pressures can occasionally create the need for direct discussions to progress things quickly to a resolution for the needs of the project team or tasks. He was unable to uphold hits point.

75. He found that the Construction Manager did not withhold information from him, nor was he asked to do so.

76. He also found that he could not uphold the allegation that Mr Clark gave the claimant unnecessary reports to complete, with unrealistic deadlines.

77. Accordingly, the claimant's grievance appeal was not upheld, and that concluded the grievance process for the claimant.

Year End Performance Review - April 2017

78. The claimant met with Mr Clark for his year end performance review on 24 April 2017. Mr Clark reached his conclusions about the claimant's overall performance against the objectives set for that year to April 2017,

and discussed them with the claimant in that meeting. Ms McLeish was also in attendance at that meeting, as agreed following the grievance hearing.

79. Mr Clark's conclusions were recorded in the Performance Review report (342ff). Ms McLeish took the view that the ratings given were higher than they might have been, and also concluded that during the meeting Mr Clark behaved himself entirely professionally and fairly. She believed that he was very precise in what he presented.

80. The overall end of year rating given to the claimant was 1. Mr Clark's comment was noted as:

"End of Year - Shrikant disappointingly did not bring evidence of any work completed, or any issues he has faced over the last six months. I found it extremely difficult to increase the scores that have been allocated for each action. The project is working, but that is due to the strong team that Shrikant has around him."

81. The claimant's comment was recorded as follows:

"End of Year - I am extremely disappointed with the ratings given for individual sections and final rating at the end of year review. The project I am working on has excellent safety and quality record; contractor has worked more than 2 years without any safety incident. My project is the best project SSEN has even seen in the history of transmission business. My project is so successful and I am the project manager, though I have been given very low rating by IC and I have not been given any credit for this success. I have excellent working relationship with site team and contractor. Despite of all this success, IC is preventing my career progression by intentionally giving very low rating in performance reviews. IC has constantly been looking out for out (sic) little things and making them into extreme bigger so that he can give me very low ratings."

Performance Review Appeal

82. On 2 May 2017, the claimant submitted an appeal against the ratings in his Performance Review (360ff).

83. The claimant repeated his views about the strength of the performance of the project, and said, in point 2, that *'7f a project shows extraordinary performance then all credit should go to the Project Manager irrespective of how strong team around the project manager.'*

84. He went on to complain that *"In my opinion, the main reason for getting such very low ratings in year end review is due to the genuine grievance that I have raised about IC recently, this grievance has not been resolved yet; it is still sitting with case management team. Therefore, in my opinion it was inappropriate for me to attend performance review meeting with IC until my grievance is fully resolved."*

85. Linzi Nicol acknowledged his appeal by email dated 11 May 2017 (380) and invited him to submit as much evidence as possible to support his appeal. On 15 May, the claimant replied (394) and attached a document (396-400) setting out his comments on the performance review ratings. Within that document, he suggested that *"Ian is famous for creating issues on site rather than solutions. Contractor will be able to provide honest response about how Ian treats people in bad way. Ian is forcing me to behave like*

him, he wants to create issues and spoil relationship with contractor so that he can get opportunity to come in picture and take credit for solution of issues. ”

86. Similarly, Mr Clark submitted observations on the appeal by the claimant by email dated 12 May 2017 sent to the claimant and to Case Management (392). He produced a short document dated 5 May 2017 (393) which set out his views on the appeal. He pointed out that the performance of the project was not a direct reflection of the claimant's performance but due to the performance of the contractor and the additional efforts of the team around the claimant. He said that the claimant provided no evidence in support of his appeal, as he had in relation to the performance review.

87. Mr Clark stressed that he had not seen any evidence of improvement in the review process by the claimant. He also said that he was not involved in the grievance process, and that that had no influence in his assessment of the claimant's performance.

88. On 1 August 2017, Linzi Nicol wrote to the claimant to confirm that the hearing in relation to the Performance Appeal process would be heard by Janine Ballard, Resource and Telephony MI Manager on 4 August 2017. Following that appeal hearing, Ms Ballard wrote to the claimant on 15 August 2017 to confirm that his appeal had been rejected (506). She confirmed that since the claimant had been advised at his mid-year review that he had areas on which he needed to improve, and that he had not provided evidence of any improvement in his performance against those objectives, and that he was currently being managed under the capability process, she was unable to uphold the performance review appeal. She confirmed that this conclusion the Performance Review process, there being no further right of appeal.

Formal Capability Meeting - Stage 1

89. On 2 May 2017, Mr Clark wrote to the claimant to notify him that Stage 1 of the Formal Capability process was to commence, and that he would be invited to a meeting on 9 May 2017 to discuss the concerns over his capability, given that following the issuing of an Informal Improvement Notice on 31 October 2016, the claimant had failed to meet the levels required, despite additional support being provided. He advised that actions which could be taken to improve his performance would be discussed at the stage 1 meeting.

90. The meeting took place on 9 May 2017. In the Performance Log which he kept, Mr Clark noted the terms of the Formal Meeting (though gave the date, incorrectly, as 8 May 2017). He recorded (294) that the claimant was *"again poorly prepared and did not really engage in the process, rather arguing that the process should not be happening."* It was also noted that the claimant repeated that he considered that he had met the performance requirements from the informal stage and that because the project was so successful the formal stage should not be implemented. Also he complained that a rating of 1 was unfair.

91 . Mr Clark wrote to the claimant on 15 May 2017 to notify him of the outcome of the Formal Capability Meeting - Stage 1 (40 lff).

92. He confirmed that he had explained that he was very concerned about the claimant's work performance, and that since the Informal Improvement Notice had been issued on 31 May 2016, support had been provided in order to assist him. He cited the informal PIP with support actions; adjustments offered to help him improve his control of project data (one page crib sheet/dashboard); implementation of action tracker; and shadow opportunities for on-site visits and audits. Mr Clark said that despite this additional support, the claimant's capability had remained unsatisfactory.

93. Mr Clark then summarised, at some length, the discussion about the ways in which the claimant had not met his objectives, and then confirmed that the respondent expected him to work to the performance standard outlined at previous meetings, and in terms of his PIPs. He went on:

"In order for you to achieve this we agreed the following objectives need to be achieved:

- Current and future risks to be identified and managed proactively through regular risk plan updates.*
- Make sure there is clear planning and preparation for review meetings, and that as Project Manager these are led by you.*
- Submission of quality reports on time, with accurate data and information.*
- Find a method that supports you to have key project information to hand.*
- Improve your approach to time management and organisation through the resources available online and via Training and Development.*
- Draft communications regarding your project and engage with the media team with articles and information and plan when future articles should be prepared.*
- Undertake updates of monthly safety reports and construction phase plans to ensure we are meeting our legal requirements and the expectations of the role. "*

94. He also noted that they had agreed that a number of steps should be taken to help the claimant to improve his performance, including attending and agreeing formal PIP with his line manager, weekly update/review meeting regarding the project and formal PIP, access time management resources available on SSEnet and online and reallocation to substation work for a concentrated period of time, of four to five weeks, as a fresh opportunity for him.

95. At the conclusion he confirmed that his decision was to give the claimant a Written Improvement Notice that unless he achieved the required standard of work over the next 12 week, inclusive of annual leave, further formal action would be taken against him under the Procedure, which may result in his dismissal.

96. Mr Clark advised the claimant of his right to appeal against the issuing of the Written Improvement Notice within five working days of receiving the letter.

Appeal - Written Improvement Notice - May 2017

97. The claimant was very disappointed with the outcome of this meeting, and decided to appeal against Mr Clark's decision. He submitted his appeal on

22 May 2017 (418), and attached a detailed appeal letter (419ff).

98. In the grievance appeal letter, he identified a number of areas in which he took issue with Mr Clark's views. He stated that he strongly disagreed with the conclusion that he was not meeting his objectives in the informal PIP, but rather that he had exceeded the expectations in that plan.

99. He asserted that there were no concerns about his management of the Keris risk register nor about risks on the project. He disputed Mr Clark's view that the claimant had a lack of drive in chairing meetings, or a lack of confidence in managing the project. He suggested that Mr Clark's constant interference with the project was affecting him in his management of the project and affected the relationship between the client and contractor.

100. With regard to the VOWD and forecast presentation, he observed that he had done his best to present information by collating information from the existing HUB report and VOWD profile report, but that *"Ian expects accurate numbers with decibel points so he didn't like my presentation."* The claimant attributed this to the fact that different people have different ways of working.

101. The claimant contested Mr Clark's views on visiting other project sites, using the action tracker and writing news articles for the project, and referred again to the celebration day with the contractors. He also stressed the excellent level of safety performance on the project, to which credit should be given to the project manager.

102. He concluded by repeating his assertion that the only reason why he was being taken to the formal capability stage was that he had raised a grievance against Mr Clark which had not yet been resolved.

103. Graeme Barclay, Project Director, Caithness-Moray Project, heard the claimant's appeal on 9 June 2017, and issued his outcome letter on 14 June 2017 to the claimant (482).

104. Mr Barclay went through the heads of appeal submitted by the claimant in his letter, and having reviewed each of those heads, issued the following conclusion:

"You advised that the outcome you were seeking by raising this appeal was that the formal Capability process was stopped, and you believed it had been undertaken as Ian Clark does not like you. Having listened to your points of appeal, as well as undertaking further investigations I have concluded that it is clear that you have failed to fulfil your role as a Project Manager within numerous aspects of the role and have clearly demonstrated a deficiency within your ability to achieve the appropriate standard that one would expect from a Project Manager. In overall conclusion I confirm that the original decision is to be upheld. I would strongly recommend that you follow the objectives as set out by Ian Clark in your Stage 1 Capability Meeting on 9 May 2017, and engage fully with the steps that have been laid out to improve your performance and meet the objectives set (as per letter dated 15 May 2017)."

105. The claimant had no further right of appeal in relation to that aspect of the capability process.

PIP - Formal Stage

106. On 11 May 2017, 2 days after the meeting at Formal Stage 1 of the Capability Process, Mr Clark met with the claimant to go over the next stage of the PIP process. A record of the issues discussed was prepared (381ff).

107. The issues discussed reflected the objectives which had been set by Mr Clark for the claimant, and focused on contract management, safety management and project leadership. The claimant accepted that the comments made were realistic, and the objectives achievable. It was noted at the end of the discussion that:

“At the end of the discussion SB agreed that the discussions were a fair reflection of SB’s performance and progress with the PIP. IC advised that based on the discussions and limited evidence presented by SB there was insufficient improvement and development in SB’s performance in the Project Manager role and hence IC would be seeking a Formal Capability review with Case Management.”

Telephone Outage Incident - 25 May 2017

108. An incident occurred on 25 May 2017 which resulted in a meeting between Mr Clark and the claimant, at Thurso South Substation site.

109. As part of the OHL project, it was necessary from time to time to have an outage in the telephone service in the local area of the work. As part of the process, it is necessary for the respondent to secure a LOA (letter of authority) from an authorised person (SAP) to ensure that the necessary permissions had been obtained and the outage properly planned in advance. The outage was planned, and took place, on 23 May 2017.

110. On 25 May 2017, it was drawn to Mr Clark’s attention by his line manager, Tony Scott, that an issue with the outage had been notified to him by Dave Mackay. Mr Clark telephoned the claimant to find out what his understanding of the situation was. On three occasions, the claimant had confirmed that Keith Logan, an SAP based in Inverness, was the SAP pre arranged to attend site to issue the LOA for that telecoms outage. He stated to Mr Clark that “Keith Logan was pre-arranged to come to site to issue the LOA but failed to turn up.” Mr Clark then told the claimant he would call Mr Logan and Mr Mackay to confirm that this was the case, and was assured that this was in fact correct by the claimant.

111. Mr Clark then contacted Mr Logan, who confirmed that there was no prior arrangement with him to attend, and that he had had to attend at short notice on the claimant’s request as the contractor was ready to commence the work on site. After a number of attempts to contact the claimant, Mr Clark left a voicemail message for him to come to the Thurso South site to meet with him, and the claimant attended at approximately 5.10pm.

112. Mr Clark was now concerned about this sequence of events, and informed the claimant that he would be recording the conversation. He also took notes (426), which were subsequently transcribed (427). The claimant and Mr Clark both signed the handwritten note as accurate. In addition, a transcript of the recording was produced to the Tribunal (429) though its terms were not referred to in evidence.

113. Mr Clark noted that:

“SB confirmed there had been no pre-outage meeting arranged but that he knew that it was his responsibility for all outages to ensure there is a pre outage meeting.

SB stated this specific outage was discussed at the Commissioning Meeting on 10th May 2017 but only in terms of it being an upcoming outage. SB confirmed detailed arrangements of the outage were not discussed at the meeting.

SB confirmed Keith Logan was not pre-arranged to come and issue the LOA and that the statement (SB) made earlier to IC in the earlier conversation was not true.

SB stated he had no confirmation that anyone was coming to issue the LOA.

SB stated he had no confirmation at the Commissioning Meeting, only work scope details.

SB agreed that the pre-outage meeting should have been done. ”

114. Mr Clark went on to ask the claimant why he had made the false statement that the attendance of Mr Logan was pre-arranged, and he said that he “felt under pressure to provide a name”.

115. Mr Clark was very unhappy about these events, but did not take disciplinary action against the claimant in relation to the fact that he had made untrue statements to him.

PIP Review Meeting - 8 August 2017

116. A PIP Review Meeting was fixed to take place on 8 August 2017, in Inveralmond House, Perth. The claimant attended and met with Mr Clark, and a record of the meeting was kept (501).

117. It was noted that the claimant referred, at the start of the meeting, to “objectives” within the PIP, and was corrected by Mr Clark, who pointed out that they were in fact agreed means to support the claimant to improve his performance. He stressed that the fact that the claimant completed an activity would not mean that the performance levels had improved or otherwise, and noted that the claimant agreed with this.

118. He provided Mr Clark with a Word document identifying the risks, actions, owner and close-out dates for actions and had used this to update the Keris system. While Mr Clark noted that this was a positive start, he observed that the risks were still not being managed, with most actions outstanding and overdue, thus increasing the potential level of risk.

119. Mr Clark then raised other issues which had arisen during the period, including the telecoms outage issue (culminating in the discussion in Thurso on 25 May 2017); the claimant’s failure to obtain an expanded OHL programme for demolition and demobilisation activities; and the claimant’s failure to discuss the changes to the risk register once he had completed them.

120. With regard to planning and preparation, the claimant asserted that he had complied with all timescales and deadlines for submitting reports and attending meetings, but Mr Clark, while agreeing with this, stated that the area for improvement related to the accuracy, informativeness and overall quality of the information, and not meeting deadlines. He raised the

concern that the claimant continued to describe actions as "ongoing" and "continuing", though the claimant responded by saying that he felt that this had improved.

121. The discussion went on to focus on the "dashboard", which the claimant had been asked to produce; his time management and the use of online resources to improve this; and communications. With regard to the last of these, Mr Clark noted that the claimant had prepared an article for publication but that the Communications team had regarded it as including no new information to justify publication. He told the claimant that he considered that he had missed the opportunity to publicise good news stories for the OHL project.

122. Mr Clark then raised issues with regard to financial, commercial and contract matters, and CDM/Safety visits.

123. He then recorded:

"At the end of the discussion SB agreed that the discussions were [as] a fair reflection of SB's performance and progress with the PIP. IC advised that based on the discussions and limited evidence presented by SB that there was insufficient improvement and development in SB's performance in the Project Manager role and hence IC would be seeking a Formal Review with Case Management. "

124. On 21 August 2017, Mr Clark emailed the claimant (510) to enclose a copy of the almost completed PIP, in advance of a further meeting to take place on 22 August 2017, at which the PIP would be discussed for the next stage.

Formal Capability - Stage 2

125. On 16 August 2017, Lucy Lambert, of Case Management, wrote to the claimant (508) to invite him to a further formal hearing to discuss the continuing concerns over his capability following the Written Improvement Notice issued on 9 May 2017. The meeting was arranged to take place in Perth.

126. At the conclusion of the meeting, Mr Clark informed the claimant verbally of his decision (set out at 535), and confirmed the decision by letter dated 24 August 2017 (554ff).

127. He pointed out in the letter that since the Written Improvement Notice had been issued, the support provided to assist him was online training and resources to help his time management and organisation, time with the safety team and Willie Ross to help him understand his COM and safety obligations, and that the claimant had advised that he did not require additional training for contract and commercial matters. However, he said, despite this support his capability remained unsatisfactory.

128. Mr Clark specifically identified the areas in which the claimant had not met his improvement area targets as Contract management and reporting, Safety Management and Leadership, and Project Management and Leadership. It was noted that the claimant and Mr Clark agreed that he needed to meet the requirements laid out for him and that in order to support him in this, they would meet bi-weekly in order to discuss any

issues arising.

129. He confirmed his decision then: *"In the circumstances, and as I advised you at the end of the meeting, I confirm my decision was to give you this Final Written Improvement Notice that unless you achieve the required standard of work over the next six weeks, further formal action will be taken against you under this Procedure, which may result in your dismissal."*

130. The claimant was notified of his right to appeal against this decision within five working days of receiving the letter.

131. Mr Clark also completed the further PIP following the meeting of 22 August 2017 (548ff) and sent it to the claimant. The review date was fixed for 3 October 2017.

132. On 27 August 2017, the claimant presented to the Tribunal his first claim under case no: 4102945/2017.

133. On 30 August 2017, the claimant submitted an appeal against this decision (557), attaching a letter of appeal setting out the grounds (558).

134. In his appeal letter, the claimant asserted that all risks were up to date on the risk register. With regard to the telecoms outage, he said that during the telephone call Mr Clark had *"put a lot of pressure on me and he was trying to interrogate so I got scared and therefore it led to the incorrect version of events... IC is constantly looking for such events so that he can prove his points and it will be very easy for him to take me in next stage of capability stage (sic)."*

135. He went on to address the criticisms made by Mr Clark of his performance under each heading, and then under "Final comments", he said:

'It's extremely difficult for me to present my points in front of IC because I am really scared of him, he never listens to me, he always tries to prove his own points, never gave me opportunity to fully provide clarification/Justification on my points. If I say anything then we end up in arguments so I thought to stay quiet and decided to put this in writing so that I can discuss all above points in detail in front of appeal hearing manager that will allow me to present my points effectively. I strongly disagree with IC's decision on taking me into next stage of the capability process. "

136. The Capability Appeal Hearing took place in Cumbernauld on 27 September 2017, to which the claimant was invited by letter dated 14 September 2017 (560). The hearing was chaired by Aileen McLeod, Head of Networks Development, Networks, an experienced manager who had no prior knowledge of the claimant or Mr Clark.

137. Ms McLeod heard the appeal on that date. Amy MacDonald was present from Case Management. Following the hearing, Ms McLeod considered the appeal points made and issued her letter of outcome on 9 October 2017 (573).

138. She dealt with the appeal under three headings, to which the claimant had spoken during the hearing.

139. The first point dealt with Contract Management and Reporting. Ms McLeod set out the subjects which he had addressed, and expressed her understanding of the claimant's position on each.

140. The second point dealt with Safety Management and Leadership, in relation to which Ms McLeod observed that the claimant believed that he had done everything asked of him and that his manager had not recognised what he had done.

141. The third point dealt with Project Management and Leadership, and Ms McLeod noted that the two concerns which the claimant raised were related to communications and financial, commercial and contract issues.

142. She then set out her conclusions. She stressed that her decision was based on establishing an impartial view of the assessing his performance against objectives.

143. She concluded:

I have carefully considered all of the evidence presented to me and decided not to uphold this appeal. The reasons for this are as follows:

1. I have considered whether the Company's Capability Policy and Procedure has been followed. All evidence has been presented to me to conclude that it has.

2. I have considered whether the Personal Improvement Plan has targeted areas where an increased capability requirement is essential to the role. I have concluded that this is the case.

3. I have considered whether the evidence presented in the Personal Improvement Plan is accurate and fairly represents performance improvements. It is my conclusion that the evidence presented is agreed by both parties, however, there is a dispute about the interpretation of that evidence.

4. I have considered whether the expectations of performance reflected in the Personal Improvement Plan are reasonable in scope and timescale. It is my conclusion that the expectations are reasonable and these expectations have been clearly explained and sufficient support provided.

In conclusion I confirm that the original decision is upheld. "

144. Ms McLeod advised the claimant that no further right of appeal existed.

PIP Review - October 2017

145. Mr Clark met with the claimant on a bi-weekly basis as agreed, but remained dissatisfied with his progress. On 3 October 2017, a PIP review meeting took place at which Mr Clark continued to address with the claimant the performance issues which were the subject of the PIP. At the conclusion of that meeting, Mr Clark recorded his views on the PIP report at 572:

"Based on the fortnightly review meetings and the PIP review, recorded above, there is insufficient or no improvement in Shrikant's demonstrated capabilities in the role of Project Manager. Contractual matters remain poorly managed; critical safety/CDM deliverables have not been provided prior to energization and are over two months late; and commercial and programme management are not aligned resulting in inaccurate data and

poor forecasting. Shrikant's failure to undertake some of the improvement Activities identified in the PIP has significantly contributed to the lack of improvement despite the repeated intervention and direction from his Line Manager.

The issues above are fundamental for a Project Manager and Shrikant has failed to demonstrate improvement despite the PIP. I therefore consider that the Further Formal Capability Interview is required."

146. The claimant's comments reveal his perspective on this discussion: *7 strongly disagree with IC's comments above. Contractual matters managed properly however there are impacts from external sources while dealing with CE matters (eg there is still no clarity on energization dates, commencement of demolition dates etc) therefore this is actually causing major issues in finalising and implementing the CE for revised outage dates. Safety/CDM deliverables - ESQCR provided to the relevant teams before energization, this has been confirmed with Operations Manager - Gordon Leslie, he is happy with all completed ESQCR requirements and received email from him as well. Annette Scobbie said that if Gordon has confirmed so there won't be any issues with ESQC sign off for OHL. Commercial and programme aligned to energization plan rev 4b plan previously however things have changed so I have moved activities accordingly as per rev 7 energization plan. I strongly disagree with IC comments about 'inaccuracy and poor forecasting' the reason being there are changes in energization plans so it has a major impact on the LT23 OHL project and some elements in OHL profile are always for review until we have clarity from commissioning team.*

I strongly disagree with IC comments about 'SB failed to demonstrate improvement despite the PIP', this is not true. IC is constantly monitoring me, looking for things so that he can prepare a strong case against me and that way he can take me into next formal stage meeting. I would say that there is no requirement to proceed further to formal meeting.. "

Formal Capability Hearing - Stage 3

147. On 9 October 2017, the claimant was invited to attend a further formal meeting under Stage 3 of the Capability Procedure, in the respondent's Glasgow office on 16 October 2017, to be chaired by Mr Clark (577). He was notified that a possible outcome of the meeting may be the termination of his employment.

148. The claimant attended the Stage 3 meeting on 16 October 2017. Mr Clark chaired the meeting, and Victoria Gray was in attendance from Case management. Notes were produced from the meeting (579), transcribed from a recording taken at the time.

149. At the conclusion of the meeting, Mr Clark presented his decision, reading from handwritten notes which he made in order to sum up his findings (586):

"For the record the time is 16.35 on 16 Oct 2017. Shrikant Basude, in arriving at my decision I have taken into account the information presented during the hearing. / have concluded the following points:

We started the PIP in October 2016. During this time you have been provided with support and training opportunities including specific guidance and direction on key matters.

You have been issued with a number of Improvement Notices and Formal

PIPs however at each stage you have failed to demonstrate the standard of work performance expected of the role.

We have discussed in detail each of the improvement areas and the expected level of capability however your capability has remained unsatisfactory.

You have raised the option of redeployment. This has been considered and given your training, qualifications and capabilities I do not consider there to be suitable opportunities.

An extension to the PIP process has been considered however the lack of improvement does not lead me to consider this would sufficiently improve your performance.

In the circumstances I did not believe that the Company could be reasonably expected to support your under performance any longer, and there was no evidence to suggest that in the future your capability would improve to the required standard.

It was therefore my decision to terminate your employment under the Company's Capability Policy & Procedure with immediate effect. You will be paid Amount of 3 months notice along with any outstanding or owed annual leave in your final salary payment. "

150. Mr Clark then wrote to the claimant on 19 October 2017 to confirm in writing his decision following this meeting (588). In that letter, he wrote that the claimant's capability remained unsatisfactory. He noted that having set out his views on the claimant's performance, he was given the opportunity to present any mitigating factors:

"You explained that you would ask that redeployment opportunities be considered and also an extension to your formal PIP. I explained to you that Tony Scott, Project Director, spoke to you previously regarding redeployment and advised you that there were currently no redeployment opportunities within Transmission. As there are concerns regarding your capability as a Project Manager, it would not be appropriate to redeploy you into this type of role. You advised that you had seen a number of job opportunities on SSE net, and asked to be redeployed into these. I advised you that employees would only be redeployed into positions for which they are currently trained or qualified, and as advised we do not believe there are any suitable vacancies. I made you aware that you could apply for vacancies at any time during this process that you felt were suitable; however, you advised that you have not applied for any of these roles. "

151 . The letter went on to confirm the decision to terminate the claimant's employment with immediate effect, and that he would be paid three months' pay in lieu of notice, together with any outstanding or owed annual leave entitlement.

152. Again, the claimant was informed that he was entitled to submit an appeal against this decision, within five working days of receiving the letter.

153. On 23 October 2017, the claimant submitted an appeal against the decision to terminate his employment. That letter was acknowledged by Lucy Lambert of Case Management by letter dated 8 November 2017 (593), and a Capability Appeal Hearing was fixed to take place on 16 November 2017 in the respondent's Glasgow office.

154. The claimant submitted grounds of appeal with his appeal letter (595ff). He asserted that he had focused on the issues which Mr Clark had

insisted that he should, and that if deadlines were missed this was because of external factors. He said that it was very difficult for him to understand what Mr Clark was looking for, and blamed many of the issues on Mr Clark's interventions and insistence that he report to him on a number of matters, instead of being allowed to progress the job itself.

155. In his appeal, he concluded:

7 strongly disagree with IC comments about 'SB failed to demonstrate improvement despite the PIP', this is not true. IC is constantly monitoring me, looking for things so he can prepare a strong case against me, he has successful (sic) in misusing his position/power and terminated my employment. He has not considered me for any redeployment opportunities and neither has he extended PIP which is clear example of unfair treatment and discrimination. Having explained above points I would like to appeal against IC's decision and I would discuss my points in detail in appeal hearing meeting. "

156. The appeal meeting was chaired by Claire Carrington, Head of Business Services, on 16 November 2017. Following the meeting, she carried out certain further investigations, and then produced a report of her findings (61 4ff). She then wrote to the claimant to confirm her decision, by letter dated 9 January 2018 (620).

157. The claimant had, by the date of the appeal hearing, submitted his second Employment Tribunal claim, under case number 4105527/2017, on 6 November 2017.

158. In her decision letter to the claimant, Ms Carrington stated:

"During the appeal hearing the agreed points of the appeal to investigate were:

- *Further evidence to be gathered from named individuals to seek opinions of your level of performance:*

- *Suzanne MacKay, Project Manager, Networks*

- *Chopper Rattray, OHL Maintenance Manager, Networks*

- *Aileen MacLeod, Head of Networks Development, Transmission, Networks*

- *Callum MacKinnon, Contracts Manager, Procurement.*

- *Agreement to contact and gain clarity on the points raised*

- *Experience of any performance issues*

- *Understand the level of work reviewed and standards of work*

- *Awareness of any unfair management being applied.*

To gain understanding of any unfair management - Ian Clark, Lead Project Manager, Mr Basude line manager would also be contacted."

159. Ms Carrington laid out the questions which were put in the discussions, namely:

- *"Do you know the employee and in what capacity?*

- *Have you experienced any performance issues with employee?*

- *If so, what were - examples*

- *Have they (sic) had opportunity to review his work?*

- *If so, was standard acceptable?*

- *Aware of any unfair management being applied to him?"*

160. She then summarised the responses made by the witnesses to whom she had spoken in order to investigate the claimant's appeal, and also set out the process of performance management to which the claimant

had been subject.

161. Ms Carrington concluded:

“The individuals identified have been interviewed and have not provided sufficient evidence to verify that your level of performance was of a suitable level or have been unable to provide any clarity or examples where you claims to have performed to the standard of work required.

There is also insufficient evidence to confirm any unfair management of performance applied by Mr Clark. The evidence suggested that you have been supported by management throughout the time of the performance improvement plans through regular performance management reviews and you have been provided with guidance on how to improve throughout. In addition, each recommended step of the capability process has been followed for the recommended timescale.

Following the investigation, I have concluded that there is insufficient evidence to support the appeal. Therefore, in conclusion I confirm that the original decision made at the stage 3 capability hearing is to be upheld. This concludes the Companies Capability Procedure Appeal process. You have no further right of appeal. ”

162. She considered that the performance management process had been fair, and that Mr Clark was a fair and clear manager. She recognised that Mr Clark had a responsibility as the claimant’s line manager to manage his performance, and that of the remaining members of the team. She found no evidence to suggest that Mr Clark had been motivated to act against the claimant on the basis of his age.

163. The claimant’s employment with the respondent came to an end on 16 October 2017. He commenced his new employment on 12 March 2018. In the meantime, he had no paid employment, and applied for no state benefits.

164. Although he was living in Glasgow, the claimant applied for a number of jobs across the United Kingdom, including a number concentrated in the south of England. The claimant’s evidence was that he was interviewed for a position as a Project Manager with Scottish Power in October or November 2017, but was unsuccessful. In addition, he said that he applied for a large number of positions with Network Rail, and was invited to attend at 12 to 15 interviews. Despite his lack of success at the majority of these interviews, he received positive feedback. He was successful in securing a job with Network Rail, which commenced on 12 March 2018, as an Associate Sponsor, a role which requires him to liaise between the client, the Department of Transport, and the deliverer of the project upgrading the rail network within Network Rail. He has to understand the client’s requirements, present papers to the Department of Transport, understand the deliverer’s approach and confirm the budget for the position. He has regular interaction with the Project Manager.

165. The claimant’s salary with Network Rail was £36,288 gross per annum on commencement, and as at the date of the hearing in this case his salary was £37,014 gross per annum. He estimated his monthly net salary as “£2,000 or so”. He is a member of his employer’s occupational pension scheme, to which he makes a contribution of 8.99% of salary, matched by Network Rail, and also receives the benefit of a 75% subsidy on train tickets. His employment is permanent.

166. The claimant complained that the treatment he received from Mr Clark caused him to feel bad. He attended his GP but was merely encouraged to speak to someone from his family. He did not have any time off work when working with the respondent on the basis of illness brought about by these events or by his treatment, nor did he attend any Occupational Health assessments for the respondent. He said that once he was dismissed, he felt “really, really bad” as a result of his dismissal and the treatment he had received from Mr Clark. Although his new line manager is very good and positive towards him, he is of the belief that this will be with him forever.

Observations on the Evidence

167. There are a number of instances where the claimant’s evidence directly differed from that given by the respondent’s witnesses, and in particular that of Mr Clark. It is therefore appropriate to set out our observations on the witnesses to the extent that it clarifies our views on the evidence.

168. Mr Clark was the respondent’s main witness, and the focus of much of the claimant’s sense of grievance against the company. We observed his evidence, but also noted the evidence of other witnesses for the respondent who spoke about Mr Clark’s management style.

169. We found Mr Clark to be a very impressive witness, whom we considered to be honest and straightforward in his evidence before us. He left us with a clear impression of a highly skilled and committed professional, bearing many heavy burdens as a Senior Project Manager. There is no doubt that he has conducted, and continues to conduct, his management role with a strong hand, taking a detailed interest in the work of those Project Managers for whom he has line management responsibilities. Both Ms Mackay and Mr Muir spoke of his attention to detail, as did Mr Cowie, and with a candour which we found helpful, made clear that at times they would find Mr Clark’s management style demanding and pernicky. Mr Muir said that every time he submitted a report to Mr Clark he was aware that it would return with many amendments and questions, but accepted that this was simply Mr Clark’s style.

170. What was obvious from those other managers’ evidence was the respect in which he was held by his staff, and their understanding of the demands placed upon Mr Clark by the responsibilities he bore in his position, especially to senior management. They were unanimous in rejecting the suggestion that Mr Clark was a bully, but also in saying that he was a “hard taskmaster”.

171. As to his truthfulness in giving evidence, we were satisfied that Mr Clark took very seriously his obligation to tell the truth to the Tribunal, and that he answered questions very carefully and fully. We considered that his evidence was entirely credible and reliable, and had no difficulty in accepting it as a whole.

172. The other witnesses of the respondents featured to a less significant degree in relation to factual disputes with the claimant, but we were impressed by the professionalism and straightforwardness of each of the witnesses from whom we heard. Ms Mackay, Mr Muir and Mr Cowie were

the three managers with whom Mr Clark was otherwise most closely involved, and we accepted their evidence as to the nature of Mr Clark's management as demanding but fair. It is clear that Mr Cowie, by whom we could not fail to be impressed, sought to assist the claimant by covering for him and carrying out some tasks which were properly the claimant's responsibility, and did so "for a quiet life". He gave his evidence with a degree of humour and affection for the claimant which was striking, but also with considerable respect for Mr Clark.

173. The claimant gave evidence over a period of time. We were less impressed by the claimant's evidence. The claimant conducted himself before us in a courteous and respectful manner. He is a softly-spoken person, clearly intelligent and articulate. However, his manner, particularly when challenged, was not helpful nor convincing to the Tribunal. He had a tendency not to answer difficult questions directed at him until pressed to do so. His evidence suffered from his proneness, as we found it, to exaggerate the events and his reaction to them over a long period of time. He regularly said that Mr Clark had subjected him to "torture", but we found that this was not a suitable nor fair description of Mr Clark's treatment of him.

174. The claimant's credibility was undermined not only by those differences from the evidence of Mr Clark, which we accepted in full, but also by the occasion when he told Mr Clark, on 25 May 2017, that he had made arrangements for an SAP to come to sign off the telecoms outage and that that SAP had failed to attend, thus requiring a last minute dash to Caithness to execute the necessary paperwork. He repeated that version of events on several occasions, firstly on the telephone to Mr Clark and then during the meeting in Thurso convened by Mr Clark and recorded by him, until eventually he confessed that this was not true and that he had not made the necessary pre-arrangements for the SAP to attend.

175. The claimant's explanation for not having told the truth to Mr Clark was that he was put under so much pressure that he panicked, in effect, and just told him that all had been well. We rejected that explanation. We found that the claimant was well aware that he had failed to make the necessary arrangements, and was prepared to lie about this to Mr Clark in order to avoid criticism. He was also prepared to lie in order to get Mr Logan into trouble, when in fact Mr Logan was blameless.

176. Further, when asked by the Employment Judge whether he accepted any of the criticisms levelled at him by Mr Clark during the professional review, PIP and capability processes, he simply said he did not. We found this an astonishing response. Mr Clark laid out very clearly the issues which he wanted the claimant to address, and it is apparent that at the time the claimant did not dispute some of those criticisms, though later in the process he did. It is simply not credible for the claimant to maintain that none of Mr Clark's criticisms were in any way justified, and such a stance casts the remainder of his evidence in a very negative light.

177. Accordingly, we concluded that in the event of a divergence in evidence between the claimant and Mr Clark, we had no difficulty in preferring the evidence of Mr Clark, for the reasons we have set out here.

Submissions

178. For the respondent, Ms Norval tended a written submission, to which she spoke. A short summary of her submission is set out below.

179. She noted that the claimant has made claims of unfair dismissal, direct discrimination on the grounds of age, indirect discrimination on the grounds of age, harassment on the grounds of age and victimisation on the grounds of age.

180. She summarised the findings in fact which she considered the Tribunal should make, and then made observations on the evidence given by the witnesses. She submitted that the evidence of the respondent's witnesses was credible, reliable and supported by the relevant documentation. She argued that the witnesses for the respondent came over as professional individuals who had tried their best to support the claimant and treat him fairly in relation to his performance issues.

181. By contrast, Ms Norval submitted that the claimant's evidence was confused and confusing, that he made broad and serious allegations without evidence to support them and failed to produce evidence corroborating his allegations, as he suggested he would. Under cross* examination, she said, the claimant would not answer the question put but instead resorted to giving his own version of events.

182. She argued that this reflected adversely on his credibility and reliability but also reflected upon the substance of the case, in that the manner in which the claimant gave evidence gave the Tribunal an indication of the difficulties faced by the respondent when seeking to manage his performance, handle his grievance or have a without prejudice conversation with him.

183. Ms Norval also observed that the claimant had failed to put his case fully to the respondent's witnesses.

184. Having summed up the relevant statutory provisions in this case, Ms Norval then moved to make submissions about each of the claims Made.

185. In relation to the unfair dismissal claim, she submitted that the reason for dismissal was the claimant's capability, and that Mr Clark had had a genuine belief in the claimant's incompetence for the role, in line with the case of **Alidair Ltd v Taylor [1978] IRLR 82**. Further, Mr Clark had reasonable grounds for that view, based on a reasonable investigation. Ms Norval set out a summary of the basis upon which she submitted that the respondent had a reasonable basis for its belief.

186. She went on to submit that the claimant was given a reasonable opportunity to improve his performance, through the PIP and performance review processes, followed by the capability processes.

187. Ms Norval addressed the decision to dismiss. She submitted that some consideration had been given to alternative roles prior to deciding to dismiss the claimant, but that the claimant himself had declined to consider moving to the role of Assistant Project Manager. She accepted that the claimant had sought to move to a different team, but argued that the respondent was correct in rejecting this approach.

188. Accordingly, she submitted that the decision to dismiss the claimant

was fair.

189. With regard to the claimant's claim that he was directly discriminated against by the respondent, Ms Norval argued that the claimant has not identified an appropriate comparator as required by section 23 of the Equality Act 2010. Ms Mackay, Mr Muir and Mr Cowie were in materially different circumstances to the claimant given their different roles, and the claimant's performance difficulties.

190. She addressed the Tribunal on the various allegations falling under the claimant's claim of direct discrimination, and submitted that either the comments were misinterpreted or simply not made in the first place. The allegation that the claimant was subjected to additional scrutiny by Mr Clark was not supported by the evidence, and in any event, it is clear that other managers were placed under similar scrutiny by Mr Clark. She submitted, having summarised the claims, that there is no basis for a finding that the claimant has been discriminated against on the grounds of age by the respondent.

191. She submitted that there was no basis for a finding that the respondent harassed the claimant on the grounds of age, nor that he was victimised on that basis.

192. Ms Norval addressed the indirect discrimination claim, and submitted that the PCP identified by the claimant was not applied by the respondent, but further that it did not constitute a PCP under the 2010 Act in any event.

193. Dealing with preliminary issues, Ms Norval spoke to the issue of time bar, and also to the meeting of 24 March 2017, in relation to which she submitted that the evidence was inadmissible on the basis that the discussions were covered by without prejudice privilege, or amounted to pre-termination negotiations under section 111A of the Employment Rights Act 1996.

194. Ms Norval then addressed the Tribunal on the question of remedy in the event that the claimant were to be successful in his claims.

195. Finally, Ms Norval invited the Tribunal to dismiss all of the claimant's claims.

196. The claimant chose not to make a submission to the Tribunal, having been assured that if he did not do so, he would not be placed at any disadvantage and that the Tribunal would in any event address the claims made by him in this case.

The Relevant Law

197. Section 98(1) of the Employment Rights Act 1996 ("ERA") provides that it is for the employer to show the reason for the dismissal, and that it is for a reason falling within sub-section (2). Section 98(2)(a) provides that a reason falls within that sub-section if it *"relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do."* *

198. Section 98(3) defines "capability" as *"his capability assessed by*

reference to skill, aptitude, health or any other physical or mental quality. . .

199. Section 13 of the Equality Act 2010 provides that "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. "

Section 19 of the Equality Act 2010 provides:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim. "

201 . Section 26(1) of the Equality Act 201 0 provides:

"A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of -

i. violating B's dignity, or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B. "

202. Section 27(1) of the Equality Act 201 0 provides:

"A person (A) victimises another person (B) if A subjects B to a detriment because -

(a) A does a protected act, or

(b) A believes that B has done, or may do, a protected act. "

203. A protected act, according to section 27(2) means bringing proceedings under the 2010 Act, giving evidence or information in connection with proceedings under the 2010 Act, doing any other thing for the purposes of or in connection with the 2010 Act or making an allegation that A or another person has contravened the 2010 Act.

Discussion and Decision

204. The issues for determination by the Tribunal in this case are:

- 1. Was the claimant unfairly dismissed by the respondent?**
- 2. Did the respondent directly discriminate against the claimant on the grounds of age contrary to section 13 of the Equality Act 2010?**
- 3. Did the respondent indirectly discriminate against the claimant on the grounds of age contrary to section 19 of the Equality Act 2010?**
- 4. Did the respondent harass the claimant on the grounds of age contrary to section 26 of the Equality Act 2010?**
- 5. Did the respondent victimise the claimant on the grounds of age contrary to section 27 of the Equality Act 2010?**

205. It is necessary to address each of these issues, and the matters which the Tribunal requires to deal with within them, in turn.

1. Was the claimant unfairly dismissed by the respondent?

206. The Tribunal must determine, firstly, what the reason for dismissal in

this case was, and establish whether or not it amounted to a potentially fair reason under section 98 of ERA.

207. In this case, there was no dispute that the reason for the claimant's dismissal was that of capability, namely that he failed to meet the performance standards expected of him by the respondent.

208. The claimant made reference, in the course of his evidence, to a desire on the part of Mr Clark, and indeed others, to collude so as to effect his removal from the organisation. He gave no clear explanation as to why he considered that the respondent wished to have him removed from their employment, nor who constructed the plan to conspire to bring about his dismissal. We were not persuaded that there was any evidence to support this rather dramatic assertion, nor that there was any other reason underlying the decision by Mr Clark to dismiss the claimant. Accordingly, we were satisfied that the reason for the claimant's dismissal was that of capability, by reference to his skill and aptitude for the role of Project Manager in the OHL project.

209. It is then necessary to determine whether, as Lord Denning put it in **Alidair Ltd v Taylor [1978] IRLR 82**, the respondent, and in particular Mr Clark, the dismissing officer, honestly believed on reasonable grounds that the claimant was incapable or incompetent.

210. In our judgment, there was no doubt that Mr Clark was entirely honest in his belief that the claimant was unable to perform his duties to the standards expected of him. Mr Clark emerged from his evidence as a straightforward, honest witness and a manager of the highest integrity and professionalism in his role as Lead Project Manager. It is plain that the claimant considered that Mr Clark was acting in bad faith, looking for reasons to criticise his performance and interfering with the way in which he was doing his job as Project Manager.

211. We do not agree with the claimant's assessment. Mr Clark is clearly a manager who demands high standards of those in his team and under his responsibility. Mr Muir, Ms Mackay and Mr Cowie also spoke very candidly of the demanding nature of Mr Clark's management, to which they were regularly subject, and the detailed scrutiny he gave, and gives, to the work which they were doing and continue to do. It is plain that at times they find it uncomfortable to work for a manager such as Mr Clark.

212. However, there is no evidence at all that Mr Clark was in any way insincere in his belief that the claimant's performance did not match the high standards expected of a Project Manager in charge of a £42 million project. His concerns about the claimant's performance, and the potential effects upon that project (for which, let it not be forgotten, Mr Clark was himself answerable to his senior management team), were born out of an honest desire to see the work done according to the high standards which Mr Clark was required to set a Project Manager.

213. It is next necessary to consider whether the respondent had reasonable grounds for their belief that the claimant lacked competence in his role, such that it was appropriate to terminate his employment, and whether those reasonable grounds emerged out of a proper investigation carried out fairly.

214. The claimant's performance was managed under a number of

different processes by Mr Clark. Initially, he was reviewed under the annual Professional Review process, in which objectives are set and then performance measured against those objectives. He was then managed by way of a PIP (Performance Improvement Plan), which again sought to provide the claimant was a clear indication that his work was not satisfactory and set out objectives for him to meet in the period to come. Finally, the claimant was managed by way of the respondent's Capability Procedure, by way of informal and informal stages, until the stage was reached whereby he was dismissed.

215. Mr Clark clearly identified, within each of these processes, the areas in which he had concerns about the claimant's performance.

216. The Informal PIP report of 27 October 2016 (270) is a clear indication of the areas for improvement for the claimant. Mr Clark identified that the claimant required to improve his project management of financial and commercial aspects of managing the contract. He noted that the Keris risks and actions, on the risk register, needed to be regularly updated, but found that the claimant was consistently failing to do this. The claimant protested that he would take account of emailed information and alerts from the Keris system, but Mr Clark's concern was that he was failing to be proactive and update the register as the project developed.

217. Mr Clark also observed that, for example, CENs (Compensation Event Notifications) were not being actions within the contract timescales. His concern in relation to this was that a CEN is a notification which the respondent receives from the contractor which says that an increased payment is requested on the basis of additional, perhaps unforeseen, works on the project. Once a notification is received the respondent has a deadline by which to respond and challenge the notification. If no response or challenge is submitted to the contractor, the default position under the contract is that the compensation sought is payable, a potentially very costly event. Mr Clark found that the claimant was not taking sufficient steps to ensure that such a situation was avoided.

218. He also notified the claimant of his need to support the project team, and to be more proactive in ensuring that contract actions were progressing within the timescales required. Further, he expressed concerns about the number and quality of safety inspections being carried out on site by the claimant, a high priority on a construction project such as this, and a crucial component, in Mr Clark's view, of the work which a project manager in the claimant's position required to carry out.

219. Mr Clark also expressed concern about the claimant's financial management of the project, and in particular his updated assessments of the value of the work done at any given stage on the project, to ensure that within each budget period only spending which was forecast and predictable was being made by the respondent. Mr Clark regarded this as fundamental to the role of project manager.

220. In our judgment, these concerns remained unchanged throughout the performance management process undertaken by Mr Clark, and at no stage did he consider that the claimant was grasping the need to be more proactive, and to attend to the matters raised in the PIP.

221. Mr Clark took, in our judgment, a methodical and evidence-based approach to the management of the claimant's performance. As time progressed, it is clear that he scrutinised the claimant's actions, and the progress on the project, more and more closely, because of his genuine misgivings about the claimant's ability to carry out the role for which he had been recruited. He gave the claimant the opportunity to improve, by regularly discussing his performance with him; by setting clear objectives for him to meet; and by measuring his performance objectively and consistently against those objectives.

222. We were also persuaded that Mr Clark sought to provide support to the claimant in improving his performance, by pointing out areas where he should improve, by giving him information about the areas where he needed to improve and by suggesting techniques, such as the time management resources to which he pointed him and the OHL tracker report which he encouraged him to prepare and maintain.

223. The difficulty throughout this process, as it seemed to us, was that the claimant at no stage accepted that any criticism made by Mr Clark was in any way valid. When asked by the Employment Judge about this in the course of his evidence, he made clear that he did not agree with any of the criticisms made by Mr Clark. It appears that from the start, the claimant was not willing to engage with the performance improvement process to which he was subject because he did not consider that his performance was such as to justify that action being taken against him. We found this a surprising response, but also a very illuminating one.

224. At each stage, the claimant was permitted to appeal against the decisions made by Mr Clark, and did so. On each occasion, the appeal was heard by a different manager, with no prior knowledge of Mr Clark, and no involvement with the department in which they operated. In our judgment, the appeals processes handled by the senior managers from whom we heard were objective and consistent with the Capability Procedure. At no stage were any of the claimant's appeals against Mr Clark's decisions upheld, and we were quite convinced by the respondent's witnesses that they were justified in reaching the conclusions they did, not least because of the consistent failure by the claimant to provide evidence to support his contention that he had met the performance objectives set for him by Mr Clark.

225. At each stage, the claimant was given notice of the meeting, and of the documents to be considered; he was offered the opportunity to be accompanied, which he never took up; he was given the opportunity to respond to the criticisms being made by Mr Clark, and to challenge those criticisms on appeal; and he was given clear and reasoned decisions both by Mr Clark and the managers dealing with the appeals.

226. In our judgment, this whole exercise carried out by Mr Clark was not only a fair procedure, but a remarkably careful and detailed process, very professionally handled, to which Mr Clark gave an enormous amount of time and effort. We were entirely persuaded that he did so with the single intention of seeking to provoke in the claimant an improvement in his performance such as to allow him to believe that the claimant was carrying out the role in a manner which could be relied upon. We rejected the claimant's complaint that Mr Clark had simply acted, and colluded with

others, with the sole intention of reaching the point where the claimant's dismissal could be secured.

227. It is important, in our judgment, to point out that on 25 May 2017, an extraordinary sequence of events took place, in which the claimant repeatedly told Mr Clark that he had pre-arranged for the SAP, Keith Logan, to attend at the project in order to sign off the documentation permitting the telecoms outage, knowing that to be untrue. He eventually accepted that he had not, in fact, made such a pre-arrangement, and that the need for urgency was brought about only by his own failure to have planned for the event. The claimant suggested that the reason why he did not tell the truth on the telephone to Mr Clark, and subsequently during the meeting in Thurso, was that he was intimidated by Mr Clark's behaviour towards him. We rejected this explanation, on the evidence available to us, at least partly because the first time he spoke to Mr Clark about it they were speaking on the telephone, and then by the time the meeting took place, several hours had passed and he was in a position to think clearly about his explanation.

228. This is important because we considered that the claimant was guilty of lying to his line manager, more than once, in relation to this matter, and that if it had been Mr Clark's intention to manufacture a reason for the claimant's dismissal, this would have provided him with ample justification for doing so. Mr Clark took no disciplinary action against the claimant following this event. He included the issue within his next performance review, but he took no formal action against the claimant, when in our judgment he would have been quite justified in doing so. In our judgment, that clearly indicates that Mr Clark was not seeking an excuse to dismiss the claimant, but was consistently and honestly following a fair procedure designed to give the claimant every opportunity to improve his performance as project manager.

229. We were also persuaded that the decision by Mr Clark was an entirely fair decision. He believed that the claimant had consistently failed to meet the performance objectives set for him, and we accepted that. He believed that the consequence was that, having reached formal stage 3 in the capability procedure, there was no reason to believe that any further warnings would have any effect, and again we agreed with that assessment. That the claimant is not prepared, even now, to accept that there was any merit in the criticisms of his performance, but continues to assert that the decision to dismiss him was based on some form of conspiracy against him, beggars belief. The claimant is plainly an intelligent man, and qualified and experienced enough to have secured the role in the first place.

230. It is correct that it is necessary for the respondent to have considered the possibility of redeployment of the claimant, but in our judgment, the claimant's refusal to accept another role as Assistant Project Manager made clear to the respondent that he was not prepared to accept the need to be redeployed. He wished, it is true, to be moved to another team, but in our judgment that did not justify the criticism that there was a failure to make reasonable efforts to redeploy the claimant. We heard evidence, in any event, that there were no suitable vacancies at the relatively senior level at which the claimant was employed; and perhaps more fundamentally, the respondent had ample evidence upon which to base their conclusion that he was not capable of carrying out the role of project manager, not because of his inability to forge a good relationship with his line manager but because

of the fundamental failings in his work which had been demonstrated over a considerable period of time, without improvement.

231. Accordingly, it is our judgment that the decision to dismiss the claimant was a fair decision, based on reasonable grounds following a thorough investigation, opportunities to improve and a fair procedure consistent with the respondent's own procedure.

232. The claimant's claim for unfair dismissal therefore fails, and is dismissed.

233. We address, in passing, at this stage the claimant's regular reference to the respondent's alleged failure to give him notice following his dismissal. No separate claim was made by the claimant on this point, but in any event, it was quite clear that the claimant was paid, and accepted, three months' pay in lieu of notice at the time of his dismissal. There was no breach of his contract, and accordingly, there was no unfairness to the claimant in relation to his notice period.

2. Did the respondent directly discriminate against the claimant on the grounds of age contrary to section 13 of the Equality Act 2010?

234. The claimant's claims are set out in detail in the further and better particulars submitted by him (11 Off). The foundation of the claimant's assertion that he was discriminated against, and indeed harassed, on the grounds of his age, is (120):

"During all above performance review meetings, he has showed major concerns about my age, he said 'how can you become a Project Manager at so young age? 1, 'Most of the people will get opportunity to become Project Manager at age of 40' and 'You are young that means you have less experience and you know nothing'. He has given me discriminatory conduct He tried to undermine & underestimate me during those meetings. I have not been treated with the respect I deserved as an employee under him. He has treated me differently to an older employee. I am younger than doesn't mean that I should not work as a Project Manager. Mr Clark has discriminated against me on the basis of my age. I am young, weak, and soft spoken person therefore he was harassing verbally & mental torture by shouting on me during those appraisal meetings. The way he was speaking and behaving with me, I got frightened and demotivated... During above meetings he said 'How come you have done MBA degree at such young age? People do that at age of 40' he was comparing himself with me by thinking he was not on a Project Manager position at his age. He also said 'You are earning much more money than other colleagues at such a young age'. He has repeated these statements during all above appraisal meetings. . . ."

235. In the course of his evidence before us, the claimant repeated the allegation that Mr Clark had made these discriminatory comments to him in relation to his position as a Project Manager, and in relation to his qualification of MBA.

236. Mr Clark's evidence was quite different. He agreed that on one occasion, he said to the claimant something along the lines of "as a Project Manager you are young in years". He also said that he may have told the claimant that it was unusual to have an MBA at that end of his career.

However, Mr Clark was clear in stating that he did not make any of the other comments attributed to him by the claimant, and that he did not make any adverse comparisons between the claimant and those of his colleagues over 40. He said he would not say such a thing. His focus, he said, was not on the claimant's age but on his performance in his role. He also pointed out that, contrary to the claimant's assertion, he himself was a Project Manager before he was 30. As to making reference to the claimant's pay in comparison with others, Mr Clark denied that he was aware of the specific pay received by any others.

237. We preferred Mr Clark's evidence to that of the claimant. The claimant's assertions, that Mr Clark made these derogatory comments at every professional review meeting, were undermined both by Mr Clark's firm and clear denials but also by the fact that at one of those meetings, Ms McLeish was present and confirmed that no such comments were made. The claimant appears to have taken one comment by Mr Clark, about his being young in years as a project manager (which referred to his experience rather than his age), and inflated that to include all sorts of derogatory and indeed insulting comments about him in relation to age. An example of this was his assertion that Mr Clark was in some way jealous of the claimant because he himself had not reached the position of Project Manager by the stage the claimant had; however, Mr Clark confirmed that in fact he was younger than the claimant when he attained that position for the first time. He was quite prepared to make such an allegation notwithstanding that not only did he lack the factual basis to say it, but also it was clear that he was wrong. We did not accept that the claimant's evidence was believable and we rejected it.

238. As to the comment made by Mr Clark, which he admitted, we do not consider this to be the basis upon which the claimant can claim that he was discriminated against on the grounds of age. Mr Clark was saying that the claimant had reached an elevated and responsible position early in his career. The claimant has interpreted this in the most negative light possible, but in fact Mr Clark did not intend it as a criticism at all. We took the view that it was intended as a positive comment about the claimant's achievement, but also as an encouragement to understand that the role is a very responsible one and he needed to attend to it.

239. Those are our general conclusions on the claim of direct discrimination. However, the claimant made a number of particular allegations, and we require to address them now. (In her submission, Ms Norval helpfully summarised these under headings, and we adopt those headings for ease of reference).

Reporting

240. The claimant complained that Mr Clark repeatedly questioned the details in his reports, and challenged him about the information contained therein. There is no basis, in our judgment, for suggesting that he did so on the grounds of the claimant's age, and no evidence to support that, but in any event, the claimant's comparators were Suzanne Mackay and Alasdair Muir, both of whom made it clear that Mr Clark treated their reports in the same way. Mr Muir in particular confirmed that he expected every report he sent to Mr Clark to be returned with questions and comments, and he accepted this as part of Mr Clark's management style. We noted that Mr

Muir has moved to a different line manager now, and in his evidence said that he now requires to remind that line manager of certain obligations which the team has, something he never had to do with Mr Clark.

241. The claimant's perspective throughout was that Mr Clark treated him differently to the way he treated the older project managers. From the evidence we heard, in relation to reporting, we did not accept this to be the case. Mr Clark expected high standards of his project managers, and enforced that expectation by challenging them where he thought that was necessary. We do not doubt that Mr Clark can at times be a difficult manager to satisfy, but nor do we doubt his intentions in seeking to maintain the highest possible standards. Neither Ms Mackay nor Mr Muir found themselves on any form of PIP or capability process, because Mr Clark considered that they were meeting their objectives, not because of their ages in comparison to that of the claimant.

Telephone Calls

242. The claimant complained that Mr Clark would telephone him on a Friday afternoon to ask him questions about the project.

243. Mr Cowie, Mr Muir and Ms Mackay also spoke about receiving such phone calls. On a Friday afternoon, Mr Clark would drive from Caithness to Perth. Not a man to allow time to pass when he could be speaking with his team, he would phone each of his managers in turn and question them about progress. Mr Cowie, who would drive from Caithness to Inverness at the same time, spoke of receiving such calls and of the need to pull off the road to speak to Mr Clark, often for protracted periods. Amusingly, and with a candour which perhaps he may regret should this reach the ears of Mr Clark, Mr Cowie spoke of the relief he felt if the mobile phone signal were lost so he could switch his own phone off and drive without interruption to his home.

244. It is quite obvious that the claimant was not singled out by Mr Clark in any way in this regard. There is simply no basis for a finding that this amounted to discrimination on the grounds of age.

Withholding Information

245. The claimant alleged that Mr Clark instructed Mr Cowie to withhold site information from him so as to prevent him being able to provide updated reports to him.

246. In our judgment, there is no basis for this allegation. Mr Cowie explained that he could see there were certain aspects of the role with which the claimant was struggling, and since he was the construction manager he was able to help him with certain information. Again, Mr Cowie described this as being "for a quiet life". However, when Mr Clark instructed him that he was in fact carrying out duties which the claimant was responsible for, he accepted that he had to desist, and did so. The claimant was unhappy about this but there is no basis upon which we could find that Mr Clark's instruction was anything other than appropriate. The claimant simply found himself incapable of seeing that Mr Clark would have any justification for such a decision but Mr Cowie accepted it.

10 May 2017 Conversation

247. The claimant alleged that on 10 May 2017 Mr Clark had put pressure on him about his appeal, and had suggested that he was wasting his time and it would not change the outcome.

248. Mr Clark's evidence was that no such comments were made by him.

249. We completely accepted Mr Clark's evidence in preference to the claimant's on this. Mr Clark is so obviously a stickler for best practice, and a person of firm principle, that we find it inconceivable in any event that he would say such a thing. However, we accepted that as a matter of fact he did not.

Sign Out Discrepancy

250. The claimant asserted that on 18 August 2017 Mr Clark challenged him about his time sheet, and told him that he could add this matter to his capability form in order to strengthen his position.

251. Mr Clark denied this, a denial we accepted. Again, it is simply not believable that he made such a comment. In any event, there is no evidence presented to us that he did in fact introduce this particular issue into the capability process. He spoke to the claimant about signing out sheets, but this does not appear to have been a significant matter.

252. Further, however, we considered that there was simply no basis upon which it could be said that this amounted to less favourable treatment on the grounds of age.

Expectations of Ian Clark - Micro-management, response rates, cover for colleagues, Safety Observation Reports (SORs)

253. It is difficult to be precise about the assertions made by the claimant under this heading. He complained, as we understood it, that Mr Clark was insistent that he should meet standards which the claimant regarded as unnecessary, and that he should conduct his business in the same way as Mr Clark, despite the differences in their personalities. The evidence demonstrated, in our judgment, that Mr Clark was indeed a demanding manager for whom it was testing to work, because he set and implemented high standards, but beyond that we were unpersuaded that Mr Clark acted towards the claimant any differently (in terms of his management style) than he did to the other managers under his supervision.

254. Ms Mackay did use the phrase "micro-managed" to describe Mr Clark's style, but did not associate that with a bullying style of management, nor did she consider it to be related to the claimant's age.

255. Our assessment of this aspect of the claim is that there is no basis for finding that the claimant was treated differently to others under Mr Clark's management, nor that any differences were on the basis of his age. By contrast, Mr Clark appeared to us to take very considerable time to give guidance to the claimant in order to assist him to improve his performance and meet the objectives of his role.

256. It was notable, for example, that the claimant focused on the fact that initially Mr Clark wished him to increase the number of SORs which he

carried out on site, and then when he did increase the number, criticised him for the manner in which he did them. The claimant sought to portray this as Mr Clark demonstrating that he would never be satisfied by the claimant's performance. In fact, a manager is entitled to consider all aspects of his employee's work, and in this instance Mr Clark confirmed that he attended at the site to observe how the claimant went about an SOR. It was clear to him that the claimant asked very few questions and appeared to be too easily satisfied by the responses given by the contractor. As a result, Mr Clark took over the inspection, questioned the contractor more thoroughly, asked him for evidence in support of his responses, and pronounced himself satisfied with the responses. In our judgment, Mr Clark was seeking to assist the claimant by demonstrating how best to carry out a safety check which can satisfy the requirements of the contract. That the claimant did not see it that way does not mean that Mr Clark was not justified in what he did, nor that this amounted to discriminatory conduct. However, given the claimant's reluctance to accept any criticism by his line manager, his criticism of Mr Clark in this regard cannot be sustained.

Holiday Handovers

257. The claimant complained that he was singled out for harsh treatment by Mr Clark in relation to the holiday handover arrangements he made, in that when he produced a note to assist those who were to look after matters in his absence, Mr Clark was critical of the lack of detail and identification of cover in the report.

258. It is correct to say that neither Mr Muir nor Ms Mackay were asked to provide detailed holiday handover arrangements in the same way.

259. Mr Clark's explanation was two-fold: that the claimant tended to take longer holidays in order to allow himself to travel to India, and that he was satisfied that Mr Muir and Ms Mackay were meeting their objectives and had left matters in hand when they went on leave. However the claimant's note of arrangements was, in Mr Clark's opinion, lacking in detail. It was not clear to him what specific timescales had been set, what meetings would take place, what targets had to be achieved, and who would be responsible for each.

260. The claimant's position appeared to be that Mr Clark should "go with the flow". It is not credible for the claimant to suggest that that was an appropriate approach to have taken to a project worth approximately £40 million, particularly given what he knew about Mr Clark by that stage.

261. In any event, we did not consider that the claimant was treated less favourably than Mr Muir and Ms Mackay, nor that this gives rise to any finding that the treatment he received was on the grounds of his age. There is simply no evidence to this effect, whereas Mr Clark provided cogent reasons for wanting to be sure that he could rely upon the information provided in the holiday note while the claimant was absent. The only basis upon which the claimant seems to suggest that this related to his age was the comment or comments he alleged that Mr Clark made about his age at the professional review meetings. We do not accept that those comments were made, and in any event, we do not find that there was any connection between those comments and Mr Clark's actions in relation to the holiday handover.

Delays in Arranging Project Success Celebration Day

262. The claimant alleged that Mr Clark shouted at him because he had delayed arranging a celebration day to acknowledge the good safety record on site and the general successes of the project. Mr Clark denied this, and Ms Mackay confirmed that she had not heard shouting from the meeting.

263. Again, we did not accept that there was any conduct in this matter by Mr Clark which would amount to discriminatory conduct on the grounds of age. We accepted Mr Clark's evidence over that of the claimant, supported as it was by Ms Mackay.

Speech at Celebration Day

264. We heard a great deal from the claimant about the upset he felt because Mr Clark, he asserted, had deliberately excluded him from the speeches made at the celebration day convened with the contractors and project staff.

265. Mr Clark, and Mr Cowie, both gave evidence which placed the events in a different context to that which the claimant sought to portray.

266. We concluded that this was an event at which Mr Clark had been aware that the claimant was due to speak; that Mr Clark had spoken to the claimant in advance of it to ensure that he was preparing something to say to the gathering, as he was concerned that the claimant was nervous; that the schedule for the day, which was informal, was changed unexpectedly as there were delays; that it had been expected that Tony Scott and Dave Gardner would be in attendance and would speak, but neither of them had been able to attend; that Mr Clark discussed the matter with the contractors and agreed that he would speak briefly, and then allow the staff to enjoy the food and drink provided; that the claimant was not invited by Mr Clark to speak, and that by that stage he had prepared something to say, though Mr Clark was not specifically aware of that; and that afterwards the claimant was upset, so Mr Clark drew him to a private table and apologised to him for not having invited him to speak.

267. The claimant's reaction to this was perhaps understandable at the time. He had keyed himself up to speak to staff and contractors, and since he was the Project Manager on the OHL project, was concerned to participate in the celebration.

268. However, Mr Clark subsequently acknowledged this and did apologise to him for his failure to call him to speak.

269. What the claimant actually alleged, repeatedly, was that Mr Clark was deliberately trying to "steal the credit" for the success of the project from the claimant, and that by not mentioning the claimant's name in his speech he had made the claimant feel marginalised and demoralised.

270. We were not convinced that Mr Clark's motivation was as the claimant portrayed it. There is no doubt that matters could have been handled much better, and it was clearly appropriate for Mr Clark to apologise for having failed to invite him to speak or mention his name. However, it is our judgment that Mr Clark did not deliberately seek to exclude the claimant, nor that he sought to steal any credit from him.

271. In any event, we could find no basis upon which it could be said that this amounted to less favourable treatment of the claimant on the grounds of his age. There appeared to us to be no connection whatever between the comments Mr Clark was alleged to have made in professional review meetings and this incident. At base, this was no more than a misunderstanding between Mr Clark and the claimant. The claimant's persistence reference to this event struck us as something of an over reaction, and his evidence about the impact upon him was rather exaggerated. He denied that Mr Clark had apologised to him, but we did not accept his evidence on this matter.

Working Late

272. The claimant alleged that Mr Clark deliberately kept him late at the office in order to speak to him about work matters after office hours.

273. Mr Clark's evidence on this was simply that he wished to address some issues with the claimant, and preferred to do so in private, without anyone else in the office. It was, therefore, convenient to him to speak to the claimant when the other staff had left. He did not, in our judgment, force the claimant to stay late, and indeed it is clear that the claimant did, from time to time, work late in order to complete tasks he needed to carry out. There was one occasion when Mr Clark confirmed that the claimant had told him that he had gone without lunch, and needed to leave in order to eat, and Mr Clark accepted this and willingly agreed that the meeting should end at that point.

274. It is also clear from the evidence that Mr Muir and Ms Mackay were kept late by Mr Clark on occasion, and were unhappy about it, particularly Mr Muir.

275. Our conclusion is that Mr Clark works very hard, and expects others to do the same; in addition, that he anticipates that each of his project managers will take their responsibilities as seriously as he does his. In our judgment, there is no basis for finding that Mr Clark treated the claimant any differently to his other project managers in this regard, and therefore no basis at all for finding that the claimant was treated less favourably than them on the grounds of age, nor at all.

Mobile Phone

276. One of the claimant's complaints was that unlike others in the team, he was not allocated a Smartphone by the respondent but was given what he described as a "Nokia". We understood this to mean the type of mobile phone which was common before the introduction of Smartphones, of a simple type with a face which allowed for text to be typed but few other functions. A Smartphone would allow him, we understood, to have access to email, applications and other facilities which would enable him to do his job.

277. The explanation given by Mr Clark was that he did not deprive the claimant of a Smartphone, but that the Communications Team would be responsible, not him, for the allocation of such a device. Some of the team already had Smartphones from the company before the claimant arrived,

and his arrival coincided with certain economic measures being put in place to save money.

278. Mr Clark explained that he knew that the claimant had his personal Smartphone and made reference to the "Good App", which he could download to that device and use for, for example, accessing his work email account. The claimant appeared to be resistant to that. When the claimant told him he was experiencing issues with his phone, Mr Clark advised him to ask for a new battery. Any new Smartphone would have to be authorised at director level, in any event, and was therefore not Mr Clark's decision.

279. In our judgment, there was a reason for what the claimant classified as less favourable treatment, and that reason was an objective reason, namely the economic stringency placed upon the business. We did not accept that this amounted to less favourable treatment, but in any event there is no basis upon which we could find that such treatment was on the grounds of the claimant's age. Further, it was clear that the claimant's allegation, that Mr Clark was preventing his obtaining a Smartphone, was misdirected, and that this was not a decision which Mr Clark actually took or could take.

Press Articles

280. The claimant made reference to a number of press articles in which individuals such as Mr Cowie or Mr Clark were named or quoted, and suggested that this was another example of Mr Clark seeking to take the credit for his own work.

281. We considered this to be an unfounded criticism. Mr Cowie wrote an article about his involvement in the project, which was published both in the press and internally. Mr Clark took the view that Mr Cowie, who was involved in the work described, should be the focus of the article. However, the Communications and Media team were responsible for the content and form of the article, even though the information contained therein would come from the engineers and managers involved on site.

282. Mr Clark's evidence was that when he was quoted in an article, it was often by the Communications team using his name, and on occasion attributing to him quotes which he had not given. While we found this surprising and perhaps unhealthy, what it emphasized to us was that the role of preparing and issuing pieces for publications did not lie with Mr Clark but with the Communications team.

283. However, it was also of importance that not only did Mr Clark encourage the claimant to prepare an article for the Communications team to celebrate the project and its progress, but he also made it one of the claimant's objectives. The claimant failed to do anything about this. It was entirely within his control to prepare and present to the Communications team an article about an aspect of the project worth publicising or celebrating; he was positively encouraged to do so; but failed to take any action on this point. That he then sought to criticise Mr Clark for having presented information for an article to the team which was then published struck us as quite unfair to Mr Clark. It was not, to put it bluntly, Mr Clark's fault that the claimant failed to do what he was instructed to do.

284. The claimant's comparators were Ms Mackay and Mr Muir and we heard no evidence about any publications which gave them any form of credit either.

285. There was no basis upon which it could be said that this amounted to less favourable treatment on the grounds of age.

Telecom Outage Incident

286. The claimant has asserted that he was treated less favourably on the grounds of age in relation to this incident.

287. The incident, which took place on 25 May 2017, was in fact an incident which was brought about entirely by the claimant's own failure to plan the outage and set up the necessary arrangements for the SAP to come to Caithness to sign off the permissions required. That failure was then compounded when the claimant lied about it to Mr Clark, on more than one occasion.

288. He complained that Mr Clark expressed strong frustration with him, and treated him with aggression when they met to discuss the matter.

289. Our conclusion was that Mr Clark was eminently justified in his frustration with the claimant's conduct before and during this incident, but that he did not treat the claimant in an inappropriate manner. We considered that Mr Clark could well have sought to take disciplinary action against the claimant as a result of this incident, though he decided not to do so.

290. To suggest that Mr Clark, in his response to what was, on any view, quite outrageous conduct by the claimant (particularly given that he was effectively seeking to blame Mr Logan, quite unfairly, for his own failings) treated him less favourably on the grounds of age, is unsustainable. There is no proper comparator for this allegation, since the claimant's actions were what brought about Mr Clark's response. Mr Clark was, not surprisingly, annoyed when he discovered what had happened. However, he handled the matter in a professional way, and chose to treat the claimant with some restraint by not taking further action against him.

291. We concluded that this was a baseless criticism against Mr Clark. In our judgment, the very fact that the claimant continues to maintain that others were in the wrong on this occasion makes clear how badly he misjudged the events and his own part in them.

292. Accordingly, we have concluded that there is no basis for the claimant's assertion that he was treated less favourably in general by the respondent, nor in particular by Mr Clark in the examples given, and therefore his claim of direct discrimination on the grounds of age is bound to fail, and must be dismissed.

3. Did the respondent indirectly discriminate against the claimant on the grounds of age contrary to section 19 of the Equality Act 2010?

293. The claimant complained of indirect discrimination on the grounds of age, and was permitted to introduce this claim by way of a late amendment in the proceedings.

294. It is necessary, firstly, to identify the provision, criterion or practice upon which the claimant relies. These are set out at page 137 in his further particulars of claim.

295. Taking each of the 9 PCPs identified by the claimant in turn, the Tribunal considered whether or not they were in fact applied by the respondent.

296. First, he said that Mr Clark had imposed job requirements which were too hard and extremely difficult for the claimant to achieve. We are satisfied that this is not a PCP within the meaning of section 19. This is an assertion that Mr Clark acted in a particular way towards the claimant alone. There is no wider application.

297. In any event, we did not accept that Mr Clark imposed job requirements which were too hard or extremely difficult for the claimant to achieve, in the sense that they were objectives which a project manager would be expected to achieve.

298. Second, the claimant said that Mr Clark was, essentially, never satisfied by his performance, and told him that his performance was not as good as two colleagues who were 40 years old. Again, this is not a PCP, but an allegation of treatment particular to the claimant.

299. We did not accept that Mr Clark said what the claimant alleges.

300. Third, the claimant said that Mr Clark was extremely demanding, and expected outputs from him that he would expect of a 40 year old. This is not a PCP, once again, but in any event, this amounts to an extraordinary allegation. The claimant himself seems to be comparing himself unfavourably to a 40 year old project manager. Mr Clark expected him to perform to the standard of a competent project manager, but never compared him unfavourably on the grounds of his age.

301. Fourth, he claimed that Mr Clark imposed unjustified requirements, unrealistic targets and gave very harsh treatment to "a young person like me" during the performance review and PIP processes. Again, the claimant is not pleading a PCP here, but making an allegation of particular treatment directed at himself. There is no basis for his assertion that he was given unrealistic or unjustified targets, nor that any of those actions were in any way related to his age.

302. Fifth, he accused Mr Clark of conducting the performance management processes with the intention of leading to his dismissal. This is not a PCP, but an allegation of treatment particular to himself. It is not an allegation which is related to age at all, and the basis for it is entirely unclear. In any event, we do not accept that Mr Clark was conducting the performance management process with a view to having the claimant dismissed. It was clear throughout that he was seeking to improve his performance as a project manager, and that indeed he refrained from taking the opportunity to dismiss the claimant on conduct grounds when it was presented to him by his misconduct on 25 May 2017.

303. Sixth, the claimant said that Mr Clark missed no opportunity to make him feel worthless, and sought to monitor him in order to trap him. There is no PCP identified here. Again, the claimant seeks to allege that Mr Clark

treated him unfairly. It is not said to have been related to his age, but the claimant has failed to present a complaint of indirect discrimination in this regard.

304. Seventh, a very unclear allegation is made by the claimant that the capability process was applied to the "victim of Bullying, harassment and torture". It appears to be an allegation of unfair treatment of the claimant by Mr Clark, not a PCP applied to him of wider application. The allegation is not sustained by the evidence and therefore there is no basis for this point.

305. Eighth, the assessment in the performance management process was carried out by Mr Clark who was bullying, harassing and torturing the claimant. It is not possible to discern a complaint of indirect discrimination in this complaint. There is no PCP of any wider application than to the claimant set out here.

306. Ninth, Mr Clark was not the appropriate person to decide on the outcome of the improvement process. No PCP is identified here, and therefore no basis can be discerned for a claim of indirect discrimination on the grounds of age. However, the Tribunal simply does not accept that there is any basis for this criticism; there was no reason why Mr Clark should not be the manager, as the claimant's line manager, to manage the performance processes.

307. It is therefore our conclusion that there is no competent indirect discrimination claim identified in this case by the claimant. It can only be assumed that the claimant, when seeking to introduce such a claim, did not fully grasp the meaning of indirect discrimination under section 19 of the 2010 Act. As an unrepresented and unqualified party, this is perhaps understandable (and the Tribunal did allow his application to amend), but the Tribunal requires, in the interests of justice, to decide whether or not there is a proper legal basis for this claim, and in this case, there is no such legal basis.

308. Accordingly, the claimant's claim of indirect discrimination on the grounds of age must fail, and is dismissed.

4. Did the respondent harass the claimant on the grounds of age contrary to section 26 of the Equality Act 2010?

5. Did the respondent victimise the claimant on the grounds of age contrary to section 27 of the Equality Act 2010?

309. We take these two heads of claim together, while acknowledging the different legal provisions to which they are each subject.

310. We accept that the claimant's allegations of harassment match those of direct discrimination, with which we have dealt above.

311. As a result, there is no basis upon which we can find that the claimant's allegations of harassment can be sustained. There is no basis upon which we can find that the claimant's dignity was violated, nor that the respondent created an intimidating, hostile, degrading, humiliating or offensive environment for him. The respondent dealt with the claimant on the basis of his performance, and not of his age.

312. Mr Clark did not harass the claimant, in our judgment, at any stage. He made one comment relating to the claimant being young in years as a project manager, but this comment fell far short of amounting to harassment on the grounds of age.

313. We have accepted the respondent's explanation that Mr Clark's actions were designed to improve the claimant's performance at work, and address the failings in that performance.

314. The claimant's claim of harassment on the grounds of age therefore fails, and is dismissed.

315. With regard to the claim that the claimant was the subject of victimisation on the grounds of age, the respondent concedes that raising a formal grievance and complaint of age discrimination on 27 February 2017 amounted to a protected act within the meaning of section 27 of the 2010 Act.

316. Again, the allegations relating to victimisation are founded on a number of acts which were addressed in the complaint of direct discrimination on the grounds of age, and found to be unfounded.

317. There are additional allegations under this heading, however, and therefore the Tribunal requires to address them, again following Ms Norval's helpful structure and headings.

Expenses

318. The claimant complains that Mr Clark's scrutiny of his expenses claims amounted to a detriment as a result of having made a protected act by raising a grievance against him.

319. In our judgment, there was no detriment applied to the claimant. It was clear from the evidence that Mr Clark subjected all expenses claims to the same level of close scrutiny, as a precursor to signing them off before issuing them to the Payroll department for payment. Mr Muir and Ms Mackay confirmed that he was very particular with them.

320. It is quite correct to say that Mr Clark was entitled to scrutinise expenses claims before sending them to Payroll. He was accepting a measure of responsibility for the claims by doing so, and therefore it was part of his job to check over expenses claims before he sanctioned them. As far as the claimant was concerned, it is clear that Mr Clark argued his case with the Payroll department on at least one occasion.

321 . We could not sustain the claimant's argument that he was subjected to any detriment with regard to his expenses, nor that Mr Clark's actions were in any way caused by his having made a protected act.

Without Prejudice Meeting

322. The claimant complained that when he was asked to meet with Mr Scott on 24 March 2017, he was subjected to a detriment or detriments as a result of the protected act.

323. The respondent seeks to argue that the evidence in relation to this meeting is inadmissible on the basis that it was a “without prejudice” conversation; or, alternatively, that it amounted to a “protected conversation” in terms of section 111A of ERA.

324. It is necessary to consider firstly whether the evidence relating to this meeting is admissible. Evidence was presented by both parties in relation to the meeting, including notes of the script to be relied upon by Mr Scott, who was accompanied by Claire Sullivan from Case Management.

325. The protection of the “without prejudice” rule (and there is no doubt that in the meeting itself the claimant was advised that it was a without prejudice discussion) only arises when the parties are “in dispute”. We interpret this as meaning that discussions which take place between parties in contemplation of litigation are not to be admitted to evidence in that subsequent litigation. In the case of **Portnykh v Nomura International plc** [2014] IRLR 251, the EAT gave guidance that a dispute was in existence once dismissal had been proposed.

326. However, in this case, it is our judgment that no dispute was in existence at the point when the discussion took place on 24 March 2017. There was no question that dismissal had been proposed or decided upon by the respondent, as the process had reached formal stage 1 of the capability process, and without that stage 1 meeting having taken place. The claimant had undergone the informal stage of the capability process, and was subject to the PIP process; in addition, he had presented his grievance, which had caused the formal stage 1 to be paused, and had received the outcome. It cannot be said - and we had no evidence to say it - that the parties were contemplating litigation at this stage, and therefore while there were discussions ongoing between the parties, the reality is that the claimant could have met his objectives and improved his performance to the extent required.

327. Accordingly, we do not consider that the discussions are inadmissible merely by the use of the description “without prejudice”. We understand why that description was used, but do not consider that that of itself places the evidence outwith the ambit of this hearing.

328. So far as the protected conversation provisions are concerned, in section 111A of ERA, it is important to note that these would only exclude evidence insofar as relating to the unfair dismissal claim. Since this issue arises in relation to the victimisation claim, we are not prepared to exclude the evidence on this basis.

329. It is necessary then to consider what was actually said at the meeting. The evidence given by Mr Scott and Ms Sullivan was consistent and coherent, and we accepted their version of events. It is clear that Mr Scott started by relying upon the script he had been given, but then diverged from it in order to encourage the claimant to consider his position.

330. The reason why the meeting was called was, in our understanding, two-fold: firstly, the respondent was concerned that the capability process had reached the formal stage 1, and that no improvements had been discerned from the earlier, informal stage nor the PIP process; and

secondly, the claimant had complained to Mr Scott about Mr Clark's management on at least one prior occasion, and had expressed his unhappiness with the situation as it generally lay at that point.

331. The respondent intended to offer the claimant a sum in settlement, in exchange for his resignation and departure from the business. It was an entirely voluntary discussion, but no offer was in fact made, since the claimant, realising what was being suggested, refused to discuss the matter and insisted on returning to his desk. No pressure was placed upon him to accept the offer, and he was not advised that his employment was going to be terminated.

332. The claimant alleged that Mr Scott had, in effect, told him to pack his bags and leave the office immediately, and not to return. We rejected this allegation. This was an example of the claimant's tendency to exaggerate and misrepresent what was said to him. Mr Scott suggested to him that since he was upset he should feel free to go home for the weekend (the meeting took place on a Friday) and think about his position, and come back afterwards once he had had a chance to reflect. He did not tell him to pack his bags and leave. The claimant did not pack his bags and leave but returned to his desk. If Mr Scott had genuinely told him that, it is illogical that he would then leave the claimant at his desk: it is much more likely that in those circumstances he would have approached the claimant and repeated his instruction to leave the building. That he did not is consistent with Mr Scott's explanation that the discussion was an entirely voluntary one, and that if the claimant chose to return to his desk, that was acceptable and understandable.

333. Accordingly, while we regarded the evidence about this meeting not to be subject to the protection of "without prejudice", we did not find that the claimant's version of what was said at that meeting was accurate. In those circumstances, a voluntary discussion by Mr Scott with the claimant about his future position, which did not lead to any offer actually being made, is no more than that, and cannot, in our judgment, be taken to amount to a detriment. In any event, there is no evidence that Mr Scott acted as he did on the grounds of the claimant's age.

334. It is true that the invitation to the meeting was slightly opaque, and we were not surprised that the claimant found himself taken aback by the subject of the discussion, but Mr Scott was acting quite genuinely, seeking to find a mutually acceptable solution, with the advice of Case Management, and conducted himself in a professional and reasonable manner while doing so.

335. Accordingly, there is no basis that this meeting, or what was said at it, amounted to a detriment on the grounds of having made a protected act.

Michelle McLeish's comments post Grievance Hearing

336. The claimant alleged that Ms McLeish put pressure on him to resign following the conclusion of the Grievance Hearing.

337. It is important, in our judgment, to understand the context in which this conversation took place. Ms McLeish had heard the claimant's grievance, investigated it, and then issued him with her decision not to

uphold the grievance.

338. When she and the claimant then found themselves alone in the room, she engaged him in an informal conversation, during which she made the point that if she were in his position, she would look forward another job. She came over to the Tribunal in giving this evidence as a sincere and caring manager, who felt sympathy for the claimant who was clearly upset by his experiences. She felt able to speak candidly with him.

339. As Ms Norval points out in her submissions, Ms McLeish was saying these things after having conducted the grievance, not instead of having done so. She was simply trying to provide some supportive advice to the claimant.

340. The claimant clearly understood that Ms McLeish was trying to persuade him to resign, but in our judgment that is not a correct interpretation of the situation. She was, we concluded, seeking to be sympathetic to the claimant who, on any view, found himself in an unhappy situation where he had been moved to raise a grievance against his line manager but had had that grievance rejected by the manager hearing it.

341. In our judgment, there is no basis upon which we could find that this was a detriment which arose out of his protected act. The protected act here was his grievance. Ms McLeish investigated and responded to that grievance in a careful and professional manner. There is simply no evidence to demonstrate that Ms McLeish was acting as she did because the claimant had raised a grievance. She was, in truth, recognising the difficult position in which the claimant had found himself, and was trying to help him think about the future.

Conversations with Tony Scott on 11 May 2017 and 30 June 2017

342. The claimant alleged that he asked Mr Scott if he could move teams because Mr Clark was treating him so badly, but that Mr Scott did not listen to him (11 May 2017); and that following Dave Mackay's outcome of his appeal, he had spoken to Mr Scott, as encouraged to by Mr Mackay, to discuss his working arrangements (30 June 2017) but that Mr Scott told him to continue with Mr Clark as usual.

343. It is not clear what the claimant was proposing to Mr Scott. He had raised a formal grievance against Mr Clark, which had not been upheld. It appears that he was now seeking to persuade the respondent to move him to another team or role so as to get away from Mr Clark's management. Mr Scott did not decline to listen to him, but took the view that the appropriate process of grievance had been followed, and that there was therefore no need to consider the matter further.

344. As to discussing his working arrangements, it is clear that the claimant expected that Mr Scott would move him away from Mr Clark's management. Mr Mackay's evidence before the Tribunal, which we accepted, was that he should speak to Mr Scott about the next steps. It was no part of Mr Mackay's role to instruct Mr Scott to alter the claimant's working arrangements, and he only spoke about it in very general terms.

345. In our judgment, no detriment arises here from Mr Scott's actions in

either of these conversations. He was justified in relying upon the outcome of the grievance in not moving the claimant to another team. The claimant was the project manager for the OHL project, and the respondent required him to carry out that role. There was no good reason for moving him, nor any reason to suppose that he would carry out the project manager role differently under a different line manager. That the claimant wished to move to another team was not a basis for compelling the respondent to comply with that wish.

346. Accordingly, there is no basis upon which we could find that the claimant was subjected to a detriment on the basis of having made a protected act in this regard.

Conversation with Dave Mackay on 9 June 2017

347. The claimant alleges that Mr Mackay told him to speak to Mr Scott about his working arrangements following the rejection of his appeal.

348. There is no detriment alleged here. There is no basis upon which it could be found that there was a detriment in what Mr Mackay did at that stage in the process.

Performance Rating/Performance Rating Appeal

349. We take these two points together, as they are closely related.

350. The claimant alleges that he was given a performance rating of 1 in April 2017 as a result of having raised a grievance. The Tribunal acknowledges that this is an allegation of a detriment having been visited upon him as a result of a protected act.

351 . In his prior ratings, Mr Clark had awarded the claimant a rating of 2. At the performance review of April 2017, the claimant did not bring any evidence to support his contention that he had achieved the objectives. In a sense, this was consistent with his position before us - that he simply did not accept the criticisms made by Mr Clark, that he regarded Mr Clark's working methods and his as simply different, and that he felt that Mr Clark should simply accept him as he was - in demonstrating an unwillingness or inability to accept any of the criticisms put forward. He appears to have failed or even refused to engage with the criticisms in the professional review.

352. We found the evidence of Ms McLeish very helpful in relation to this matter. She attended the meeting with the claimant's consent, as an observer, and concluded that not only was Mr Clark entirely justified in his conclusions, but would also have been entitled to award lower scores on some of the points raised owing to the failure of the claimant to engage with the process and perform to the level required.

353. Janine Ballard heard the performance rating appeal but we heard no evidence to the effect that she knew that the claimant had presented a grievance. As a result, we cannot find that her decision on the appeal, which upheld Mr Clark's rating, was anything other than objective, nor that it was reached on the grounds that he had made a protected act. Ms Ballard

was, on the evidence, not aware of the grievance and therefore cannot have been influenced by it. We found Ms Ballard to be an entirely straightforward and honest witness, in any event.

354. Accordingly, we do not find that the respondent subjected the claimant to any detriments in relation to the performance ratings he was given on the grounds of having made a protected act.

Failure to set Objectives

355. The claimant persistently complained about Mr Clark's failure to set objectives for him for the year 2017/2018 performance review. It is true that the performance review process normally includes the setting of objectives. It appears that the claimant considers this to be a detriment, as a result of his protected act, but also that he views this as a sign that the respondent had already made up its mind about the outcome of the whole process.

356. We do not accept either argument. It is clear that Mr Clark is a manager for whom process is extremely important. As a senior project manager, we do not find this surprising. His explanation was an objective one. He said that the claimant was already required to meet objectives under the capability process, and that to add to those objectives as part of the performance review would have been unfair to the claimant.

357. We have concluded that this was an entirely reasonable approach to take. Indeed, it is our view that had Mr Clark set the claimant performance review objectives for that year, the claimant would have complained about that. On no view can this be regarded as a detriment upon the claimant. It was a decision taken with an understanding of all that was going on at the time for him, and taken in order to avoid further pressure being placed upon him.

Commencement of Formal Capability Process

358. The claimant alleged that the formal capability process was commenced against him as a result of his having raised a grievance.

359. The claimant was invited to a formal stage 1 capability hearing by letter dated 16 February 2017, and was warned before then that this was a possibility.

360. The claimant presented his grievance on 27 February 2017, some 11 days after the formal stage 1 process was commenced.

361. The formal stage of the capability process was initiated prior to the claimant's grievance, and therefore cannot have taken place because of it.

362. There is no basis for this aspect of the claim.

Collusion (Outcomes of Grievance, Grievance Appeal, Stage 1 Capability, Stage 2 Capability, Stage 3 Capability)

363. The claimant alleged that there had been collusion between a number of senior managers employed by the respondent, in order to engineer his dismissal. It is not clear on what basis he alleged this. The managers affected were Mr Clark, Ms McLeish, Mr Mackay, Ms Ballard, Mr Barclay, Ms McLeod, Ms Carrington and Mr Scott.

364. When this was put to each of the managers, not only did they deny it (as may be expected) but they denied that they had personal knowledge either of the claimant or, in most cases, of Mr Clark. Each defended their own integrity and independence to reach their own conclusions beyond the influence of any other individual, and in our judgment, it was plain that they did so.

365. There is simply no evidence to support what amounts to a rather wild allegation, suggesting that there was a conspiracy against the claimant to have him removed from the organisation. When this conspiracy was formed, and what the reason for it was, were not set out for the Tribunal. There is no basis upon which, on the evidence, we can properly find that the respondent's managers conspired to remove the claimant from the organisation. On the contrary, we considered that each manager took their responsibility very seriously, acted objectively and fairly towards the claimant, and sought to make decisions without regard to the personalities or status of those involved. We were impressed by the respondent's witnesses as a group, and considered that the allegation that they colluded with each other in order to remove the claimant from his employment was without foundation or merit.

Witnesses interviewed as part of the Stage 3 Appeal

366. The claimant alleged that the wrong witnesses were interviewed by Claire Carrington in the stage 3 appeal process. Ms Carrington's evidence was that she noted the names suggested by the claimant during his appeal, and told the claimant at the end of the hearing that she would speak to those named individuals, a list of whom she read out to him without correction.

367. A misunderstanding then arose as Ms Carrington spoke to Aileen McLeod, when the claimant had in fact wanted her to speak to Ali Macleod, and she gave evidence to this Tribunal that this was an error on her part. In our judgment, nothing turns on this point, and it certainly does not amount to a detriment on the grounds of having made a protected act.

368. That Ms Carrington also chose to speak to Mr Clark and Mr Mackinnon was entirely legitimate and reasonable in her position as an objective decision-taker. The claimant appears to suggest that it is for him to decide who should be interviewed as part of an appeal process, but Ms Carrington required to consider the matter from both the claimant's perspective and also management's perspective. We considered that her decision to take these statements was no more than a reasonable manager would have done in the circumstances in seeking to reach a balanced conclusion, and again, there is no basis for finding that this amounted to a detriment as a result of having made a protected disclosure.

369. It is our conclusion, therefore, that the claimant's claim that he was victimised as a result of having made a protected act must fail, and it is dismissed.

Conclusion

370. We have found that all of the claimant's claims have failed, and therefore they are dismissed.

371. On the basis that we have reached this unanimous conclusion, we have not addressed the preliminary point of time bar in this Judgment.

372. We would wish to acknowledge the claimant's conduct before us, which was respectful and courteous, in a case which was clearly of great importance to him. We commend him for this.

373. We would also wish to commend Ms Norval for the very considerable assistance which she gave to the Tribunal and to the claimant by the preparation of documents, and also by her conduct of these proceedings, in which she was professional and courteous. She presented her case in a clear and logical manner, and shepherded a large cohort of management witnesses, in a way which allowed the Tribunal to hear the case in the most efficient way and conclude the hearing within the allocated dates.

Employment Judge: Murdo Macleod
Date of Judgment: 12 April 2019
Entered in register: 15 April 2019
and copied to parties