EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Pal	**- V -**	Accenture (UK) Ltd

Heard at: London Central

On: 3-12 May 2022 (and 7 July 2022 in chambers)

Before: Employment Judge Baty
Mr D Kendall
Mr J Carroll

Representation:

For the Claimant: Ms E Banton (counsel)
For the Respondents: Ms K Eddy (counsel)

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal succeeds. However, the compensatory award for unfair dismissal is reduced to zero as a result of the finding we make under the principles in Polkey v AE Dayton Services Limited [1987] IRLR 503.

2. The claimant's complaints of wrongful dismissal, direct race discrimination, direct disability discrimination and discrimination arising from disability all fail.

3. The tribunal does not have jurisdiction to hear the claimant's complaints of a failure to make reasonable adjustments as they were presented outside the tribunal time limit and it is not just and equitable to extend time. However, if the tribunal had had jurisdiction to hear them, they would have failed.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 19 December 2019, the claimant brought complaints of unfair dismissal, wrongful dismissal,

direct race discrimination, direct disability discrimination and discrimination arising from disability. The respondent defended the complaints.

2. On 11 May 2020, EJ Snelson granted an amendment application by the claimant to add complaints for a failure to make reasonable adjustments. However, this was specifically "granted without prejudice to the right of the respondent to plead and argue that the claims so added are out of time and accordingly outside the tribunal's jurisdiction". The respondent duly defended these complaints as well in an "amended ET3".

3. A draft list of issues was then produced for a preliminary hearing on 3 June 2020 before EJ Glennie. This included the reasonable adjustments complaints. The list of issues was agreed, subject to two points of clarification agreed at that hearing.

4. The claimant then sought to bring a further application to amend. This was refused at a hearing on 7 June 2021 by EJ Emery. The parties were represented by the same counsel at that preliminary hearing as they were at this hearing. EJ Emery did, however, allow an application by the claimant to add an additional (sixth) comparator for the purposes of her direct race discrimination complaint.

5. Neither party sought to make further changes to the list of issues until shortly before this hearing, when the claimant's newly appointed solicitors sought to make an application to amend (which is referred to below).

The Issues

6. However, subject to that, the issues for the tribunal to determine were as follows:

Alleged unfair dismissal

1. What was the reason for the Claimant's dismissal? The Respondent claims that the Claimant was dismissed for:

(a) capability (under performance) within the meaning of section 98(2) of the Employment Rights Act 1996 ("ERA"); or

(b) some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the Claimant held within the meaning of section 98(1)(b) ERA - namely, the Respondent's need to limit the "Time At Level" that any consulting employee in the Respondent's organisation can spend in a particular role so as to maintain its pyramid structure and provide appropriate services to clients.

2. Did that reason constitute a fair reason for the purposes of section 98(1)(b) and/or (2) ERA?

3. Did the Respondent follow a fair process within the meaning of section 98(4) ERA in dismissing the Claimant? In particular, the Claimant contends the following matters are relevant to this issue:

(a) Did the Respondent implement regular performance reviews, or implement any performance management procedures, in respect of the Claimant prior to her dismissal? (The Respondent claims that the Claimant was subject to continuous performance management).

(b) Was the Claimant aware that she might be dismissed unless her performance improved?

(c) Was the Respondent required to comply with the ACAS Code of Practice, and if so, did it do so?

(d) Was the Respondent entitled to use the disciplinary procedure in dismissing the Claimant?

(e) Did the Respondent make the Claimant aware of its use of the disciplinary procedure prior to the appeal hearing?

(f) Did the appeal cure any unfairness in the original dismissal?

4. Did the Claimant's dismissal fall within the band of reasonable responses for the purposes of section 98(4) ERA? In particular, the Claimant contends the following matters are relevant to this issue:

(a) Was the Claimant suffering from an illness at the material time which unduly affected her performance? If so, was the Respondent aware of that illness and did it give adequate consideration to it in coming to its decision to dismiss the Claimant?

(b) Should the Respondent have allowed more time for the Claimant's performance to improve?

(c) Should the Respondent have given greater consideration to redeploying or retraining the Claimant?

(d) Did the Respondent act consistently in dismissing the Claimant (does it or would it dismiss other employees in similar circumstances)?

Alleged disability discrimination

Alleged disability

5. Was the Claimant disabled for the purposes of section 6 EqA at the material time by reason of:

(a) asthma; and/or

(b) sciatica; and/or

(c) endometriosis?

6. If so, did the Respondent know, or could the Respondent reasonably have been expected to know, that the Claimant was so disabled at the material time?

7. If so, when did the Respondent know, or when should it have known, of any or all of those disabilities?

Alleged direct disability discrimination (section 13 EqA 2010)

8. The Claimant contends that she was subjected to less favourable treatment (her dismissal) because of her disability.

9. The Claimant relies on the following comparators in respect of this claim:

(a) Comparator A .

Was there any material difference between the circumstances of the Claimant and the individual listed above, save for the Claimant's alleged disability? (The Respondent contends that her circumstances were materially different from those of the Claimant because she had stronger performance than the Claimant).

10. Was the Claimant dismissed because of her disability?

Alleged discrimination because of something ajrising in consequence of disability (section 15 EqA 2010)

11. The Claimant claims that she was dismissed owing to something arising in consequence of her disability.

12. The Claimant claims that, owing to her disability, she was:

(a) unable to work to the requisite standard and/or

(b) unable to accept work outside London, thereby restricting her opportunities and/or

(c) unable to accept client facing work, and/or

(d) limited in the work she could do.

13. Was the Claimant subject to the limitations set out at (12) above at the material time?

14. If so, did the limitations set out at (12) above arise from her disability?

15. If so, was the Claimant dismissed because of the matters set out at (12) above?

16. If so, was that dismissal a proportionate means of achieving the Respondent's legitimate aims of ensuring high performance standards from its consulting staff, maintaining its pyramid structure, and being able to provide appropriately resourced, competitive, high quality services to its clients?

Alleged failure to make reasonable adjustments:

17. The Claimant claims that the Respondent failed to make reasonable adjustments pursuant to section 20 EqA.

18. The Claimant claims that the Respondent failed to make the following reasonable adjustments:

a) varying and/or waiving the performance standards required of the Claimant; and/or

b) extending time for the Claimant to achieve the required standards. Specifically, the Claimant alleges that:

i. whilst purportedly extending the TAL period of 48 months to 63 months, the Respondent failed to make any further extension to the TAL period;

ii. the Respondent failed adequately or at all to extend and/or alter the level of chargeability required of someone at her level;

iii. the Respondent failed adequately or at all to extend and/or alter the level of sales required of someone at her level;

iv. the Respondent failed adequately or at all to extend and/or alter the level of skills and potential required of someone at her level to progress to the next level.

19. If and to the extent that the Claimant relies on section 20(3) EqA:

a) what is the provision, criterion or practice relied upon by the Claimant pursuant to this section? (The PCP relied upon is the application of the Time At Level metric as an indication for the period for which employees are expected to be in a particular role before progressing to the next level.)

b) did such provision, criterion or practice place the Claimant at a substantial disadvantage in comparison to persons who are not disabled? If so, what was that disadvantage? The substantial disadvantage is that of not being able to satisfy the unadjusted requirements of the metric.

c) if so, did the Respondent know, or ought the Respondent to have known, that such provision, criterion or practice would place the Claimant at that disadvantage?

20. If so, when did the duty for the Respondent to make reasonable adjustments arise? The claimant contends that the duty arose during the period when the respondent was considering dismissing the claimant on grounds of capability and/or performance.

21. Would it have been reasonable for the Respondent to have made the adjustments set out above (and would they have ameliorated the substantial disadvantage suffered by the Claimant)?

22. In respect of the allegedly reasonable adjustments set out above, did the Respondent fail to make such adjustment?

Alleged direct race discrimination (sections 9 & 13 EqA 2010)

23. The Claimant claims that she was subjected to less favourable treatment (her dismissal) than colleagues she describes as Caucasian because she is of Indian ethnicity.

24. The Claimant relies on the following comparators in respect of this claim:

(b) Comparator A;
(c) Comparator E
(d) Comparator B-
(e) Comparator D;
(f) Comparator C; and
(g) Comparator F.

Were there any material differences between the circumstances of the Claimant and each of the individuals listed above, save for the Claimant's race? (The Respondent contends that their circumstances were materially different from those of the Claimant because they had stronger performance than her).

25. Was the Claimant dismissed because she is of Indian ethnicity?

Jurisdiction

26. Does the Tribunal have jurisdiction under s.123 EqA to determine the Claimant's disability discrimination complaints?

Alleged wrongful dismissal

27. The Claimant alleges that she was wrongfully dismissed because the Respondent paid her in lieu of her notice period in the absence of an express contractual right to do so.

28. The Claimant was given notice of termination on 3 July 2019 and her employment terminated on 17 July 2019. The parties agree that the Claimant was paid her basic salary in lieu of notice in respect of her remaining notice period which post-dated 17 July 2019 and the Claimant's Schedule of Loss makes no claim for compensation in respect of this claim. The Claimant has now been paid the £20 outstanding from her payment in lieu of notice.

29. The Respondent invited the Claimant to withdraw this claim in its Request for Further Information dated 9 March 2020. The Claimant maintains that she did not receive or sign the contract of employment which the Respondent claims that she signed electronically on Sunday 1 September 2013, whilst she was in India. She asserts that:

a) the applicable contract of employment was the one she signed on commencement of her employment with the Respondent in 2009;

b) there was no contract of employment provided on promotion in 2011; and

c) that contract required the Respondent to pay both basic salary and contractual benefits in lieu of notice (or any remaining period of notice).

30. Is this claim withdrawn by the Claimant?

31. If not:

a) which employment contract applied to the Claimant at the point of her termination;

b) did that contract allow the Respondent to terminate the Claimant's employment and pay her in lieu of notice (or any remaining period of notice); and

c) did that contract require the Respondent to pay the Claimant's contractual benefits as well as her basic salary in respect of any remaining period of notice?

Remedy

32. The Claimant seeks:

(a) "suitable declarations and recommendations";

(b) the basic award in respect of her unfair dismissal claim;

(c) compensation for:

(i) financial loss caused by the treatment complained of;

(ii) injury to feelings; and

(iii) personal injury;

(d) aggravated damages;

(e) interest on the above sums.

33. If the Claimant is successful what, if any, compensation would it be just and equitable to award to the Claimant, taking into account the financial loss sustained by the Claimant in consequence of:

(a) any unfair dismissal by the Respondent;

(b) any adjustment for a failure by either party to follow the ACAS Code;

(c) any discriminatory treatment for which the Respondent is found liable;

(d) any damages payable to the Claimant for wrongful dismissal;

(e) the Claimant's duty to mitigate her loss;

(f) any earnings or other payments received by the Claimant since her dismissal;

(g) any deduction which it would be just and equitable to make pursuant to Po/key v AE Dayton Services Limited [1987] IRL.R 503 (i.e. to reflect the likelihood that the Claimant would have been fairly dismissed in any event);

(h) the statutory cap on compensatory awards for unfair dismissal;

(i) interest on the above sums?

34. Is the Claimant entitled to an injury to feelings award and, if so, in what amount?

35. Is the Claimant entitled to any compensation in respect of personal (psychiatric) injury and, if so, in what amount?

36. Is the Claimant entitled to aggravated damages and, if so, in what amount?

37. What declarations or recommendations, if any, is it appropriate for the Employment Tribunal to make?

7. In summary, the complaints all relate to the dismissal of the claimant by the respondent.

8. The tribunal agreed with the parties at the start of the hearing that this hearing would determine the liability issues only and not those of remedy, with two exceptions. The tribunal would consider, for the purposes of issue 33(b), whether there had been a failure to follow the ACAS Code and whether that failure was unreasonable (but not the percentage of any adjustment which might follow from that as that should only properly be done in the context of any overall award of compensation as a whole). The tribunal would also at this stage determine the issues at 33(g) regarding Polkey insofar as they related to whether, if the dismissal was, for example, procedurally unfair only, what reduction in compensation should be made; but would not consider the Polkey principles in relation to matters concerning personal injury/psychiatric injury, a large redundancy exercise carried on by the respondent after the pandemic and issues to do with stigma damages (which would be left to any future remedy hearing (if appropriate)).

Amendment application

9. As noted, the claimant's new solicitors wrote to the tribunal, two working days before the commencement of this hearing, making an application which amounted to an application to amend the claim. The application included new complaints of discrimination arising from disability based on six previously un-pleaded instances of unfavourable treatment and a different "something arising from"; and new reasonable adjustments complaints based on two additional PCPs and two further alleged reasonable adjustments. The respondent opposed the application. Ms Banton confirmed at the start of this hearing that she wished to pursue this application.

10. The first issue to determine was at what point we should address this application. Ms Banton said that we should wait until we had read the witness statements and documents before determining it; Ms Eddy objected to this and said that we should determine it straightaway. The tribunal decided that it should determine the application straightaway so that there was absolute clarity on the issues from the start; it would be highly unsatisfactory if we had to start considering the large amount of evidence in this case without knowing the extent of the issues which we had to determine.

11. Both representatives had addressed the amendment application in their respective opening notes, which the tribunal read. Both then also made oral submissions to the tribunal. The tribunal adjourned to consider its decision.

12. When the hearing reconvened, the tribunal refused the application to amend. It did so for the following reasons.

13. In considering whether to allow an application to amend the claim, the leading case is the case of Selkent Bus Co Ltd V Moore [1996] ICR 836. In determining whether to grant an application to amend, the tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties in granting or refusing the amendments. In Selkent, the then President of EAT, Mr Justice Mummery, explained that relevant factors may include: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

14. The amendment application sought substantial amendments. They were not a relabelling of matters already pleaded; rather they were not pleaded at all. Ms Banton submitted that some of these issues were referred to in the respondent's witness statements for this case. However, that is of no consequence as the extensive witness statements for this case, which the tribunal had not read at that stage, were always likely to give a massive amount of context; that, however, is a very different matter from what is the claimant's pleaded case in the claim form.

15. Secondly, the claimant's employment terminated on 17 July 2019, with her claim having been presented on 19 December 2019. The complaints which Ms Banton now sought to add were therefore 2 ½ years out of time.

16. The nature of the amendments proposed was not clearly set out. Therefore, if we granted the application, we would be faced with unclear complaints and further clarification would be required.

17. The timing and manner of the application was significant. The application was presented only two working days prior to an eight day hearing in the context of a case brought in 2019. This was a case where there had been three preliminary hearings already and where the claimant had been represented by professional representation for the majority of this period. Ms Banton submitted that the claimant had instructed new solicitors recently and had had difficult times earlier in 2022. However, even if that was the case, an application of this nature should have been presented years before. A list of issues had been agreed back in June 2020. Furthermore, the claimant had previously been given permission to amend the claim in May 2020 and a further application to amend had been refused in June 2021. That this amendment application was left at this stage was highly prejudicial to the respondent.

18. All of the above factors militated against the granting of the amendment.

19. There would be enormous prejudice to the respondent if the amendment was granted, for the above reasons. The case had been prepared based on a list of issues agreed in 2020, whereas the respondent had notice of this attempt to change the issues only two working days before the hearing. Clarification of the amendments would be required; furthermore, there would almost certainly be a requirement for an amended grounds of resistance, and possibly supplemental witness statements, which would potentially lead to an application to postpone or at least delay this hearing. Granting the amendments would almost certainly therefore derail a hearing in relation to which, by that stage, the representatives had acknowledged that even as things stood a very tight timetable would be required to complete the evidence within the eight-day listing.

20. By contrast, there was little prejudice to the claimant, who could still rely on the extensive allegations which she was bringing under the original claim.

21. For these reasons, we refused the application to amend.

The Evidence

22. Witness evidence was heard from the following:

For the Claimant:

The Claimant herself.

For the Respondent:

Ms Emily Wintle, an HR Business Partner at the respondent, who was at the times relevant to this claim an HR Business Partner in the respondent's Financial Services ("FS") division;

Ms Monica Juneja, who at the times relevant to this claim was a Managing Director in the respondent's Talent & Organisation ("T&O") practice group within the respondent's FS division ("FS T&O") and who was the claimant's Career Counsellor from 24 March 2017 until the termination of the claimant's employment on 17 July 2019;

Mr Andrew Young, a Managing Director at the respondent and who, at the time of the claimant's dismissal, was the UK Practice Lead for FS T&O;

Ms Emma May, who has since June 2015 been employed by EDP Health, Safety and Environment Consultants Ltd ("EDP"), an organisation engaged by the respondent to provide, amongst other things, healthy working risk assessments;

Ms Laura Jesse, who is employed by the respondent in HR and was the assigned HR contact for the claimant from August 2018 to February 2019; and

Ms Ugo Ojike, a Managing Director at the respondent, who heard the claimant's appeal against dismissal.

.

23. In addition, the claimant submitted witness statements from Ms Nora Russell, Ms Charmian Bedford and Mr Diego Gutierrez. However, at the beginning of the hearing, Ms Banton informed the tribunal that the claimant would not be calling these three witnesses. The tribunal read their witness statements but reminded the parties that it could give less weight to that evidence as those witnesses were not present at the hearing to be cross-examined on their evidence.

24. The witness statements themselves ran to several hundred pages in length.

25. In addition, an agreed bundle in eight volumes, numbered pages 1 - 2,549, was produced to the hearing.

26. At the 7 June 2021 preliminary hearing, EJ Emery had made an order under Rule 50 that the names of the respondent's clients and the names of the comparators the claimant relied on should be redacted and instead referenced by a code number in all documents relevant to the proceedings. The bundle and witness statements reflected this order, as do the references in this judgment and reasons.

27. The tribunal read in advance the witness statements and those documents in the bundle set out on reading lists provided by the representatives. Both representatives also provided opening notes, which the tribunal read in advance. In addition, an agreed chronology was provided and both representatives provided cast lists.

28. A timetable for cross-examination and submissions was agreed between the tribunal and the parties at the beginning of the hearing. Sadly, this afforded hardly any time for deliberation within the eight-day listing, but the tribunal recognised the volume of material which it was necessary to consider and agreed a timetable with the parties which would at least enable the evidence and submissions to be completed within the listing, which they duly were.

29. Both representatives produced written submissions which they supplemented with oral submissions.

30. Given the time available, the tribunal's decision was reserved.

Adjustments

31. At the start of the hearing, Ms Banton explained that the claimant would need to take regular breaks or be able to stand up and walk in the hearing room from time to time if necessary, which was allowed throughout the hearing. She also asked that the claimant be provided with an ergonomic chair for use at the hearing, which the tribunal duly provided.

32. Two of the respondent's witnesses were dyslexic and Ms Eddy asked that extra time be allowed for them when reading documents while giving their evidence. This was duly allowed.

Findings of Fact

33. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

Overview

34. The claimant commenced employment with the respondent on 24 August 2009 as an "Analyst".

35. On 1 March 2011, she was promoted to "Consultant".

36. On 1 September 2013, she was promoted to "Manager".

37. In late 2015, the claimant requested a one-year leave of absence to pursue charitable activities, which the respondent agreed to. The claimant returned to work for the respondent on 1 December 2016.

38. At the end of year talent discussion on 6 August 2018, the claimant's end of year performance was rated as "Not Progressing". This was, in accordance with the respondent's usual practice, communicated to the claimant in November 2018.

39. At the mid-year talent discussion on 21 March 2019, the claimant was for a second time rated as "Not Progressing". This was, in accordance with the respondent's usual practice, communicated to the claimant in June 2019.

40. At a meeting on 3 July 2019, Mr Young communicated to the claimant that her employment would terminate with effect from 17 July 2019. The claimant's employment duly terminated on 17 July 2019.

41. On 10 July 2019, the claimant appealed against her dismissal. The appeal was heard by Ms Ojike. Ms Ojike did not uphold the claimant's appeal and communicated that to the claimant by letter of 11 November 2019.

Background

The respondent

42. The respondent is a global professional services business.

43. At the time of the claimant's dismissal, it was divided into five industry sector-focused business divisions, of which the Financial Services ("FS") division was one. Consulting within FS is further subdivided into "practice groups" with their own specialist focus areas. The Talent & Organisation ("T&O") practice

group was one of these. It provides change management, people and human resources consulting services to clients. It is a practice that is part of the Client & Market side of the respondent's business; in other words amongst other things it involves client facing work.

44. From 2014 to 2019 (including the time of the claimant's dismissal), Mr Young was the "Practice Lead" for the UK FS T&O practice group, which comprised around 130 people.

45. The respondent's profit is derived from charging clients for work done by its consultants. Much of its commercial success depends on having as many of its consultants as possible working on chargeable client projects at a given time. The respondent therefore expects its consultants to maintain strong personal chargeability. This also contributes significantly to their development.

46. Furthermore, the respondent's success in achieving strong chargeability depends to a great degree on its client relationships, in other words its ability to develop new client relationships, as well as cementing relationships with existing clients by delivering well on its engagements, getting to know their businesses and identifying further needs that the respondent is able to meet by selling them further work. The respondent typically has excellent client relationships and wins most of its work through these relationships.

47. When client facing roles are unavailable, the respondent's consultants work on business development and sales related activities from clients. On occasion, they may also conduct internal projects inside the respondent, a small number of which are internally "chargeable" from a personal metrics perspective, but do not generate any revenue for the respondent.

48. Consultants remaining chargeable on client facing work is important for the health of the respondent's business and for the development of its people.

Progression based performance model

49. The respondent operates a "progression based" model of performance management for its employees. This means that it expects its employees to be demonstrating continuous development towards the next level of seniority in the career model and to be already demonstrating performance at that level before they are promoted. A failure to demonstrate continuous improvement constitutes underperformance for internal purposes. This means that, even if an employee is performing at the level of the position they currently hold, if they do not within a reasonable period demonstrate the skills to be promoted to the next level up, they are deemed to be underperforming. In those circumstances, they may (if appropriate) move to other areas within the respondent or leave the respondent either, as is common, through their own volition, or more rarely, as in the case of the claimant, through being dismissed.

50. This "up or elsewhere" performance model is standard in the consulting industry. It is clear from the respondent's internal documentation and is well known to its employees. Whilst the claimant's evidence as to her own

awareness of this process varied, she at times acknowledged that she was aware of it. Notwithstanding that, we find that it is inconceivable that someone with around 10 years' experience at the respondent, as she had by the time of her dismissal, would not be fully aware of this model. Accordingly, we find that the claimant was indeed fully aware of it.

51. The order of career progression of consultants, in terms of job titles, is as follows: Analyst; Consultant; Manager; Senior Manager; Managing Director (Career Level 4); Managing Director (Career Level 3); Managing Director (Career Level 2); and Senior Managing Director.

Time at level

52. The requirement for continuous development is "time-based", which means that the respondent generally expects consultants to be promoted to the next level within a particular period of time (although subject to adjustments for an individual's personal circumstances where appropriate).

53. The respondent would expect promotion from Manager to Senior Manager to take around 3 - 4 years. It requires continuous progression towards Senior Manager throughout that period and, by around two years in, would expect Managers to be demonstrating performance either at the level of Senior Manager or demonstrating the potential to progress to Senior Manager level within the near future.

54. The period for which someone has been in a certain role is formally adjusted to take account of certain leaves of absence from the business (including sabbaticals and family leave). The respondent calls that adjusted period "time at level" or "TAL". In the claimant's case, her one-year sabbatical from late 2015 to December 2016 was taken into account in this respect; in fact, two years were discounted from the actual time she had spent as Manager to reflect not only the year on sabbatical but also an extra year to reflect the difficulty of getting back into client facing work on the return from sabbatical. Her TAL was therefore the total time as Manager less 2 years, which meant that her TAL at the time she was dismissed was just short of four years.

55. Periods of sickness absence are not automatically deducted for the purposes of calculating TAL. However, adjustments for sickness absence may, depending on the circumstances, be taken into account when assessing performance generally which, as we will come to, happened in the case of the claimant.

56. Whilst TAL is a key metric that the respondent uses to assess an individual's trajectory through its internal career model, it is only one of many factors that the respondent considers and is not binary. The respondent has dismissed people who were not progressing in line with internal requirements before they hit the lower end of guideline TAL, where it felt that they did not meet its high performance standards and did not have the potential to progress their careers. Equally, reaching the upper limit of guideline TAL is not a defined outcome. If someone at that level of TAL shows strong signs of sustained

promotion readiness, the respondent would not terminate that person's employment. Equally, if someone reached the upper TAL guideline and that individual was clearly promotion ready, but the business could not afford enough promotion slots to accommodate them in that year, the respondent would usually extend their tenure to give them a further opportunity for promotion in the following promotion round, when affordability and their continued performance allowed this. We were taken to numerous examples of this in the evidence, including amongst the comparators named by the claimant for the purposes of her discrimination complaints.

Talent outcomes

57. A lack of material continuous improvement towards the next level in a timely way, or gaps in performance at an employee's current level, constitutes underperformance for internal purposes and can lead to termination of an individual's employment. Individuals who are underperforming in this way receive a "Not Progressing" appraisal rating (which the respondent calls "talent outcomes"). Talent outcomes are assessed on a twice-yearly basis, at the respondent's mid-year and year-end.

58. A "Not Progressing" talent outcome is a signal to employees that they need to significantly improve their performance and their demonstrable progress towards the next level without delay. It is widely understood at the respondent. Such an outcome might lead to an individual implementing significant performance improvement measures (with support from their practice management and "Career Counsellor") to substantially build the readiness for the next level. Alternatively, it may lead some employees to conclude that they have reached their maximum potential under the consulting career framework and to take steps to seek alternative employment. A failure to take either of these actions may lead to termination of an individual's employment. This means that the respondent loses a proportion of its staff each year, if they are failing to demonstrate continuous progression in the way that the respondent requires.

59. As noted, this is well understood by the respondent's employees. The claimant would have been fully aware of this approach both through training and communications with practice leadership and because of her own involvement as a Career Counsellor within performance achievement in relation to more junior employees. We therefore find that the claimant was fully aware of this approach.

60. To exemplify, of the five people in FS T&O who were awarded "Not Progressing" ratings at year-end in 2018 (of which the claimant was one), two resigned and one took steps successfully to recover their performance. Of the five people you received "Not Progressing" ratings in mid-year 2019 (one of which was again the claimant), all but the claimant resigned. Those who resigned did so on good terms, as do almost all of the respondent's leavers.

61. The model described above is common across many management consultancies. The respondent operates it because both its clients and the nature of the work it does demand high performance. The standard is very high. By promoting only its top performers and counselling out those who it does not

feel have the potential to progress, the respondent ensures that it maintains on an ongoing basis the highest possible standards of performance in each practice and across the business as a whole. In addition, it creates a workforce "pyramid" (i.e. successively smaller numbers of staff at each level of seniority) that supports appropriately structured and priced teams to clients.

62. For all employees there is a lot of support and training provided to help them develop and perform to their best.

Performance expectations

63. The respondent has a clear set of performance expectations at each level, which are explained through training, discussions with Career Counsellors and Practice Leads, and in a range of documents available on the respondent's internal portal. The competencies which the respondent expects to see at each level are therefore clear.

64. Broadly speaking, Managers are expected to lead client engagements or large work streams of bigger programmes, by managing the client, the team and the project delivery to plan, while staying on track with budget, quality and client expectations. As part of delivery, Managers are expected to bring good content expertise in their area of practice specialisation. It is particularly important for Managers to develop strong client relationships and client "stickiness" (i.e. an ability to become a trusted adviser with a client and to be sought out by them for further work).

65. As noted, the next progression step for the claimant would have been promotion to Senior Manager. Some of the key points of readiness for someone operating at a Senior Manager level would be: building and sustaining more senior client relationships; originating/generating client opportunities and selling work; proactively supporting larger deal pursuits; leading larger client engagements; leading large (often global) engagement teams; shaping and leading complex client delivery; and leading areas of practice specialisation internally and out into the market.

66. Managers also have an annual chargeability target. These were: 86.9% for the 2017 performance year; 86.8% for the 2018 performance year; and 84.7% for the 2019 performance year.

67. The respondent expects its staff to meet those targets as a minimum and promotion ready candidates typically exceed them in some way. Most Managers would achieve at least 90% chargeability, and some up to 108% (which is the normal maximum using an eight-hour working day). Below target chargeability would only be acceptable if someone had been asked to support a prolonged period of (non-chargeable) business development work, such as a large bid, that had resulted in a significant sale of work.

68. Chargeability levels are, however, adjusted for sickness absence and other time out of the business, so employees are not disadvantaged by this.

69. Low chargeability in general typically means that someone will not be promoted, since they are not economically contributing to the business and are not getting the client facing development they need. Furthermore, an individual's chargeability is inevitably affected by underlying factors, including the consistency of their performance on client projects, their ability to build and maintain strong client relationships, their proactivity and their internal network and relationships. High performers are typically in demand and have high chargeability, usually finding their own roles.

70. In addition, although there is no formal sales target for Managers or Senior Managers, sales plays a key role in the growth of the respondent's business and as such the respondent also expects Managers aspiring for promotion to Senior Manager to have a track record of having developed and sold work.

Proactivity

71. It is crucial at the respondent for an employee to show proactivity in managing their own performance and developing their skills and career. The performance model at the respondent is very self-directed. Responsibility for personal development lies with the individual, although the respondent gives them a great deal of help with this. There is a huge amount of support and training readily accessible for people to develop their performance, their skills and their career. It is therefore up to the individual to understand expectations and their priorities and strengths, address competency gaps, find projects that will allow them to demonstrate the key hallmarks that the respondent expects to see for the next stage up and then to exhibit those skills. This is made very clear to employees through communications, training and Career Counsellors and again is extremely well understood across the workforce.

72. A large part of that involves taking the initiative to find and get staffed in roles which will allow employees to maintain personal chargeability, address any competency gaps and showcase their readiness for progression. The respondent has a team of "schedulers" who help individuals who are "on the bench" (the term the respondent uses for consulting staff not currently assigned to projects) to be matched with upcoming available roles. However, the schedulers' main job is client focused (that is, making sure from the client's perspective that a new project is properly resourced and staffed). Their job is not to manage those on the "bench" individually; they are not responsible for chasing or scheduling every single person within the business all the time. While schedulers assist with flagging suitable projects to available staff, the respondent expects consultants to be responsible for finding their next project on their own, by proactively seeking out opportunities to get involved with client work, establishing themselves as trusted advisors with clients, networking internally and identifying and pursuing their own opportunities.

Continuous feedback

73. To monitor performance against the progression based model, the respondent invites continuous feedback on its staff from clients, supervisors

within client engagements, and other employees within the business. Individuals are expected to seek this performance feedback themselves. That gives both the respondent and its employees a comprehensive understanding of any development points that might hinder their ability to reach the next level and allows them to address those points on an ongoing basis (with support from the business). In this way, instead of formally managing performance only when something goes wrong, the respondent operates constant performance management in which employees engage with very regular feedback on their progress.

74. As noted, all employees are fully aware that a failure to show continuous progression is likely to lead to their dismissal. However, because of the continuous feedback model, a formal performance improvement plan ("PIP") is not always needed or used, since employees have an ongoing overview of how they are performing and any development areas. PIPs are, if used, generally used for much more junior employees.

75. The claimant was provided with a mix of written and verbal feedback from her projects and her Career Counsellor (Ms Juneja) throughout the period leading up to the termination of her employment, which included the two "Not Progressing" talent outcomes and the associated actions to be addressed.

76. Each individual at the respondent is assigned a "Career Counsellor", usually from within the same practice group, who works with them closely on their professional development and career progression. The Career Counsellor is the key point of support for their counselee and acts as a "sounding board" for their professional development and career progression. They seek and "roll up" internal and external feedback on counselees, communicate that feedback regularly to each counselee and identify/advise on areas for improvement and the means of doing so.

77. The respondent expects consultants to proactively work closely with their Career Counsellors to identify and address any gaps in their competency to progress to the next level.

Talent discussions

78. As noted, the respondent assigns formal "talent outcomes" twice a year; at the midpoint of its financial year (in or around March) and again at year-end (in or around August). The year-end talent outcomes are then followed by compensation (remuneration) discussions.

79. An individual's talent outcome is initially recommended by their Career Counsellor but is then subject to detailed group discussion and moderation in what the respondent calls "talent discussions", at which an individual's promotion readiness is also discussed. Each practice group holds separate talent discussions for each seniority level within that practice group (so all Managers within the UK FS T&O practice group would be considered at one talent discussion; all Senior Managers in that practice group at a separate talent

discussion; and so on. No one at a peer level would be in one of these discussions.

80. Because cohorts within each practice group are considered together, their talent outcomes are comparative. For example, the claimant had a very high performing peer group and therefore would have needed to really "stand out" to be identified as ready for promotion as compared with her peers.

81. Talent discussions are run by a nominated chairperson and attended by the practice leadership, the Career Counsellor for each individual under discussion and a member of HR who monitors the discussion for bias or discrimination. The decision on talent outcomes is in practice a collective one made by that group after considered discussion and review. (In the case of the claimant there was a very strong consensus in that group on each of the "Not Progressing" talent outcomes which she received prior to her dismissal.)

82. After the talent discussion, the provisional talent outcomes that have been decided upon are reviewed by HR for (among other things) consistency and bias across the FS UK and Ireland businesses before being finalised. This is a time-consuming process and is one of the reasons why there is such a gap between the provisional decisions at the talent discussions being made and the point at which talent outcomes are communicated to employees, often several months later.

Claimant's performance issues

83. Right up to the time when she was dismissed and beyond (and indeed at this tribunal), the claimant maintained that there were no significant issues with her performance. However, we have been taken to a vast amount of evidence in the contemporary documents as well as in the witness evidence that there were significant performance issues in relation to the claimant. These include low chargeability; relationship problems with both clients and internally; an inability to demonstrate the client "stickiness" referred to earlier; and not originating new work and therefore not demonstrating sales acumen. Much of this was despite the respondent, and in particular Mr Young and Ms Juneja, encouraging the claimant to take on client roles, many of which she chose not to take. The issues in question demonstrate underperformance over a period of years rather than simply the last year of the claimant's employment with the respondent.

84. It is not necessary to set out each and every example here and, rather, we summarise some of them by year.

2017 performance year

85. There was a conflict between the claimant and Client 1, which was fed back to Mr Young in March 2017. Whilst the claimant was doing a pretty good job of delivering the actual work on the project, the client relationship was not going well. This was to become a recurring theme.

86. Whilst client relationship issues are serious, an isolated incident is not enough to stall someone's progress and the claimant still received a full year talent outcome of "Continue Progressing" in 2017. However, her talent actions to take forward into the following performance year focused on her client relationship skills, in particular on building strong client relationships by being mature, objective and independent on client site. A further talent action was to find a chargeable role, ideally with Client 1, thereby demonstrating consistent "stickiness" at a client. These talent actions were not, however, addressed by the claimant in the 2018 performance year.

87. Furthermore, the claimant's chargeability for the 2017 full year was 80.9%, which was below her target of 86.9%.

2018 performance year

88. In April 2018, there was a serious incident whilst the claimant was working on a project for Client 2. This involved a series of arguments between the claimant and another member of the team. Furthermore, a member of Client 2's team considered that the claimant's delivery was well below par. As a result of these issues, the claimant was asked by the client to "roll off" (i.e. leave) the project in April 2018. This was avoided, but only resolved by the intervention of a Senior Managing Director and after a loss of client goodwill. The incident revealed serious issues about the claimant's ability to manage client and team relationships.

89. Furthermore, during the 2018 performance year, the claimant's overall chargeability was 66.1%. This was very significantly below the target of 86.8% for that year and was one of the lowest levels of chargeability in the practice area. To put this in context, if all of the respondent's consultants worked at only around 66% chargeability, the business would not be profitable at all.

90. This was despite a great deal of support being given to the claimant to find chargeable roles (even though, as we have found above, the principal responsibility to find roles lies with employees themselves). However, the claimant had a tendency to decline roles even when others recommend her for them. An example in this performance year came when Mr Young in September 2017 recommended the claimant for a role working at Client 3, which was a good role with the potential to assist the individual to demonstrate that they were capable of making Senior Manager. However, the claimant turned it down.

91. A similar situation occurred in February 2018 when Ms Juneja emailed the claimant about a role at Client 4, which was another good role with a very good client and could have helped her development towards Senior Manager. However, she turned this down.

92. There are other examples of Mr Young, Ms Juneja and others attempting to support the claimant in finding client facing roles to help develop her career.

93. Furthermore, the claimant repeatedly failed to engage with Ms Juneja, her Career Counsellor, when it would have been in her own best interests in terms of her career to do so. She frequently did not respond to Ms Juneja's communications. Career Counsellors represent a key point of support for their counselees. The claimant's dismissiveness of Ms Juneja's attempts to support her was, as well as being discourteous, not in her own interests in terms of her own career development.

94. In June 2018, the claimant wrote a rude, threatening and wholly inappropriate email to more junior employees in the respondent. Mr Young and another Senior Managing Director had to get involved. The claimant acknowledged to Mr Young that she had acted inappropriately and apologised, but her actions on this matter showed her general lack of awareness and indeed defensiveness about her own behaviour. It mirrored her mismanagement of client relationships.

95. By the 2018 full year talent discussions, which took place on 6 August 2018, the claimant had failed consistently to demonstrate strong performance on any of the key metrics that the respondent assesses at Manager level, let alone to demonstrate readiness for Senior Manager promotion. As already noted, she was awarded a "Not Progressing" rating and there was strong consensus on this among the practice leadership.

2019 performance year

96. On 26 September 2018, the claimant informed Mr Young and Ms Juneja that she had to have an urgent operation scheduled for 30 September 2018 in order to remove two ovarian cysts. They were not aware of this prior to that. The claimant was subsequently off sick for about a month due to the surgery and returned to work full time on 30 October 2018 of her own volition and against occupational health advice, which was that she should come back on a phased return to work. Mr Young was not at the time aware of that occupational health advice (which was confidential) and the claimant did not choose to share it with him. We will return to further details of this in due course.

97. Prior to this, Mr Young had proposed the claimant for a role with Client 7 which he had originated with the client and which the claimant was very interested in doing because the role concerned "inclusion and diversity", which was an area that she was particularly interested in. It was due to start on 8 October 2018 but, in the light of the claimant's operation, Mr Young was clear with her that she should take time to recover and that, whilst she should let Client 7 know, he was sure that the client would be fine about it and they could find a workaround. There was no pressure on her to return to work.

98. However, the claimant said she was keen to start work and came back full time on 30 October 2018.

99. Problems arose with both the claimant's client relationships and her work delivery only a few days after she started to work on the Client 7 project. It

is not necessary to go into the full details but eventually the client asked that the claimant be rolled off the project, which happened in mid-November 2018.

100. We note that, at this tribunal, the claimant made lots of excuses as to why these various issues with clients (and colleagues) occurred, seeking to put the blame on other individuals including the clients and colleagues themselves rather than accept blame herself. However, the continuation of this pattern over a number of clients and in relation to a number of internal relationships speaks for itself.

101. The claimant had been given feedback on the performance issues described above throughout and the issues with Client 7 were no exception. Mr Young discussed them with her.

102. In addition, Ms Juneja, as the claimant's Career Counsellor, on 6 November 2018 delivered the claimant's full-year 2018 talent actions to her and informed her on 15 November 2018 of the "Not Progressing" talent outcome for the 2018 full performance year which had been decided upon back on 6 August 2018. As noted already, the time gap between the decisions on talent outcomes being made and the communication of them to employees is in line with the respondent's normal practice.

103. When communicating the talent actions for the 2019 performance year to the claimant, Ms Juneja clearly explained both the background to the talent actions and the talent actions themselves. She emphasised the need to focus on sales and leadership behaviour, to demonstrate an ability to sell new work, and the need to address the concerns relating to her leadership style and how to respond to others in particular situations.

104. The claimant then had a second period of sickness absence from 24 November 2018 to 8 January 2019, which was related to post operative recovery in relation to her previous surgery. Furthermore, an eight-week phased return to work was agreed after that, which covered the period from 9 January 2019 to 4 March 2019. As was standard at the respondent, time spent off sick was not included for the purposes of calculating the claimant's chargeability for that year. In addition, the respondent chose not to include the eight-week period of phased return in calculating the claimant's chargeability for that year.

105. It was agreed between the claimant and HR that she needed to be on a chargeable client role by 4 March 2019. At this tribunal, the claimant has suggested that the agreement was that she would not take a chargeable role <u>until</u> 4 March 2019. However, that is not reflected in the contemporaneous documents nor does it accord with the evidence of the respondent's witnesses. The reality was that she was expected to have found a chargeable client role by 4 March 2019 at the latest but that that did not preclude her from taking on a chargeable role during her phased return to work. Furthermore, there would have been plenty of opportunity for client work during that phased return, with appropriate adjustments.

106. Mr Young had a meeting with the claimant on 31 January 2019. Ms Juneja also had a meeting with the claimant on 4 February 2019. Both of these were to make sure that the talent actions and feedback provided in November 2018 and over the previous years were clear for the claimant.

107. After his 31 January 2019 meeting with the claimant, Mr Young followed it up with an email to the claimant. In it he set out in absolutely clear terms the concern about the "Not Progressing" outcome and that being a "signal of being over time at level" and the areas that the claimant needed to focus on specifically: chargeability; consistently developing deeper client relationships and "stickiness"; origination and sales growth; and practice leadership and outcomes. He reiterated that he was keen that she should have all the support that she needed and that he was happy to spend further time together with her, as was Ms Juneja.

108. The claimant's evidence at this tribunal is that expectations were not made clear to her. That is absolutely not the case. Both Mr Young and Ms Juneja made clear exactly what was expected of her, both orally on several occasions and in writing. She was told exactly what the problems were and what she was expected to do in order to rectify them.

109. Furthermore, the claimant's evidence to this tribunal was that she felt that she was on course to be Senior Manager. However, whilst Mr Young and Ms Juneja often expressed their desire to support her in trying to help her achieve her ambition to become Senior Manager, they did not tell her that she was on track to become Senior Manager; quite the contrary, they emphasised the considerable number of issues which meant that she was in fact very far from being ready to be Senior Manager and which she therefore needed to address.

110. In one meeting on 18 January 2019, the claimant and Ms Jesse of HR discussed the prospect of a move to a different business area and Ms Jesse followed up on this with the claimant in writing. However, the claimant did not take this further. That the claimant had such a discussion with Ms Jesse is unsurprising in the context of the "Not Progressing" rating which the claimant had received; as noted, receiving such a rating is often a catalyst to an employee looking at different career paths within the respondent or outside.

111. Ms Jesse, in a meeting with the claimant on 7 March 2019, by which time the claimant had finished her eight-week phased return, again clearly set out key feedback points for the claimant which included: emphasising that the key focus for the claimant was to find a chargeable role; team leadership abilities; sales; and chargeability. By this stage, the claimant was yet to find a chargeable role.

112. The mid-year talent discussions took place on 21 March 2019. The claimant was, as noted and unsurprisingly in the context of the issues about her performance, given a second "Not Progressing" rating and there was strong consensus about this.

113. At this tribunal, the claimant made a great deal of an email from a member of HR to Mr Young on 10 April 2019 after the mid-year talent discussion which stated: *"The only other I felt could be a NP from discussion was Sanju, this would also be backed up in the data. But I think we landed on CP in the end. Would you please confirm you are in agreement?"* Mr Young replied: *"Sanju is a continued Not Progressing. Her chargeability is still not where it needs to be."* We fully accept Mr Young's evidence that this was almost certainly a misunderstanding on the part of the person in HR and that at the talent discussion Ms Juneja had recommended a "Not Progressing" talent outcome and, based on the evidence and discussion, the leadership team had been strongly aligned that that was the right outcome for the claimant.

114. In fact, the claimant did not obtain a chargeable role until 8 May 2019 (and even that was an internal chargeable role which, because it was not client facing, did not give her the opportunity to address the issues concerning client "stickiness", client relationships and sales and origination. We will return to this in due course.

115. There was no good reason for this delay in obtaining a client facing chargeable role. As part of the phased return, the respondent had agreed with the claimant that her first client role following her return would be in London (in order to limit travel). However, there was plenty of support for her to find London based roles and, as the division in which she worked was financial services, at least 90% of the client roles and work done were London-based. Furthermore, even if there were ordinarily elements of travel in London based roles, accommodations could have been made for the claimant.

116. The claimant was not proactive in trying to find a role. Despite this, throughout this time, Mr Young, Ms Juneja and the scheduling team all continued to promote the claimant by suggesting her for available roles and contacting her about positions that they thought might be suitable for her.

117. We do not repeat all of these attempts here. However, one significant example was an opportunity on a role for Client 11 which would have given the claimant a solid opportunity to demonstrate consistent, long-term chargeability and to embed with the client so as to create sales opportunities and develop her client relationship. Mr Young even communicated to the scheduling team that the claimant should be prioritised for this role. However, the claimant was repeatedly slow to communicate with the respondent's liaison person for the role. This was extremely frustrating at a time when they were doing all they could to help her land the client facing chargeable role to help her address development points. Eventually, which was even worse, the claimant ultimately turned down the role on 16 April 2019.

118. The result of this was that, even including the internal chargeable role which the claimant took on 8 May 2019, by the time of the decision to terminate the claimant's employment, her chargeability for the 2019 financial year was around 32.7% which, when adjusted for her sickness absence and phased return, equated to around 60%. This was well below her 2019 chargeability target, which was 84.7%.

119. The internal chargeable role which the claimant eventually took involved working for Karen Newman, a Senior Manager in Accenture legal. The claimant got in touch with Mr Young to check that he was happy for her to apply for it. By that point, the claimant had not been on a chargeable consulting role for four months following her return from sickness absence and his view was that she needed to take any role offered to her that provided chargeability. He therefore responded to say: *"Priority has to be chargeability given you've not been client chargeable for a number of months"*. The claimant therefore took the role with effect from 8 May 2019.

120. In light of the significant issues in relation to the claimant's performance, discussions took place between Mr Young, Ms Juneja and HR (including Ms Wintle) in May/early June 2019 about whether to invite the claimant to a disciplinary meeting which might result in her dismissal for performance reasons. This was the first time that dismissal was specifically considered as a possibility, notwithstanding the fact that the claimant already had two "Not Progressing" ratings.

121. Ms Juneja communicated the claimant's mid-year 2019 talent outcome of "Not Progressing" to her on 3 June 2019. Again, the gap between the decision and the communication of that decision was in accordance with the respondent's usual practice, for the reasons already outlined above.

122. By letter of 6 June 2019, the claimant was invited to attend a meeting to discuss her performance. The letter advised the claimant that "subject to our discussions at this meeting, there is a possibility that you may be dismissed".

123. The claimant's evidence to this tribunal was that she was not aware prior to this letter that her job was at risk. However, we do not accept this. For someone with the best part of 10 years' experience at the respondent who was fully aware of the career progression model there and who had received a "Not Progressing" rating (and in the claimant's case two such ratings), it is highly unlikely that she would not have been aware that her job was likely to be at risk. In fact, what she said herself at the subsequent meeting with Mr Young backs this up: *"I've been here long enough to get the whole progression based model piece, I totally get it…. You don't stay at an organisation like this if you don't thrive on that"*. We make this finding despite the fact that the claimant at the time (and still at this tribunal) had a very different view of her abilities and performance from what the evidence in fact showed; even if she had a different view of her own abilities, the very fact of having had a "Not Progressing" rating would have indicated to her that her job was at risk.

124. The meeting was originally scheduled for 10 June 2019. However, it was delayed twice at the claimant's request and eventually took place on 3 July 2019. Mr Young held the meeting and was accompanied by Ms Wintle. The claimant recorded the meeting without their knowledge, so there is a transcript of the meeting.

125. Mr Young had a "script" document which he used in relation to the meeting. It was not a document that was specific to the claimant's meeting; rather, it was a set of standard wording that the respondent uses in all these types of meeting to help it structure its disciplinary meetings and to make sure that it covers off the key procedural points in a fair and proper way. Mr Young has used the same standard wording in other similar meetings. The claimant and Ms Banton have suggested that the existence of this script somehow showed that a decision to dismiss the claimant had already been made prior to the meeting. We do not accept that that was the case. Scripts of this type are commonly used in all sorts of disciplinary meetings conducted by employers for good reasons, specifically to try and help ensure that the meeting is fair, and are not indicative of a decision already having been made. We do not, therefore accept that a decision had already been made prior to the meeting.

126. During the meeting, the claimant raised her periods of sickness between late September - October 2018 and late November - early January 2019 and her phased return. She did not raise her sciatica, asthma or any ongoing impact of her endometriosis after her phased return to work and did not at any time suggest that her possible termination of employment was as a result of race discrimination.

127. It is also clear from the meeting that the claimant had a very different view of her own abilities and performance to that demonstrated by the evidence, stating at one point: *"I feel I have had a really stellar record at Accenture until very recently"*.

128. Mr Young listened to what the claimant had to say. He then adjourned the meeting for almost an hour to consider what she said and make the decision. During that time, he also (at the claimant's request) spoke to Karen Newman, the Senior Manager whom the claimant was at that point working with on the internal role. The claimant's performance working for Ms Newman was good and she had been given positive feedback by her and was over 100% chargeable during this period. However, that role was in its very early stages and it was not client facing and did not therefore give the claimant the opportunity to address the many concerns that had been outlined to her over a long period. The positive elements of that role did not therefore outweigh the significant and extensive evidence of underperformance set out above.

129. Mr Young concluded, therefore, that the claimant had over a considerable period of time during which she was active in the business, failed (and was still failing) consistently to meet almost all of the key competencies, including chargeability, client relationships, leadership skills, sales acumen and proactivity, that were required to demonstrate continuous improvement in line with the respondent's performance requirements. Some of these issues were points of inconsistent performance at Manager level: in other words, she was underperforming even as a Manager, let alone demonstrating potential to act as a Senior Manager. He therefore took the decision to dismiss the claimant.

130. The fact that, at this point, the claimant was coming up to 4 years TAL (as adjusted) at Manager level was one indicator but it was the performance

concerns over the various areas referred to above and the unlikelihood of any improvement which drove the decision. These were concerns which had arisen and continued over a substantial period of time and, in taking his decision, Mr Young took a long view; he did not, as the claimant has suggested to this tribunal, take into account only her performance in the short period prior to her dismissal.

131. Mr Young reconvened the meeting and communicated the decision to the claimant.

132. The claimant's dismissal was confirmed in writing by letter of the same day. That letter was a short form letter which deals primarily with the practical aspects of the claimant's termination of employment; it did not set out the reasons for the decision which had been communicated to the claimant by Mr Young at the meeting.

133. For the first time, during her oral evidence at this tribunal, the claimant alleged that the decision to dismiss her was not in fact taken by Mr Young but rather was taken by Ms Wintle and based on racial grounds. Ms Banton did not even then put this allegation to the respondent's witnesses (although the tribunal felt in the circumstances that it ought to and did so). However, there is absolutely no evidence whatsoever for this assertion. We accept the evidence of the respondent's witnesses that the decision was that of Mr Young alone.

Pay in lieu of notice

134. The claimant was notified that her last day of employment would be 17 July 2019 and that she would be paid the balance of her notice period beyond that date in lieu of notice, which she was. However, there is a dispute as to whether she was entitled to be paid "salary" in lieu of notice or "salary and benefits" in lieu of notice.

135. The claimant's original employment contract with the respondent, which was issued in 2009, did not contain a payment in lieu of notice clause. The respondent issued a new contract for the claimant when she was promoted to Manager on 1 September 2013. That contract contains the following clause:

"The company may, at its discretion:… (a) terminate your employment at any time by notifying you that it will make a payment of basic salary (only), less applicable deductions in lieu of all or the remaining part of your notice period…"

136. That contract was sent to the claimant on 1 September 2013 and we have seen the letter enclosing it along with a copy of the contract dated 1 September 2013 with the claimant's name on it. However, neither the respondent nor the claimant currently have in their possession a "signed" copy of that contract. The letter of 1 September 2013 from the respondent requests the claimant to *"accept the new terms and conditions of your contract online by 16 September 2013"*.

137. However, in the light of these documents, we find that the contract was duly sent to the claimant on 1 September 2013 and that she received it (the fact

that the claimant, as she maintains, was in India around the time that it was sent makes no difference to this and the evidence of the respondent, which we accept, is that it was likely to have been sent by email. On the balance of probabilities, we find that the claimant did receive it and continued working for the respondent on that basis since then. The 2013 contract is, therefore, the contract that was in force at the point when the claimant's employment terminated. The respondent was therefore entitled to pay salary in lieu of notice only and did not therefore breach the claimant's contract by doing so.

138. We further find that, just because there is no document before us evidencing that the claimant accepted the new terms and conditions "online", that does not mean that she did not do so. The evidence of the respondent was that the respondent's IT systems have changed and that that is likely to be why it cannot recover a "signed" version of the contract at this point. However, in the context of a professional employer and a professional employee, we find that it is far more likely that the claimant did indeed accept it online at the time and that is just convenient for her now to suggest that she did not. In finding this, we take into account the findings we make below regarding the unreliability of the claimant's evidence in general. We therefore find that, on the balance of probabilities, the claimant not only received the contract but accepted it electronically.

Appeal

139. The dismissal letter did not include a sentence informing the claimant of her right to appeal the decision to dismiss her. Nonetheless, the claimant did appeal by letter of 10 July 2019.

140. In that letter, she set out various grounds of appeal including referencing *"my disability due to sickness has not been considered"* and concluded *"In summary, I do not accept that there are any performance issues. My dismissal is unfair and I believe the real reason for my dismissal is my illness."*

141. Ms Ojike was appointed to hear the appeal.

142. There was a delay in arranging the appeal hearing but this was largely due to the claimant herself who was on holiday in July 2019, which meant that the original time in July 2019 which was envisaged by the respondent for the appeal hearing needed to be moved. The appeal hearing was eventually fixed for 11 September 2019.

143. A couple of hours before the hearing was due to start, the claimant sent a 15 page "statement of appeal" together with supporting documentation which she asked to be considered. The statement was very detailed and introduced a number of new grounds of appeal, including race discrimination and various new health conditions, for the first time. Ms Ojike was therefore unable to have read that document prior to the hearing. She informed the claimant that she would of course read it (and indeed in due course did so and considered it carefully). However, the claimant did not ask her to adjourn the hearing in order to do so at that point and she did not.

144. Following the appeal meeting, Ms Ojike interviewed various relevant individuals, namely Mr Young, Ms Juneja, Ms Wintle and Ms Jesse.

145. By letter of 11 November 2019, Ms Ojike informed the claimant that her appeal had not been upheld. In doing so, she went through all the points of appeal in a detailed outcome letter.

146. It is not necessary for these purposes to consider each and every one of those points, with one exception. That related to the "Disciplinary and Appeals" policy which the respondent used in relation to the claimant's dismissal. It was the evidence of the respondent's witnesses that this was indeed the policy that was used in relation to the claimant's dismissal and that it is used in relation to both disciplinary and performance dismissals. We have seen a copy of the policy, which was at page 1912 of the bundle, and it does indeed state that "This policy includes Disciplinary procedures for issues of misconduct, attendance and performance, and performance when managed through a Performance Improvement Plan." Much of the language it contains and its provisions are suited to a disciplinary process. However, when applied to a performance dismissal, some of that language does not fit with the way the respondent carried out this particular performance dismissal. That is not to say that the performance dismissal in relation to the claimant was necessarily carried out unreasonably; rather, that the way it was carried out didn't fit with all of the terms of the policy.

147. The specific point raised by the claimant at the appeal stage (and one which was emphasised by Ms Banton a great deal at this tribunal) was that the the policy outlines a five stage procedure: investigation; disciplinary hearing; adjournment; decision; and appeal. The claimant says that this was not followed in relation to her dismissal. Ms Ojike did not allow this ground of appeal. The last four stages were certainly followed: there was a hearing chaired by Mr Young; that hearing was adjourned; Mr Young then gave a decision; and the claimant appealed. It is correct, however, that there was no investigation in the sense of a formal disciplinary investigation; instead, there was continuous performance assessment of the claimant over a long period of time, including two "Not Progressing" ratings. That process is perhaps equivalent to (and in the context of a performance dismissal, far more relevant than) a formal investigation and we do not criticise Ms Ojike for reaching the conclusion which she did that all five stages were complied with and that the performance management process was the equivalent of the investigation; however, it does sit awkwardly with the wording of the policy which looks designed more for disciplinary than performance matters.

148. On a similar issue, which was raised by Ms Banton at this tribunal although not, as far as we can see, at the appeal stage, the policy states:

"Procedure for Disciplinary Hearing;

(a) The Disciplinary Panel (appointed above) will be convened and chaired by someone more senior than the employee and will consist of;

- Chairperson (not previously involved)

- HR Advisor (not previously involved)…"

149. Mr Young (the "Chairperson") had of course been previously involved in performance managing the claimant. Furthermore, Ms Wintle ("HR advisor") had been previously involved amongst other things in discussing whether or not to invite the claimant to the meeting on 3 July 2019. The respondent was therefore in breach of its policy. However, we reiterate that this appears to us to be because the policy is tailored to misconduct issues rather than performance management; it is not as a matter of fairness inappropriate that a manager who has been involved with performance managing an employee should be the one who takes the decision to dismiss that employee and in many cases it will be entirely appropriate for that to be the case.

150. Although the policy states that *"the Company reserves the right to depart from the policy in appropriate circumstances…"*, we do not consider that the flexibility of that provision extends to disregarding core terms about the make up of dismissal panels; if this wording permits that, then one might as well not have a policy at all as it would enable an employer to depart from pretty much any term of it as it saw fit.

The claimant's conditions

Reliability of evidence

151. It is at this point worth making some findings about the reliability of the evidence and in particular the reliability of the claimant's evidence. Whilst these findings are relevant to the other findings of fact we have made as well (but to a lesser degree because so many of those findings are capable of being made based on the contemporaneous documents), they are particularly relevant to our assessment of the claimant's conditions and in particular the disability impact statement which the claimant provided in support of her assertion that she was a disabled person by reason of each of the three conditions which she relies on and by reason of the cumulative effects of those conditions.

152. We did not find the claimant to be a reliable witness of fact.

153. As Ms Eddy submits, the claimant's lengthy witness statement is, in large part, the claimant's commentary on the disclosure, written in many cases several years after the underlying events.

154. We also agree that the inferences that the claimant sought to draw from the documents were not reliable either. Examples include the fact that the claimant suggested in her evidence that her end of year talent outcome for 2018 was because of her period of sickness absence which began in late September 2018; this was despite the fact that the talent discussion at which the "Not Progressing" outcome was given happened on 6 August 2018, almost 2 months before that period of sickness absence. Secondly, the claimant criticised Ms Juneja for not asking how she was feeling after her operation in October 2018 but omitted to mention the number of messages from Ms Juneja both before and

after the operation in which Ms Juneja is clearly asking about the claimant's well-being, including one in which she asks in terms how the claimant was feeling.

155. The claimant had disclosed various notes, many of which (her "iPhone notes") were disclosed very late indeed. The respondent's witnesses were questioned on the contents of these notes as if they were contemporaneous notes of the various meetings and discussions, but they were not. On their face, the iPhone notes contain a mix of the claimant's thoughts in anticipation of meetings, and her reflections and responses after the fact - sometimes in the same document. As a tribunal, we initially found this particularly confusing as this was not made clear to us. Even the claimant's handwritten notes are written in the past tense. The same is true of the claimant's "notes" of the appeal hearing, which were not taken in the hearing (she was not taking notes), but afterwards.

156. We agree with Ms Eddy's submission that the claimant's evidence was selective and self-serving, particularly so in relation to the evidence she gave about her medical conditions. For example, when asked why she hadn't mentioned that the cause of her pain in her back towards the end of July 2017 was trying to lift a heavy box of wine, the claimant said that her father *"said I shouldn't put that in as it might come across as negative"*. When she was challenged on the fact that she had allowed the contents of her witness statement to be influenced by someone else, she sought to resile from her admission and said that her father had not meant it in relation to her witness statement, but just generally. In her impact statement, the claimant said that *"I now only wear trainers, even normal flat shoes put pressure on my back when walking and cause pain"*. This was demonstrably false; the claimant wore flat shoes throughout the entire proceedings. Similarly, the claimant's impact statement gave a description of her persistent cough and alluded to an inability to speak; however, she gave oral evidence, clearly and audibly, over the course of two full days. The claimant suggested that, because of her condition she was unable to perform the tasks of daily living (including cooking for herself) but was taken to evidence in cross-examination from her own Facebook posts suggesting that the contrary was true and that she was cooking, even on the first day back at work after her surgery.

157. In addition, when giving her evidence, the claimant was not straightforward and often did not answer directly questions put to her. She also often sought to say something which she wanted to say in answer to a question rather than focusing on the question being asked.

158. For these reasons, we place little reliance on the evidence which the claimant gave except when it is backed up by contemporaneous documentation. This includes, in particular, her impact statement. We have referenced numerous examples above where that statement is demonstrably exaggerated and our concern is that it is exaggerated elsewhere too. There is certainly, for example, an absence in the contemporaneous medical documentation of a great many of the details set out in the impact statement.

159. By contrast, we found the witnesses for the respondent straightforward. They answered the questions put to them. Their evidence was consistent in all material respects with each other, with their witness statements and with the contemporaneous documents. We did not, therefore, have any concerns about the reliability of their evidence.

Sciatica

160. The claimant went to her GP with a six-day history of lower back pain on 27 February 2017. She had private health insurance and chose to use it to access physiotherapy for her back. Her GP explained to her that *"this is not necessary usually in the early days of sciatica"*. By 27 March 2017, the claimant's GP notes record that this was *"much improved - having physio with BUPA, feels it is much better"*.

161. She was also referred to occupational health and an occupational health report was produced following an assessment on 31 March 2017. The conclusion of the report was that *"Ms Pal is suffering from an episode of low back pain which is improving; she is fit to attend work"*. The OH practitioner concluded that *"in my opinion the terms of the Equality Act 2010 are unlikely to apply in this case"* and that *"there is no evidence at this time that there is a risk of recurring absence in the future"*.

162. Following this, the respondent's HR department referred the claimant to Ms May and the claimant told Ms May that she had been *"diagnosed with sciatica in March"* and that she had *"experienced a flareup recently after a long period of walking"* and found that *"sitting for long periods and moving from sitting to standing is most aggravating"*. Ms May did a telephone assessment and recommended that the claimant should have a more supportive and ergonomic chair for home, a laptop riser and a keyboard to avoid hunching over her laptop and a spare charger to be kept at the client site. These were provided. A height adjustable desk was also subsequently booked for the claimant.

163. The claimant gave evidence in her witness statement that towards the end of July 2017 she felt a sudden severe pain in her back. What she didn't mention, but which as noted came out in cross-examination when she was asked, was that the cause of that pain was lifting a heavy box of wine. She went to her GP. The GP commented at the time as follows: *"likely back strain after lifting heavy object. could be a slipped disc. majority of these do heal on their own. Pt has BUPA so for physio ASAP to help loosen up back.… likely may need a couple of days off work"*.

164. The claimant had an MRI scan privately. The findings are recorded in the claimant's GP notes for 8 August 2017: *"has seen specialist who arranged MRI scan - showed a minor slipped disc but associated muscle wasting"*. The advice was for physio and Pilates. By 30 August 2017, the position as recorded in the claimant's physio notes was *"Pt is managing condition well. Occasional twinge/discomfort after prolonged sitting/lifting/wearing high heels"*. The claimant's GP sick certificate recorded that, as of 11 August 2017, she may be fit for work with amended duties and workplace adaptations.

165. On 19 December 2017, Ms May enquired after the claimant and the claimant told her that her back was much better *"although I still do have pain from time to time… The standing desk at these times is really great"*.

166. On 9 January 2018, the claimant contacted Ms May again to say that she was experiencing greater back pain. On 6 March 2018, the claimant contacted Ms May again and told her that she was now back in a role with a particular client and she needed an ergonomic chair and variable desk as her sciatic pain had been flaring up. This was duly provided. Ms May did not hear further from the claimant in relation to this issue.

167. There was then a further period of back pain over a year later, in February 2019, which followed the claimant's packing luggage. Her GP entry for 5 February 2019 states: *"the first and last time this happened was in 2017 and it turned out I had a disc bulge causing sciatic pain down my left leg and I was referred to BUPA for physio and seen very quickly which was amazing help"*. The claimant was not signed off sick with sciatica during this period but did have some physiotherapy sessions. The physio notes do not suggest that the claimant, even during this period, was in constant pain.

168. There was no further consultation with the claimant's GP for back pain in the period leading up to the claimant's dismissal.

Endometriosis

169. Endometriosis is a common condition, which affects many women. The exact number is not known. This is because many women have endometriosis without symptoms, or with mild symptoms, and are never diagnosed.

170. The claimant had private ultrasound tests at the end of September 2018 and a (benign) cyst on one of her ovaries was found. She had a laparoscopy on 1 October 2018, and the view at the time (not shared with the respondent) was that *"she had a 10% chance of another endometrioma"*. As noted already, she took time off for the surgery.

171. She was referred to occupational health and an assessment was undertaken on 23 October 2018. The OH practitioner concluded that *"Ms Pal is not yet fit for work. She is making good progress in her recovery but still has some residual symptoms common in recovery from this type of surgery…."*. The practitioner further stated: *"The terms of the Equality Act 2010 are unlikely to require consideration as the symptoms have not been present for the pre-requisite full year"*.

172. As noted, she returned to work on 30 October 2018, against occupational health advice, as this was not in line with the phased return to work that had been suggested by the OH practitioner.

173. As noted, the claimant was rolled off the project with Client 7 at the end of November 2018 and then was signed off sick again. This time, the reasons given were post-operative recovery.

174. The occupational health report of 14 January 2019 states that:

"Miss Pal informs me that she is making progress with her recovery however she continues to experience abdominal pain at times…

Miss Pal informs me at present she is completing light everyday tasks however she is not carrying heavy shopping. Miss Pal informs me at present she is able to walk for up to 20 minutes, longer than this exacerbates fatigue.

I understand from Miss Pal she has been taken off the project she was working on prior to her sickness absence and she reports she is unsure what project or for what client she will be working when she returns to work.

In my clinical opinion Miss Pal is fit to return to work however due to her ongoing symptoms and to assist with the recovery I feel she would benefit from the following temporary adjustments [the phased return]…

I am hopeful Miss Pal will make a good recovery from her surgical procedure and once she returns to work she is likely to be able to once again offer reliable service and attendance. I do not anticipate Miss Pal's performance to be significantly affected once she has completed her recovery.

The decision on whether the definition of disability applies is ultimately one for a tribunal. However, my interpretation of the relevant UK legislation is that Miss Pal's condition is unlikely to be considered as a disability because it is unlikely to have a substantial long-term effect on the activities of daily living."

(We have added the word "not" in the penultimate paragraph above as both parties agreed that its omission from the original occupational health letter was a typographical error.)

175. The claimant subsequently met her surgeon, Mr Okaro, in March 2019. He noted that she had been largely well since he last saw her. He scanned her and noted a recent endometrioma. However, he stated that he was optimistic that they would be able to not just control the symptoms but manage the cyst conservatively with the pill. She did not require further surgery.

Asthma

176. The claimant first went to her GP with respiratory symptoms on 15 May 2018. The question was whether she had a mild wheeze and the GP wondered whether she had "mild asthma triggered by hay fever". She was prescribed an inhaler but did not use it.

177. She was not diagnosed with asthma until much later, on 9 April 2019, at which point she was advised to use her inhaler.

178. Her GP notes of 21 September 2020, which reference an "asthma annual review", state that asthma causes her daytime symptoms 1 to 2 times per month but asthma is not limiting her activities or disturbing her sleep.

179. Mr Young was not aware that the claimant suffered from any of the three conditions she relies on. Furthermore, he did not see anything that suggested to him that the claimant's ability to work or her everyday life were being impacted by them. He was aware of the claimant's ovarian cysts and her surgery regarding those, based on her single email to him in September 2018, but he was not aware that she was suffering from ongoing endometriosis.

Comparators

180. The claimant relies on six comparators for the purposes of her direct discrimination complaints, all six in relation to the race discrimination complaint and one (Comparator A) in relation to the disability discrimination complaint.

181. We have seen an abundance of evidence in the bundle and the witness statements as to why none of these comparators are or were in the same or materially similar circumstances to the claimant so as to be appropriate comparators within the meaning of section 23 of the Equality Act 2010 (for the most part because they were high performers, in contrast to the claimant). It is not necessary to repeat all of it here and we summarise the key points below.

182. Comparator A is a talented and focused individual who is now a Senior Manager. She started out as one of the claimant's peers in FS T&O and then transitioned out into an alternative career track (Innovation & Thought Leadership). She had proactively managed this transition. Employees in Innovation & Thought Leadership have a different (typically slower) career progression model to those in Client & Market roles and are judged against different performance metrics as their roles are not client facing. During the period that Comparator A was in Client & Market, she was a high performer, especially in relation to her content expertise, team leadership, client relationship management and delivery management. Her move was never, as the claimant suggested, an alternative to dismissal. It was, instead, entirely self-directed, in part to manage her family commitments and health. It was her decision and she had to go through a full selection process to make this career track and role change. She received excellent feedback which was consistently good and demonstrated her proactivity, drive and stakeholder management skills. She was, therefore, a far stronger performer than the claimant.

183. Comparator B is a Senior Manager in the T&O practice group of the respondent's Resources division. She works in the US and has done so since September 2017, so was not compared against the claimant. Before this she worked in the UK practice and was a strong performer. She always demonstrated high levels of commitment, engagement and proactivity. She did not have two Not Progressing ratings. Her performance was consistently excellent and she made a significant impact with the respondent's clients.

184. Comparator C was in a different practice group (the Finance and Risk practice group). Comparator C's performance was therefore not at any stage assessed against the claimant's performance and she is not an appropriate comparator for that reason alone. Furthermore, she had never had any "Not

Progressing" ratings. Rather, she had positive feedback in the run-up to her promotion to Senior Manager on 1 December 2020, at which time her TAL was over the guideline amount. The feedback included that she was already "operating as a Senior Manager" and that she had made a "SM level contribution". As already indicated, it is common for TAL to be disregarded for individuals who are showing concrete progress to the next level.

185. Comparator D similarly worked in a different practice group (Technology & Advisory) and division (Health & Public Services) to FS T&O. As a result, his performance was never assessed against that of managers in FS T&O and, for that reason alone, he is not an appropriate comparator. He was promoted to Senior Manager with effect from 1 December 2018, within his guideline TAL, but his feedback was excellent. He is not, therefore an appropriate comparator.

186. Comparator E is a Senior Manager in FS T&O, a role to which he was promoted with effect from 1 December 2018. He was and remains one of the top performers and consistently received excellent feedback on internal and external roles. Despite being put forward for promotion in the mid and end of year talent discussions in 2017, he was given an outcome of "Continue Progressing" because there were not enough promotion slots on either occasion and there were other individuals performing slightly better than him. His performance was such that he was flagged as a talent priority for future promotions. He is another example of the circumstances in which the respondent disregards TAL for strong performers who are on a positive trajectory towards promotion.

187. Comparator F is currently a Senior Manager in FS T&O, to which she was promoted with effect from 1 December 2019. She is another example of a top performer who was retained by the business despite her high TAL, and who had been flagged for future promotion, but who had not been promoted earlier because there were not enough promotion slots. Once again, her circumstances are simply not comparable to the claimant's because comparator F is and was a much higher performer.

The Law

Unfair dismissal

188. The tribunal must decide whether the respondent had a reason for dismissal which was one of the potentially fair reasons for dismissal within s.98(1) and (2) of the Employment Rights Act 1996 ("ERA") and whether it dismissed the claimant for that reason. The burden of proof here rests on the respondent. Both capability and some other substantial reason would be such potentially fair reasons for dismissal.

189. Capability is defined under s.98(3)(a) ERA as *"capability assessed by reference to skill, aptitude, health or any other physical or mental quality"*.

190. On a capability dismissal, the question is whether the employer honestly believes on reasonable grounds that the employee was not capable or was

unsuitable for the job; there is no obligation on the employer to prove that the employee was incompetent (Alidair Ltd v Taylor [1978] ICR 445, CA).

191. It is for the employer to set the standards asked of employees; tribunals cannot and should not substitute their own view of an employee's competence. Moreover, employers can insist on levels of competence that are higher than those at comparable institutions.

192. The tribunal must then be satisfied, in all the circumstances of the case (including the size and administrative resources of the respondent) that the respondent acted reasonably in treating capability (or some other substantial reason) as a sufficient reason to dismiss the claimant. The tribunal refers here to s.98(4) ERA and directs itself that the burden of proof in respect of this matter is neutral and that it must determine it in accordance with equity and the substantial merits of the case. In this respect, the actions of the employer should be measured against the range of reasonable responses rather than against the tribunal's subjective view of what it would have done or decided in the circumstances; the tribunal should not substitute its view for that of the respondent.

193. A fair dismissal for performance will usually (but not invariably) require that an employee have been warned and given an opportunity to improve. In this respect, Ms Eddy drew our attention specifically to the case of James v Waltham Holy Cross UDC [1973] IRLR 202:

"In the field of capability similar problems frequently arise. If an employee is not measuring up to the job, it may be because he is not exerting himself sufficiently or it may be because he really lacks the capacity to do so. An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance. But those employed in senior management may by the nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent. Again, cases can arise in which the inadequacy of performance is so extreme that there must be an irredeemable incapability. In such circumstances, exceptional though they no doubt are, a warning and opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the business." [Emphasis added]

194. Where a warning has been given, the function of the tribunal is not to determine whether the warning should or should not have been issued, but to apply the statutory test of reasonableness to determine whether the warning was a circumstance which a reasonable employer could reasonably take into account in the decision to dismiss the claimant (Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374 at paragraphs 20-24, applied in the context of a capability dismissal in General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, EAT at paragraph 51).

195. In performance capability cases, there is no legal requirement to redeploy, and nor is there any general principle that an employer will be acting unreasonably if the employer does not give an underperforming employee an

opportunity of alternative employment in a less demanding role: Awojobi v London Borough of Newham (UKEAT/0243/16/LA) (20 April 2017, unreported) at paragraph 22.

196. If the dismissal is unfair the tribunal must take account of the principles in the case of Polkey v A E Dayton Services Ltd [1987] IRLR 503 HL if it is satisfied that, but for a defect in the procedure adopted by the respondent which has rendered the dismissal unfair, the claimant would have been dismissed fairly anyway. If so, issues of when such fair dismissal would have happened and of consequent adjustments or limits to any ongoing financial losses of the claimant will arise.

Breach of contract/wrongful dismissal

197. The burden of proof is on the claimant to show that she was dismissed in breach of contract.

Disability

198. It is for the claimant to prove on the balance of probabilities that she was disabled at the relevant time. Whether a person is disabled is a question for a tribunal, not a medical expert.

199. Under section 6(1) of the Equality Act 2010 (the "Act"), a person has a disability if that person has a physical or mental impairment which has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities.

200. An adverse effect is "substantial" if it is more than minor or trivial.

201. An impairment is to be treated as having a substantial effect on the ability of the person to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

202. The effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months or it is likely to last for the rest of the life of the person affected.

203. The likelihood of any adverse effect lasting for at least 12 months, or of it recurring, is assessed on the basis of the evidence available at the date of the alleged discrimination, putting aside the benefit of hindsight and subsequent events (McDougall v Richmond Adult Community College [2008] ICR 431 at paragraph 24). "Likely", in this context, means something that "could well happen", rather than something that is "more likely than not" to happen (SCA Packaging Ltd V Boyle [2009] ICR 1056. The fact that the effect of an impairment has recurred does not, as a matter of law, mean that it is likely to again (Sullivan v Berry Street Capital Ltd [2021] EWCA Civ 1694).

Direct race and disability discrimination

204. Under section 13(1) of the Act, a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination.

205. Disability and race are protected characteristics in relation to direct discrimination.

206. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

Discrimination arising out of disability

207. Section 15 of the Act provides that a person (A) discriminates against a disabled person (B) if:

a) A treats B unfavourably because of something arising in consequence of B's disability; and

b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

However, A does not discriminate if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Reasonable adjustments

208. The law relating to the duty to make reasonable adjustments is set out principally in the Act at s.20-22 and Schedule 8. The Act imposes a duty on employers to make reasonable adjustments in certain circumstances in connection with any of three requirements. The requirement relevant in this case is the requirement, where a provision criterion or practice of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

209. A failure to comply with such a requirement is a failure to comply with the duty to make reasonable adjustments. If the employer fails to comply with that duty in relation to a disabled person, the employer discriminates against that person. However, the employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to.

210. In respect of all of the above provisions, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the

tribunal could decide, in the absence of any other explanation, that the employer did contravene one of these provisions. To do so the employee must show more than merely that she was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, we must hold that the provision was contravened and discrimination did occur.

Time extensions and continuing acts

211. The Act provides that a complaint under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable.

212. It further provides that conduct extending over a period is to be treated as done at the end of the period and that a failure to do something is to be treated as occurring when the person in question decided on it.

213. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of "an act extending over a period". The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

214. As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA.

Conclusions on the issues

215. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Unfair dismissal

Reason for dismissal

216. The respondent has clearly proven that there were considerable performance concerns in relation to the claimant and that it was for those reasons that it dismissed her.

217. We have seen a huge amount of compelling evidence that that was the case. A lot of it is set out in our findings of fact above which we do not repeat here. However, in summary: the claimant received a "Not Progressing" rating in two consecutive performance periods; her chargeability was low; she was not originating new work; there were serious concerns about her style, and her leadership behaviours and her client relationships; and she showed a lack of "client stickiness" and indeed proactivity in finding client roles (which in turn had an impact on her chargeability). She was not even consistently performing at "Manager" level whereas, under the respondent's progression based model, what she needed to be doing was showing that she was ready for promotion to the next level (Senior Manager), which she was not doing. Under the respondent's progression based model, not demonstrating readiness for promotion is underperformance.

218. For the avoidance of doubt, the respondent is absolutely entitled to use the progression based model which it does. Although the claimant did not appear to be challenging that, Ms Banton in her opening note criticised the dismissal, amongst other things, on the basis that the claimant's performance was "judged against Senior Manager and not Manager". It is not clear whether she is suggesting that the respondent did so mistakenly, which suggests a misunderstanding on her part of how the progression based model operates, or whether she is suggesting that the respondent did so intentionally but that that system is essentially unfair. We feel that we should therefore emphasise that, as it is (as a matter of law) for the employer to set the standard asked of employees, the respondent is entitled to operate this system. It is, in addition, a model which is widely used throughout the consultancy industry and one which is logical and reasonable given the need to retain the very high standards expected by the respondent and its clients and to maintain the "pyramid structure" which the respondent has. Ms Banton's criticism of that system, if indeed she was criticising it, is therefore not accepted.

219. We also note that a not inconsiderable amount of time was spent by the claimant and Ms Banton at this tribunal suggesting that the two "Not Progressing" outcomes were undeserved. To be clear, there are no allegations before this tribunal relating to the award of those "Not Progressing" outcomes. In the context of the unfair dismissal complaint, we remind ourselves of the principles in Davies v Sandwell; it is not our function to determine whether or not these warnings should or should not have been issued but simply to apply the statutory test of reasonableness to determine whether the warning was a circumstance which a reasonable employer could reasonably take into account in its decision to dismiss the claimant. It clearly was reasonable to take those warnings into account given the reasons for them. However, whilst it is not our function to look behind the reasons for those warnings, we in any case add that, from the considerable evidence that we have seen, those warnings were justifiably given in the light of the performance concerns about the claimant which led to them.

Reasonableness

220. In general terms, there are contained within the list of issues under paragraphs 3 & 4 a number of points to consider under this heading. Some of these can be better grouped together and, consequently, we do not address that list of points strictly in the same order as set out on the list of issues but, rather, note next to our conclusions below the points at which we have dealt with those individual items in the list of issues. We also, as we go along, cover a number of additional points which Ms Banton made in her submissions/opening note.

221. In terms of her awareness, the claimant was clearly and undoubtedly aware of what was required of her. Again, we do not repeat all of our extensive findings of fact above. However, the claimant knew that the progression based model ("up or elsewhere") applied; it is clear in the respondent's documentation and was well-known among its employees (and indeed the industry in general); and the claimant had the best part of a decade's experience working for the respondent. She even acknowledged her awareness of it at the 3 July 2019 meeting at which she was dismissed (which we quoted in our findings of fact above).

222. Notwithstanding the claimant's continuing assertion that her performance was not only good but "stellar", she cannot, in the light of having received two "Not Progressing" outcomes, have failed to realise that there was a risk that she would lose her job for performance reasons (even if she disagreed with the respondent's assessment of her performance). We are not talking about junior, ill-informed or vulnerable employees; the respondent's employees are intelligent highly paid individuals who would be fully aware of the implications of two such outcomes and we do not accept that the claimant is any different in this respect. This is a case, following James, of individuals who are, by the nature of their jobs, "fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement".

223. Even if that was not the case, the claimant was nonetheless aware that the respondent considered that she was underperforming, not only from the two "Not Progressing" outcomes but also from the large amount of feedback that was given to her concerning the performance concerns on the projects. This was, in accordance with the respondent's practice, done as concerns arose. In addition, as we have found, both Mr Young and in particular Ms Juneja had lots of meetings and discussions with the claimant at which her performance was discussed. In and around the talent discussions which resulted in the two "Not Progressing" outcomes, they in particular had detailed discussions with the claimant which were very clear about what she needed to achieve. Ms Jesse also had discussions with her. Whether the claimant accepted the criticisms and the feedback that she was given is not the question; those criticisms and that feedback was given to her and she was told what she needed to do to improve.

224. The claimant and Ms Banton have placed a lot of emphasis on the fact that the respondent did not use a formal performance improvement plan ("PIP") in relation to the claimant. However, as we have found, formal PIPs tend to be a management process which is used by the respondent only for more junior

employees, because the performance of employees at the claimant's level is generally dealt with through the structures set out in our findings of fact above. For employees of that level, those structures are entirely reasonable. We do not, therefore, consider that the absence of a formal PIP was unreasonable.

225. The above paragraphs cover the issues set out at 3(a) & (b) of the list of issues.

226. We do not, as Ms Banton has submitted, consider that the dismissal was predetermined. Ms Banton relies in this respect in part on the "script" which Mr Young used at the meeting at which the claimant was dismissed. However, as we found in our findings of fact above, this was a standard document used for all such meetings and did not relate to the outcome. Similarly, the fact that the letter given to the claimant later that day confirming her dismissal did not contain the reasons for the dismissal is also no indication that the matter was pre-determined. That letter deals mainly with the practical issues in connection with the claimant's termination of employment and does not address the reasons for her dismissal, which were given by Mr Young at the meeting. There is nothing improper about this; the claimant was clearly told what the reasons were at the meeting. We do not, therefore, accept Ms Banton's submission that the dismissal letter was "markedly different from reasons for dismissal subsequently advanced"; rather, it did not cover the reasons for dismissal at all, which were dealt with elsewhere. Furthermore, the fact that the letter did not set out the reasons is no indicator that the decision to dismiss the claimant was taken before the meeting of 3 July 2019.

227. There is therefore no reason for us to doubt the evidence of the respondent's witnesses that inviting the claimant to a meeting which might result in her dismissal was only first considered in May/early June 2019 and that the actual decision to dismiss her was not made until after the adjournment in the meeting on 3 July 2019.

228. Ms Banton made lots of criticisms of the respondent's use of different metrics in assessing the claimant's performance. Large chunks of her cross-examination, submissions, opening note and indeed the basis for many of her submissions in relation to the amendment application which we rejected, focused on metrics, in particular TAL and chargeability. It seems to us that there was a fundamental misunderstanding here. TAL is an indicator of the period within which an employee is generally expected to demonstrate readiness for promotion to the next level. It is anything but an absolute point at which an employee should either be promoted or dismissed. We have seen numerous examples, many of them quoted in our findings of fact, where individuals have been neither promoted nor dismissed towards the end of their TAL at that particular level, for example because whilst they were ready for promotion, there were not enough promotion slots for them so they could only be rated as "Continue Progressing" for another year and, similarly, other employees can be dismissed before they reach their TAL if it becomes clear that they are not ever going to be ready for promotion. Most of the material put before us by Ms Banton and the claimant about either individuals who were kept on after they reached their TAL to suggest that the metric was used inconsistently or indeed the (contradictory) suggestion

that TAL was an absolute metric which was unfair in itself is therefore irrelevant. TAL is not an absolute metric (rather it is just an indicator). Similarly, suggestions that chargeability was somehow an absolute metric and that the claimant was dismissed solely because her chargeability was low are also unfounded. It was one metric that was indeed very relevant to performance. However, there were many others which are mentioned above (for example the claimant's style, leadership behaviours, client relationship issues, "client stickiness" and deal origination and sales) which were also all very relevant and taken into consideration in an assessment of the claimant over a long period. Furthermore, there was nothing opaque about the way these were used as they were explained clearly to the claimant on a number of occasions.

229. We think that this is what is behind the issue at issue 4(d) of the list of issues, which asks whether the respondent acted "consistently in dismissing the claimant (does it or would it dismiss other employees in similar circumstances)?"; in other words that this issue is predicated upon the assumption that somehow the respondent applied metrics such as TAL and/or chargeability absolutely in the case of the claimant but did not do so in the case of other employees. As set out above, this fundamentally misses the point of how the system operates. Other employees with lower TAL than the claimant have been dismissed and other employees who have had higher TAL than the claimant have been kept on. It is similar with chargeability. However, as neither is an absolute metric, one would not be comparing like with like if one used just one of those two metrics. What we have not seen any evidence of is an employee with the range of performance issues which the claimant had (as set out above) but who was not dismissed (and we should add that none of the six comparators whom the claimant has cited are comparable to the claimant's situation, largely because they were, in contrast to the claimant, good performers). We do not, therefore, accept that the claimant was treated inconsistently with others.

230. Issue 4(b) asks whether the respondent should have "allowed more time for the claimant's performance to improve". This issue is also similar to a number of points made by Ms Banton in her opening note and her submissions, in which she suggests variously that the respondent could have waited "a little longer" and, without any evidential basis, that the claimant "required six months to be ready for promotion to senior manager". Similarly, she submits that the claimant had "good performance from May 2019 prior to dismissal" and that her chargeability at that point was over 100%. However, Mr Young explained that the fact that the claimant was chargeable and had good feedback in isolation for the period of less than two months prior to her dismissal needed to be set against her performance over a much longer period; in addition, the role which she had at that point was only an internal role and was not therefore allowing her to develop the key indicators (for example client facing skills/sales and deal origination) which she could only do through client work. In the light of two previous "Not Progressing" ratings and the large amount of feedback over a long period of time which had not been addressed by the claimant, the respondent was perfectly entitled to take the decision to dismiss at the point which it did. It was not unreasonable not to allow further time.

231. As to issue 4(a), the claimant has not demonstrated that she was at the material time suffering from an illness which unduly affected her performance. We will deal with this more fully in relation to the disability discrimination complaints. However, none of the performance reasons which were the basis for the claimant's dismissal were caused by the claimant's sciatica, endometriosis, or asthma. There is no evidence that her asthma had any impact on her ability to do these things. Furthermore, any impact which sciatica had on her working arrangements at all was dealt with by the adjustments that were put in place and the performance problems for which she was dismissed were not affected by the sciatica. In relation to endometriosis, the claimant was given time off to recover from surgery and a phased return and those periods did not count in the calculation of her chargeability so did not impact on that metric. Furthermore, the effects of the surgery did not impact on the other performance issues for which she was dismissed. Finally, when he took the decision to dismiss the claimant, Mr Young was not aware of any suggestion that any of these conditions might be responsible for any of the claimant's performance issues.

232. Similarly, it has been suggested by Ms Banton that the fact that the respondent did not seek another occupational health report in relation to the claimant before it took the decision to dismiss her was unreasonable. However, we accept Ms Eddy's submission that this is not a reasonable criticism because this was not an ill-health capability dismissal. The respondent was not dismissing the claimant because it considered that, by reason of her ill-health, she was unable to meet the requirements of her role; rather, it was dismissing her because of her performance and, as we have set out above, not only were the claimant's performance issues not affected by her ill-health but the respondent was not even aware of any suggestion that they might be at the time when the decision to dismiss was taken.

233. Issue 4(c) asks whether the respondent should have given "greater consideration to redeploying or retraining the claimant". First of all, we remind ourselves that there is no legal requirement to redeploy and no general principle that an employer will be acting unreasonably if it does not give an underperforming employee an opportunity of alternative employment in a less demanding role. In addition, in this case, as set out in our findings of fact above, the respondent's career progression model is and was self-directed. The claimant knew this, as did everyone else in the business. The claimant could have applied for roles in other areas of the business at any time. We have seen plenty of evidence, amongst the claimant's comparators, of individuals choosing of their own volition to apply for roles in different areas of the respondent, for a variety of reasons. Furthermore, receiving one "Not Progressing" warning, let alone two, was likely to be an indicator that, if the claimant wanted to stay at the respondent, seeking a role elsewhere in a different area might be a sensible thing to do. In one meeting in January 2019, there was even a discussion between the claimant and Ms Jesse about the prospect of a move to a different business area, but the claimant did not pursue this further. We therefore accept Ms Eddy's submission that this is not a case in which it could sensibly be said that there was a failure to offer the claimant opportunities to pursue a career in a less demanding role. The claimant could have sought those opportunities but chose not to. We do not, therefore, consider that it was unreasonable for the

respondent not to give any greater consideration to redeploying or retraining the claimant than it did.

234. The remaining issues regarding the reasonableness of the dismissal (issues 3(c) – (f)) concern procedural elements.

235. As noted, the respondent used a particular disciplinary procedure in relation to the claimant's dismissal and appeal. That procedure was said to cover both misconduct and performance matters. For the purposes of issue 3(d), the respondent was therefore entitled to use this procedure in relation to the dismissal of the claimant.

236. The claimant was not specifically made aware of the fact that the respondent was using this procedure prior to the appeal hearing. Having said that, the procedure was available to the respondent's employees so, whilst it would of course have been far better if the respondent had specifically told the claimant in advance of the meeting of 3 July 2019 with Mr Young that this procedure would apply, the fact that it is there for all employees to see does not in itself render the dismissal unreasonable or unfair. In any event, it was clear by the appeal stage that this was the procedure which the respondent was using so, looking at the overall fairness of the dismissal process as a whole, the claimant was not prejudiced in a way which rendered the dismissal unfair by the respondent not specifically telling her in advance of the 3 July 2019 meeting that this was the procedure which would apply.

237. However, as we noted in our findings of fact, the policy used by the respondent appeared tailored to misconduct dismissals and not to performance dismissals (even though it was stated to apply to performance issues as well). Consequently, in many areas, what was actually done did not fit comfortably with the provisions in the policy. We reiterate that we do not consider that the process which the respondent used in dismissing the claimant was unfair in itself; rather that it did not fit in with its policy. We have noted the awkwardness of the five stages of the policy being compared with the process used in relation to the claimant's performance dismissal and in particular the "investigation" stage prescribed by the policy, which envisages a misconduct style investigation; whilst the way that the respondent managed the claimant's performance over the lengthy period prior to the dismissal was not unreasonable, it is something of a stretch to describe it as an "investigation". Furthermore, the composition of the people at the meeting at which the claimant was dismissed, whilst not unreasonable in the context of the claimant's performance dismissal, was clearly outside the terms of the policy and was therefore a clear breach of that policy.

238. We are surprised, given that the respondent is a large and well-resourced employer, that this discrepancy between policy and practice exists. Going forwards, we think that the respondent would be well advised to put in place for performance dismissals a policy which actually reflects the approach it takes (which, as we have found, was not in itself unreasonable). However, employees are entitled to know the process that applies to them in dismissal situations, be they conduct or performance dismissals, and the claimant can therefore be forgiven for any confusion on her part in the non-alignment of the

process actually used with the terms of the policy. We therefore consider that that non-alignment was not only unreasonable but also renders the dismissal unfair.

239. However, we are in no doubt that, had the respondent used a policy which properly reflected the otherwise reasonable approach that it took in the dismissal, the claimant would have been dismissed fairly at the same time in any event. We therefore make a reduction of 100% to the compensatory award under the principles in Polkey.

240. In relation to issue 3(c), the ACAS Code of Practice applies to performance dismissals as well as misconduct dismissals and it therefore applied in the case of the claimant's dismissal.

241. In her submissions, Ms Banton suggested three potential breaches of the ACAS Code by the respondent. The first two of these were that the decision about dismissal was predetermined and that warnings for unsatisfactory performance/warnings about the possibility of dismissal and time to improve were not given. We have rejected these factual assertions in our findings above and therefore find no breach of the ACAS Code in these respects.

242. The third allegation is that "no right to appeal [was] offered". Paragraph 22 of the Code states: *"A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal."*

243. Ms Banton's criticism is that the dismissal letter does not inform the claimant of her right to appeal. That is correct and it would clearly have been far better if the dismissal letter had contained that notification. However, the right to appeal is contained in the policy, which is available to all employees, so in that sense the claimant had already been informed of her right to appeal. We do not, therefore, find that there was a breach of the ACAS Code in itself. Furthermore, the fact that the right to appeal is in the policy and the fact that the claimant was clearly aware of her right to appeal such that she did put in an appeal only a week after the hearing at which she was dismissed leads us to conclude two things. First, even if the failure to include information about the appeal in the dismissal letter was a breach of the ACAS Code, it was not an unreasonable breach of the Code; and it is only unreasonable breaches of the Code which trigger the tribunal's obligation to consider making an uplift to compensation; no uplift in compensation is therefore made. Secondly, those facts also mean that the failure to inform the claimant about her right to appeal in the dismissal letter is not so serious as to render the overall dismissal unfair.

Summary

244. We appreciate that there have been a lot of points which we have had to cover on the issue of reasonableness. However, in summary, on only one point (the specific breach of the respondent's disciplinary/performance policy) do we consider that there was a failure which rendered the dismissal unfair and, in

relation to that failure, we made an adjustment to compensation under the principles in Polkey which reduced the compensatory award for unfair dismissal to zero.

Breach of contract/wrongful dismissal

245. The claimant's case that the respondent breached her contract by paying her only salary in lieu of notice is predicated on the assertion that the relevant employment contract which applied at the termination of her employment was the 2009 contract rather than the 2013 contract because she did not receive the 2013 contract.

246. However, as set out in our findings of fact above, we found that the claimant did receive the 2013 contract and that that contract was the applicable contract at the time of the termination of her employment. The respondent terminated that contract in accordance with its terms. There was therefore no breach of contract and the claimant's complaint of breach of contract/wrongful dismissal therefore fails.

Disability

247. There is no dispute that the claimant had each of the three conditions which she relies on as disabilities, namely sciatica, endometriosis and asthma; the dispute is as to whether any of them or the three of them cumulatively amounted to a disability for the purposes of the Act.

248. We have made extensive findings in relation to each of the three conditions in our findings of fact above and do not repeat those here. We also reiterate our skepticism about the contents of the claimant's impact statement given our findings about the reliability of her evidence (including many aspects of her evidence which related to her conditions). We also remind ourselves that the burden of proof is on the claimant to show that she was disabled at the material time.

Sciatica

249. The evidence which we have seen indicates that the claimant has had a number of episodes of back pain over a period of time. However, one of those, in July 2017, came as a result of lifting a heavy box of wine rather than sciatica. Secondly, an episode in February 2019 followed the claimant's packing luggage and whilst she has in relation to that episode referred to "sciatic pain", she has not proven that it was related to sciatic pain. The earliest episode, from February/March 2017, whilst it was dealt with relatively quickly, included a reference from the claimant's GP in relation to whether she should have physiotherapy that *"this is not necessary usually in the early days of sciatica"*. We consider that that is enough to amount to a diagnosis of sciatica. We are satisfied therefore that she had the impairment of sciatica.

250. We also note that, in conjunction with Ms May, a number of adjustments were put in place for the claimant in relation to her back problems, including an

adjustable desk. Notwithstanding, therefore, the episodic nature of the flare ups (and the fact that some of them were related to other things like lifting wine boxes), we consider that the need for these adjustments is evidence enough that the impairment of sciatica had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities; it was certainly more than minor or trivial, which is the definition of substantial for these purposes, and it was corrected by adjustments without which the claimant may have struggled to do at least some of the normal day to day activities of her job. Furthermore, it had carried on for well over a year by the time of the claimant's dismissal.

251. We therefore find that, at the time of the alleged discrimination (the claimant's dismissal), the claimant was a disabled person by reason of sciatica.

Endometriosis

252. Again, there is no dispute that the claimant had endometriosis. However, the evidence indicates that the reason why the claimant was absent from work was because she was recovering from surgery; this is what is reflected in the medical evidence. Whilst we have no doubt that the symptoms she suffered during this period were very unpleasant, the claimant has not proven that her endometriosis (as opposed to her need to recover from the surgery) has an ongoing substantial adverse effect. For this reason, the claimant has not proven that such an effect has lasted or is likely to last more than a year.

253. We do not, therefore find that the claimant was at any stage disabled by reason of her endometriosis, including at the point at which she was dismissed.

Asthma

254. The claimant has been diagnosed with asthma. However, we refer again to our findings of fact above. On the evidence before us, the claimant has not proven that her asthma has a substantial adverse effect on her, let alone that that effect is long-term. In terms of the effect, we note that her records, albeit from September 2020, state quite the contrary, namely that asthma is not limiting her activities.

255. We do not, therefore, find that the claimant was at any stage disabled by reason of her asthma, including at the point at which she was dismissed.

Cumulative effect

256. We accept Ms Eddy's submission the this is not a case where we are in a position to make an assessment as to the "cumulative effect" of these impairments on the claimant's day-to-day activities. We accept that, from the evidence we have seen, the impairments are entirely unrelated.

257. We do not, therefore, find that the claimant was at any stage disabled by reason of the cumulative effect of her conditions, including at the point at which she was dismissed.

258. Even at this stage of our analysis, therefore, the claimant's disability-related complaints could only succeed on the basis of sciatica as a disability, as that is the only condition which we have found amounted to a disability.

Knowledge of disability

259. Although we have found that only sciatica amounted to a disability for the purposes of this claim, we analyse for completeness' sake the issue of knowledge of disability as if the claimant was disabled by reason of all three conditions.

260. We accept Ms Eddy's arguments that the respondent did not have the requisite knowledge of the material facts constituting the alleged disabilities.

261. The respondent had had three occupational health reports on the claimant, in respect of two different medical issues (her back pain and her ovarian cystectomy). None of these suggested that there would be a substantial adverse effect on the claimant's daily activities. Although we recognise that the question of whether someone is disabled is a question for the tribunal rather than for a medical practitioner, these reports, which express an opinion, indicated that the practitioners in question did not consider that the claimant was disabled for the purposes of the Act.

262. The respondent was aware that the claimant had issues with her back. However, it did not know that this was having a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. It did not have knowledge of the GP records at the time. Although Mr Young did not know about the adjustments made for the claimant in relation to her back, this was something which the respondent's HR department were aware of because they authorised those adjustments after the claimant had discussed them with Ms May. However, knowledge that certain adjustments are in place is a very different thing from knowing that the claimant had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities which was corrected by those adjustments. The respondent did not, therefore, have knowledge that the claimant was disabled by reason of her sciatica nor could it reasonably be expected to know that. Therefore, any complaint based on sciatica also fails.

263. As to endometriosis, both occupational health reports (and the claimant's sick certificates) suggested, in terms, that the claimant's symptoms were connected to her recovery from surgery. It is therefore unsurprising that the conclusion reached in the occupational health report was that the adjustments would only be temporary. Even if the claimant had, therefore, been disabled by reason of her endometriosis, the respondent did not have knowledge of it nor could it reasonably be expected to have such knowledge.

264. Similarly, the respondent did not have any knowledge of the claimant's asthma or any knowledge of if or to what extent it had any impact on her day-to-day activities. Therefore, even if the claimant had been disabled by reason of

her asthma, the respondent did not have knowledge of it nor could it reasonably be expected to have had that knowledge.

265. Although all of the disability complaints fail on the basis of the combined findings made above on the issues of disability and knowledge, we nonetheless go through those complaints for completeness' sake.

Direct disability discrimination

266. There is no evidence beyond assertion to support this complaint and, as Ms Eddy noted in her submissions, this allegation does not appear to have been seriously pursued by the claimant in these proceedings.

267. The claimant relied on one comparator, Comparator A. For the reasons set out in our findings of fact above, Comparator A is not an appropriate comparator.

268. Even taking into account a potential hypothetical comparator, there is no evidence before us to suggest that the decision to dismiss the claimant was in any way because of the claimant's sciatica and/or endometriosis and/or asthma and there is nothing to shift the burden of proof in this respect. By contrast, and without repeating it again, there is an overwhelming amount of evidence that the respondent dismissed the claimant for performance issues and performance issues alone such that, even if the burden of proof had shifted, the respondent would have discharged its burden to show that its reason for dismissing the claimant was in no sense whatsoever because of disability.

269. The direct disability discrimination complaint therefore fails.

Discrimination arising from disability

270. The claimant has set out at issue 12 of the list of issues four things which she says arose in consequence of her disability, namely that she was: unable to work to the requisite standard; unable to accept work outside London, thereby restricting her opportunities; unable to accept client facing work; and/or limited in the work she could do.

271. However, the complaints of discrimination arising from disability fail at the first stage because the claimant was not dismissed for any of these four reasons, in whole or in part. She was dismissed for performance reasons but these were, again in summary, chargeability, lack of "client stickiness", low sales and her difficulties with managing relationships at clients and internally. She was not dismissed for any of the four things which she has set out at issue 12.

272. Again, for completeness' sake, we turn to each of the four issues.

273. It was not the claimant's conditions which meant that she was "unable to work to the requisite standard". Rather, it was a whole range of other issues unrelated to her conditions. The fact that she was "unable to work to the requisite standard" was not something arising in consequence of her disability.

274. As noted, the claimant had agreed a London restriction with HR which was to be a restriction on her first client role which the claimant was, in accordance with the phased return to work, due to begin at the latest by 4 March 2019. This was therefore a restriction which applied for a very limited period, especially in comparison with the much longer period of years which Mr Young looked at when considering the claimant's performance. In any event, because 90% of the respondent's clients in financial services are based in London, it was a restriction easily accommodated by the respondent. Furthermore, even for roles based outside London, the respondent can and will agree arrangements with the client to minimise the travel required or to deploy other members of the team to do the travel. However, it was the claimant's unwillingness to take on roles which stopped her from getting client roles, not this limited periodical travel restriction. Therefore, although the decision to agree this restriction arose from the claimant's recovering from her surgery, it was not what stopped the claimant from getting client work. Furthermore, it was, in any event, not one of the reasons why Mr Young dismissed her.

275. It is not true that the claimant was "unable to accept client facing work". In fact, it was her own case that she was looking for it. The reality was, however, that the claimant turned down lots of opportunities of her own volition; it was not, however, the case that she was unable to accept client facing work, due to her conditions or otherwise.

276. Similarly, it is not the case that the claimant was "limited in the work that she could do", whether due to her conditions or otherwise.

Justification

277. Finally, again for completeness' sake, we find that the respondent was justified in pursuing the legitimate aims identified at issue 16 of the list of issues, namely "ensuring high performance standards from its consulting staff, maintaining its pyramid structure, and being able to provide appropriately resourced, competitive, high quality services to its clients".

278. We accept that these aims are plainly legitimate and that the claimant does not appear to suggest otherwise.

279. In the circumstances and in the light of the serious performance concerns regarding the claimant, it was also plainly proportionate for the respondent to dismiss her in pursuit of these legitimate aims. To retain her, given the performance concerns, would drive a coach and horses through the respondent's policy of trying to ensure these legitimate aims.

<u>Reasonable adjustments</u>

280. The PCP relied on by the claimant is the application of TAL as an indicator for the period for which employees are expected to be in a particular role before progressing to the next level. There is no dispute that the respondent uses TAL as an indicator.

281. The substantial disadvantage which the claimant contends that the use of TAL as an indicator put her at is "not being able to satisfy the unadjusted requirements of the metric". However, we accept Ms Eddy's submissions that using TAL as an indicator did not put the claimant a substantial disadvantage in comparison with non-disabled persons, for a number of reasons.

282. TAL is used only as an indicator. It is not a metric that employees were required to satisfy and it did not, in and of itself, drive performance decisions. As we have found, there were a number of employees retained by the respondent who were above their guideline TAL. Secondly, it was not the fact that the claimant was approaching her guideline TAL that caused the respondent to dismiss her; rather it was the fact that she had multiple significant performance issues. If she had been a good performer, it is unlikely that she would have been dismissed.

283. In addition, the TAL metric had in fact been adjusted for the claimant's case, for her extended leave of absence to pursue charity work, where she had had the advantage not only of a discount for the year when she was away but also for a further year to reflect any difficulties she may have had adjusting back to client work after the year's leave of absence. In real terms, therefore, by the time she was dismissed, the claimant had been at Manager level for almost 6 years.

284. Further, and importantly, in assessing her performance, the respondent focused only on the periods of time when the claimant was in the business. Therefore, even though the TAL metric was not adjusted to reflect the time in late 2018 and early 2019 when the claimant was away on sickness absence, the respondent did not focus on that period in assessing her so the fact that the TAL was technically not adjusted did not put the claimant at a substantial disadvantage.

285. The reasonable adjustments complaints therefore fail at this stage for those reasons.

286. In the context of the claim pleaded, some of the adjustments sought by the claimant at paragraph 18 of the list of issues are somewhat bizarre.

287. First, the claimant suggests varying and/or waving the performance standards required of the claimant. That would not alleviate any alleged substantial disadvantage because of the use of the TAL metric. It can't therefore be a reasonable adjustment. The same applies to "extending time for the claimant to achieve the required standards". As already set out above TAL is not what determines the point at which someone is either dismissed or promoted and, if someone is performing well, they may remain at their current level well in excess of their guideline TAL or, if they are not performing, they may be dismissed well before they get to their guideline TAL. TAL is not the issue. What the issue is is whether someone is performing. The other adjustments suggested by the claimant are to do with altering levels of chargeability required, levels of sales required and the level of "skills and potential required". Again, these are

nothing to do with TAL per se and such adjustments would not have had a bearing on the claimant's TAL.

288. Therefore, as none of the claimant's proposed adjustments are "reasonable", the complaints fail for these reasons too.

Time limits

289. As noted, the reasonable adjustment complaints, which were introduced as a result of an amendment application granted on 11 May 2020, were prima facie presented well out of time. As there are no successful "in time" complaints which might form the basis of argument that the reasonable adjustments complaints amount to conduct extending over a period, the reasonable adjustments complaints were presented well out of time.

290. We turn therefore to the question of whether it is just and equitable to extend time. We remind ourselves that the burden of proof is on the claimant. No argument has been put to us as to why the claimant did not bring the reasonable adjustments complaints within the tribunal time limit and why it would be just and equitable for us to extend time. We do not, therefore extend time. The tribunal does not therefore have jurisdiction to hear the reasonable adjustments complaints and they are struck out.

<u>Direct race discrimination</u>

291. There is no evidence beyond assertion to support this complaint. As noted, the complaint took a further surprising turn with the claimant's assertion out of the blue in cross-examination that the decision to dismiss was in fact taken by Ms Wintle and that Ms Wintle had been motivated by "unconscious bias" against those with Indian ethnicity. We have already rejected that allegation, which has no evidential basis to it whatsoever.

292. The claimant relied on all six comparators in relation to this complaint. For the reasons set out in our findings of fact above, none of these comparators are an appropriate comparator.

293. Even taking into account a potential hypothetical comparator, there is no evidence before us to suggest that Mr Young's decision to dismiss the claimant was in any way because of the claimant's Indian ethnicity and there is nothing to shift the burden of proof in this respect. By contrast, and without repeating it again, there is an overwhelming amount of evidence that the respondent dismissed the claimant for performance issues and performance issues alone such that, even if the burden of proof had shifted, the respondent would have discharged its burden to show that its reason for dismissing the claimant was in no sense whatsoever because of her race.

294. The direct race discrimination complaint therefore also fails.

Next steps

295. The only one of the claimant's complaints to succeed was her complaint of unfair dismissal. However, in the light of the Polkey finding which we have made, the parties are now in a position to calculate and agree the amount of the award payable by the respondent the claimant. This will comprise the basic award for unfair dismissal only.

296. We do not therefore propose to list a remedies hearing at this stage, in anticipation that the parties will be able to agree this amount very swiftly and confirm to the tribunal that the case is settled/withdrawn.

297. However, if the parties are unable to do so, they are ordered to provide to the tribunal, no later than four weeks from the date when this judgment is sent to the parties, their dates to avoid over the next six months for a one day remedy hearing.

8 July 2022

_____

Employment Judge Baty

Judgment and Reasons sent to the parties on:

08/07/2022.

For the Tribunal Office