EMPLOYMENT TRIBUNALS

Claimant: Mr John Gillies

Respondent: Network Rail Infrastructure Ltd

Heard at: London Central Employment Tribunal (in person)

On: 17, 18, 19, 20, 23 and 24 January 2023

Before: Employment Judge E Burns
Mr S Godecharle
Mr D Schofield

Representation

For the Claimant: Sam Healy, Counsel
For the Respondent: Sebastian Purnell, Counsel

JUDGMENT

The unanimous judgment of the Employment Tribunal is that the Claimant's claims fail and are dismissed.

REASONS

THE ISSUES

1. The issues to be determined were discussed and at the start of the hearing. Some amendments were agreed at the start of the hearing. The agreed issues were as set out in the appendix to this judgment.

THE HEARING

2. The Claimant gave evidence. He also called David Barnes, a Programme Engineering Manager for the Respondent and union representative for the TSSA union to give evidence on his behalf.

3. For the Respondent we heard evidence from:

   - Cameron Thick, Financial Controller (Sussex & Property)
   - Charlie Walker, Senior Network Delivery Manager
   - Ed Salmon, Programme Manager – Joint Industry Efficiency & Collaboration
   - Zubair Kari, former Senior Finance Business Partner
   - Mark Smith, Head of Human Resources, Kent Route Managed Stations and Chief of Staff
   - Naomi Roycroft, former Finance Director

4. Ms Roycroft's statement had been served late, and the Claimant objected to it being admitted in evidence. We heard submissions from both parties and decided to allow it in. We gave oral reasons for our decision.

5. There was an agreed hearing bundle which grew to 811 pages when an additional document was admitted into evidence during the course of the hearing with the agreement of the parties. We read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision in brackets below.

6. Both parties provided helpful written closing submissions and we thank them for this.

FINDINGS OF FACT

7. Having considered all the evidence, we find the following facts on a balance of probabilities.

8. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

Background

9. The Respondent owns, operates and develops the UK's national railway infrastructure. It is a large employer with around 38,000 employees nationally, a large HR function (250 people in total) and an in-house legal department.

10. The Claimant commenced employment with the Respondent on 30 May 2000 (129). At the material times for the Tribunal's purposes, he was employed as a Finance Business Partner. This was a Band 4 role. The Respondent's banding system has eight bands with Band 1 being the highest.

11. The Claimant's date of birth is 2 November 1961 (7).

12. The Respondent has a Grievance Policy and Procedure (149 - 154) and a Performance Improvement Policy and Procedure (155 – 162).

13. In addition to the Performance Improvement Procedure, it has an annual appraisal process. Called a performance review process, its employees should have an interim review in or around September each year and an annual performance review in or around April each year. Employees are given one of five performance ratings which could be:

    - Outstanding
    - Exceeded
    - Good
    - Partially Achieved (this was renamed in March 2013 from Performance Improvement Required)
    - Significant Performance Improvement Required

    There is also an alternative for employees new in post which is "Developing in role".

14. The Respondent encourages line mangers to raise performance concerns with employees as soon as they occur. The thinking is to ensure that anything said at an appraisal does not come as a surprise. Where an employee is not performing to the required standard, he or she will be put on a Performance Improvement Plan (PIP). This may arise as a result of a low performance rating at an appraisal, but can equally arise at any time outside the appraisal process.

15. The Claimant had several line managers during the period with which the Tribunal was concerned, as follows:

    - In 2018 / 2019 he was line managed by Rebekah Baldock. When Ms Baldock was absent on maternity leave, he was managed by her maternity leave cover, Karrar Alizaza.

    - He transferred into the wider group managed by Naomi Rycroft, Finance Director (Band 1) in June 2020 and was line managed by Debbie Brown, Senior Finance Business Partner (Band 3). Ms Brown reported to a line manager who reported to Ms Rycroft. Ms Rycroft reported to Peter Austin.

    - Cameron Thick moved into Ms Rycroft's group as the Financial Controller (Band 2) in April 2021. He was responsible for line management of the Claimant's line managers.

- Olga Kyrpo, Finance Business Partner, acted up as the Claimant's line manager for a period of 10 weeks form early June 2021 to 16 August 2021

- Zubair Kari, Senior Finance Business Partner (Band 3) 16 August 2021 to around mid-October 2021.

- Ed Salmon, Senior Finance Business Partner (Band 3) officially managed the Claimant from 8 November 2021 to 10 January 2022. There was a handover period from mid-October to 8 November 2021 however, where he began to take the role over.

- Cameron Thick took over direct line management of the Claimant between from 10 January to 31 January 2022.

2019 Grievance

16. Between 3 April and 16 December 2018, Mark Smith, now Head of Human Resources Kent Route Managed Stations and Chief of Staff was seconded as Head of Human Resources to the Infrastructure Projects department where the Claimant worked.

17. Ms Baldock, the Claimant's line manager at the time, sought Mr Smith's advice about the Claimant's performance, which she considered to be poor, and with regard to setting objectives for the Claimant for the year 2018/2019. Ms Baldock had set objectives for the Claimant in April 2018, but he objected to them because he thought they were outside the scope of his role and was refusing to sign them off. In June 2018 Ms Baldock asked Mr Smith to review the objectives which he did. He considered them both to be reasonable and in the scope of the Claimant's role and attended a meeting with the Claimant to explain this to him.

18. On 13 August 2018, the Respondent wrote to the Claimant to inform him that allegations of misconduct had been made against him. The allegations were connected to his ongoing refusal to sign off his objectives (183).

19. In early September 2018, Ms Baldock asked Mr Smith to attend a meeting with her and the Claimant to help communicate the objectives to him. The Claimant objected to Mr Smith's attendance and the meeting did not take place (795-796 and 761-762). The Claimant wrote to Mr Smith at the time expressing concerns about Ms Baldock's conduct towards him, but nothing further came of this.

20. Mr Smith's secondment finished in December 2018 and he moved into a different HR role in an entirely different part of the business.

21. On 13 December 2018, Ms Baldock gave the Clamant a 'partially achieved' rating at his interim performance review for the year 2018/19.

22. On 23 January 2019, the Claimant raised a grievance against Ms Baldock and her line manager Hannah Jones (188). He later expanded on the grievance in an email dated 24 April 2019 where he included allegations against Ms Alizaza, which was covering for Ms Baldock's maternity leave (205 – 206). Ms Alizaza had that day conducted his end of year performance review and given him a "partially achieved" rating (591-614)

23. The Claimant's grievance included a complaint that he had been subjected to bullying and harassment by Ms Baldock and Ms Jones, that Ms Baldock had made an unfounded and malicious claim of misconduct against him and that the partially achieved rating was unjustified and should be changed to good. There was also a complaint about Ms Baldock being careless with documents relating to the Claimant sickness absence.

24. The Claimant commended a period of long term sick leave from 12 June 2019.

25. The Respondent followed its grievance process and invited the Claimant to a grievance meeting on 17 October 2019. On 23 October 2019, the Claimant received the grievance outcome. His grievance was upheld on one point, namely relating to the handling by Ms Baldock of documents relating to the Claimant's sickness absence (247). The Claimant appealed against the outcome on 1 November 2019 (255 - 261). One paragraph in his appeal included allegations that he had been subjected to age discrimination (258).

26. The outcome of the Claimant's appeal, delivered to him on 10 February 2020, was that his grievance was partially upheld. The Claimant was found to have been bullied and harassed, although was silent as to whether this was related to the Claimant's age. In addition, it was held that the rating of partially achieved was unjustified and should be changed to good. The manager conducting the appeal did not uphold his complaint that the misconduct case was taken out against him maliciously, but recommended that it be reviewed given that 18 months had elapsed since the disciplinary case was opened (268). The case was subsequently dropped.

27. Mr Smith played no part in the grievance or grievance appeal process and was not aware that the Claimant had submitted a grievance or appeal.

28. The Claimant returned to work from his long term sickness in February 2020. In line with the recommendations made by the appeal officer, he was moved to a different team away from his previous line managers. This led to him becoming a member of Ms Rycroft's wider team in June 2020 under the line management of Debbie Brown.

29. Ms Rycroft spoke to Ms Baldock about what to expect by way of performance from the Claimant, but was not told about the Claimant's grievance by her or anyone else. Ms Rycroft also had a small amount of direct knowledge of the Claimant as she had previously interviewed him for jobs in her wider group. He had not been successful in such applications.

Industry Special Voluntary Severance Scheme

30. In June 2021, the Respondent and a number of other employers in the rail industry, together with the trade unions ASLEF, RMT, TSSA and Unite, entered into an enabling framework agreement ("the Framework Agreement") for the purposes of establishing the Rail Industry Recovery Group ("RIRG") (779).

31. The purpose of the Framework Agreement was to address the efficiency and cost savings required in the rail industry caused by the impact of the Covid-19 pandemic. One of the commitments made by the employers under the Framework Agreement was to commit to not making compulsory redundancies before 31 December 2001, but instead to offer a voluntary leaver's scheme.

32. In August 2021, the Respondent introduced the Industry Special Voluntary Severance Scheme ('the Scheme') (275 – 284). It was not a collective agreement and initially some concerns were raised on the union side about the scheme. Mr Barnes told us that his union the TSSA, initially commenced an Avoidance of Dispute process in relation to the scheme, but this was discontinued.

33. The Scheme Rules were developed at national level within the Respondent. There was agreement at national level with the treasury as to the tax treatment of the severance payments to be made under the Scheme.

34. We note that in the introductory section to the Scheme Booklet, it says the following:

"Rail employers are able to offer a discretionary and time limited opportunity, through this scheme, to individuals who may wish to leave the industry. It is an opportunity, but it is entirely up to you whether you want to pursue it.

If you leave under this scheme, it will be because you have chosen to leave under a mutual agreement to end your employment.

No dismissal and no redundancy would be involved.

If you make a request and it can be accepted, your employer will agree a mutually acceptable leaving date with you. Until you sign an agreement letter bringing your employment to an end by mutual agreement, you can

decide not to proceed with your request and your employment would continue."

35. The Scheme was opened from 10 August to 20 September to all Band 1 to 4's in particular areas of the Respondent's business. It was mainly targeting the functional areas and was opened as an industry wide scheme to help reduce costs post COVID, to assist in government bailout payback and offered as a way to mitigate possible compulsory redundancies as part of rail modernisation (363).

36. It is relevant to note that there were no actual proposed redundancies at this time. There was, however, an understanding that it was likely that some compulsory redundancies may need to be considered at some point in the future.

37. All applications to the Scheme were voluntary. The general approach was that anyone who applied to the Scheme would be accepted unless there was a good business reason not to or that their skills or job role were specialised and difficult to replace. Guidance was developed for Review Panels, which would be responsible for approving applications made by employees, as to the approach to adopt. This included a specific instruction not to give any regard to age, gender, race, disability or any other protected characteristics when reviewing any applications (521).

38. The Scheme documentation produced for employees encouraged them to seek financial advice prior to applying to the Scheme (pages 280). In addition, two sets of Frequently asked Questions and Answers were produced. One set on 23 September 2021 (286) and the second set on 26 October 2021 (300). Both reinforced the point that applications to the Scheme could be withdrawn at any time up to the point when a binding agreement had been reached.

39. Mr Smith was the people lead for the Management Modernisation Programme for the Scheme for the Southern Region. This meant he facilitated the Scheme application process by sending the names of eligible applicants to the appropriate teams who would make the decision on whether or not to accept the application. He played no part in the decision making, however, as to which applications should be accepted.

40. There was no target or quota for the numbers the Respondent wanted to lose via the scheme. We were provided with various statistical analyses as to the proportion of applications that were accepted and rejected. Based on Mr Smith's written evidence, out of 90 applications, 70 were accepted. Proportionally more applications were made by older employees (59+), but a number of younger employers (including those under 30) also made applications which were accepted. In addition. We have seen evidence of applications being refused from older employees. We note that Ms Rycroft

left under the scheme aged 34 having worked for the Respondent for 12 years.

41. Managers were asked to brief members of their teams about the Scheme, but the guidance for managers was that it was a personal decision for their staff as to whether they applied or not.

Respondent's Conversations with the Claimant About the Scheme

42. All eligible employees were briefed about the Scheme in groups according to management level. Although the Claimant was on annual leave, he joined the applicable group briefing for him on 9 August 2021 remotely.

43. On 16 August 2021, Mr Kari took over as the Claimant's line manager. He had been promoted to the position of Senior Finance Business Partner following a competitive process. The Claimant has also applied for the role and been interviewed by Mr Thick on 21 April 2021, but had not been successful (461 – 462).

44. The Claimant and his new line manager Mr Zubair Kari had an introductory meeting by telephone on Mr Kari's first day. The Claimant was working from home at this time due to the pandemic. Neither made a note of what was said on the call.

45. It is not in dispute that Mr Kari asked the Claimant if he was aware of the Scheme during this conversation. Mr Kari had been asked to ensure that all members of his team were aware of the Scheme.

46. The Claimant says that Mr Kari also asked the Claimant if he had applied for the Scheme. Mr Kari denies this. We consider it unlikely that Mr Kari would have asked the Claimant if had applied as the Scheme had only just been launched and it would have been too early to expect employees to have made applications. We therefore find that he did not ask him this.

47. We note that we do not take the view that the Claimant's evidence was deliberately embellished. We found him to be a sincere witness, but one whose recollection has been altered by the subsequent events. This was also the case on other occasions when we did not accept his evidence, although we record that we considered each occasion separately rather than reach any sweeping conclusions.

48. Mr Thick, Mr Kari's line manager, also rang the Claimant to speak to him about the scheme in the week beginning 16 August 2021. Mr Thick believed the Claimant had not attended the initial briefing because the Clamant had been on annual leave on 9 August 2021. Mr Thick also rang and spoke to two or three other employees who he believed had not been present at the initial briefing. Neither Mr Thick nor the Claimant made a note of what was said when they spoke on the phone.

49. The Claimant told us that even though he told Mr Thick that he was aware of the Scheme, Mr Thick proceeded to talk to him about it. We find this did occur. The Claimant did not ask Mr Thick to stop talking about the Scheme.

50. There was a dispute between Mr Thick and the Claimant as to what was said during the call. The Claimant told us that Mr Thick encouraged him to apply for the Scheme by saying, words to the effect of "*Why not apply, you never know you might get accepted. Then you could even comeback and join as a contractor. Just a thought?"* Mr Thick denied encouraging the Claimant to apply and told us that he did not say this. Mr Thick told us he merely wanted to ensure that the Claimant was aware of the Scheme and give him the opportunity to ask any questions about it.

51. Our finding was that Mr Thick's recollection of what was said was accurate. This was because under the rules of the Scheme, no-one who left with a voluntary severance payment could return to work for the Respondent within two years of leaving (282). We consider it unlikely that Mr Thick would have suggested the Claimant consider something that was contrary to the Scheme rules.

7 September 2021

52. On 7 September 2021, the Claimant and Mr Kari had a catch up meeting (285). This was the first time the Clamant had returned to the office since 20 March 2020. Although the Claimant had had the introductory telephone call with Mr Kari, he and Mr Kari had not met face to face as line manager and direct report before this date.

53. The meeting was initiated by Mr Kari and he took the Claimant to a private breakout area to conduct the meeting. This was a proper use of the breakout area. Had Mr Kari not taken the Claimant to the breakout area, the meeting would have been in the open plan area which was not where such meetings were meant to take place.

54. The meeting was relatively brief and lasted between ten and twenty minutes.

55. Mr Kari did not send the Claimant an agenda or any paperwork prior to the meeting. Neither the Claimant nor Mr Kari made notes of what was said at the meeting. On the same day of the meeting, the Claimant emailed his union representative, Dave Barnes. In that email he said:

Hi Dave

Today I am back in the office for the first time since 20th March 2020, now at Puddle Dock; and I was asked to have a catchup meeting with my manager. The meeting consisted entirely of asking me about how old I am, what was I going to do about retirement, and have I been thinking about VS?

the entire meeting was about nothing else, certainly not my work. And this isn't the first time I've been approached on this matter.

Now, it so happens I have been looking at options; but surely this is not ethical, especially with all our diversity and inclusion initiatives? I just think it is rather a clear indication of what they are working on behind the scenes.

I wondered if this is common practice, and thought it might be useful in your wider dealings in the company, or possibly even develop further? (810-811).

56. The Claimant told us that in addition to asking him about his age and retirement plans and whether he would be applying under the Scheme, Mr Kari said the Respondent was looking to recruit 'more fresh young talent', due to the workload of the firm becoming more demanding and difficult and more like a private rather than a public sector organisation. He also told us Mr Kari had informed him that another employee, Gary Millard, was not intending to retire until he was 67.

57. In his written witness statement prepared for the purposes of the hearing, Mr Kari said the purpose of the meeting was to get to know the Claimant as his new line manager and that they discussed "*his background and experience as well as his objectives, plans and development opportunities*." He told us that he had similar meetings with the other two members of the team.

58. He accepted that he mentioned the Scheme, but said this was because he had been asked to do so by Mr Thick. He also said:

"I know [the Claimant] says that I asked him how old he was during this meeting. I most definitely did not. Neither did I ask [the Claimant] if he had retirement plans. [the Claimant's] age wouldn't have played a part in any of my thinking. John said he was aware of the Scheme. He didn't ask me any further questions about it at that time, and I made no further mention of it either.

I did not ask [the Claimant] if he intended to apply for the Scheme. I did not ask John intrusive questions or put him under duress or pressure to apply to the Scheme. Further, I did not say to [the Claimant] that [the Respondent] was looking to recruit "more fresh young talent" or that workloads were expected to become more difficult and demanding similar to those expected in private companies".

59. When giving his oral evidence to the Tribunal, Ms Kari significantly changed his evidence. He said that he had asked the Claimant how old he was and discussed his possible retirement with him. He said that in discussing the Claimant's career development plans, the topic of when he might retire had arisen naturally and it was the Claimant that raised it. He admitted that as

part of that discussion he had asked the Claimant his age. He denied making the other comments attributed to him by the Claimant, however.

60. Our finding, based on a balance of probabilities, was that during a discussion about his career plans and whether he was thinking of making an application under the Scheme, the Claimant himself mentioned his retirement and Mr Kari asked him his age. However, we do not find that Mr Kari went on to ty to encourage the Claimant to make an application under the Scheme by making the other comments.

61. We have given careful consideration to this finding before making it because of the change in Mr Kari's evidence. In reaching our conclusion we have taken into account that change in evidence.

62. We note that Mr Kari ceased to be the Claimant's line manager in around mid-October 2021 and left the Respondent altogether in April 2022. We were told by Mr Walker, who later investigated the Claimant's grievance, that it was quite difficult to get any details from him about what he said. Mr Kari told us that, until he appeared at the hearing, he did not really take the matter very seriously and that he intended his previous denial to relate to him having acted inappropriately rather than the specific words he had said. We did not find this explanation particularly convincing.

63. However, the primary reason we made the factual finding we made was because we considered that had Mr Kari said the things the Claimant attributed to him, the Claimant would have referred to this in his email to Mr Barnes.

64. In addition, we note that when asked under cross examination, Mr Kari was able to give a fair amount of accurate detail about what he learned about the Claimant's career with the Respondent at the meeting. This included that the Claimant had applied for promotion several times, but had not been successful, including applying for his role and that he had a keen interest in developing his expertise in using a particular piece of software. This was consistent with the purpose of the meeting being a genuine meeting whereby Mr Kari could meet the Claimant face to face for the first time and get to know him a bit better.

10 September 2021 – Interim Performance Review

65. Three days after the face to face meeting with Mr Kari, the Claimant attended a mid-year performance review with him and Ms Kyrpo via video. The meeting was conducted by them both because Mr Kari was so new to being the Claimant's line manager. The Claimant filled in a Performance Management Objective Setting and Review Form (the "Form") and sent it to Mr Kari and Ms Kyrpo prior to the meeting.

66. Prior to the meeting, Ms Kyrpro spoke to Ms Brown, the Claimant's previous line manager to obtain feedback from her about the Claimant's performance earlier in the year.

67. In addition, Mr Kari met with Mr Thick. Mr Thick advised Mr Kari to give the Claimant a 'partially achieved' rating which he duly did. Mr Thick's reason for this rating was because the Claimant had missed some deadlines in July which had caused Ms Kyrpo a great deal of stress. She had spoken to Mr Thick at the time. In addition, Mr Thick considered that the quality of the Claimant's forecasting was lacking and that his performance was not at the same standard as his peers.

68. Mr Kari told the Claimant he was being given a 'partially achieved' performance rating towards the end of the meeting. The Claimant was upset by this. He thought his performance merited a 'good' rating. We note that the Claimant's previous ratings had all been 'good' or above, save for in 2015 and 2019. The Claimant had successfully challenged the previous 'partially achieved' ratings and they had been converted to 'good' ratings.

69. The Claimant asked Mr Kari to justify the rating. Mr Kari cited the three reasons given to him by Mr Thick, but did not provide any evidence to support this assertion. As far as the Claimant was concerned, he had not had any negative feedback prior to the interim review meeting and therefore the rating came as a surprise to him.

70. Mr Kari sought to reassure the Claimant that it was a mid-year rating and that he would support the Claimant to try and improve his performance over the following six months. The Claimant then accused Mr Kari of deliberately giving him the rating to put him under pressure to apply under the Scheme and said that he would be raising a grievance about the rating. The meeting came to an end.

71. Although he was meant to complete the line manager's comments on the Form relatively quickly after the interim performance review meeting and provide the Form to the Claimant, Mr Kari did not do so. He told us that he completed it later and sent it to Mr Thick. Mr Thick confirmed this was the case, although the Claimant did not see the completed Form until it was disclosed to him through the litigation, after his employment had ended and after his appeal. Our finding is that the relevant section on the Form was completed contemporaneously.

72. The completed section of the Form said:

"Interim review: [the Claimant] is keen on the use of power BI and Python and has a good understanding and has developed himself well in these areas. However there does need to be an improvement in core finance tasks. As per previous manager communications there have been a couple

incidences of missed deadlines which need to be worked on. Performance at key times in finance i.e. re-forecasting periods need to be improved and have a better understanding and explanation of area numbers, including future years. Needs to take more of a lead on efficiencies which is one of our key objectives and find where we can make savings to tackle efficiency gap. It has been communicated that small steps of improvement are needed and [the Claimant] is capable of doing so in order to improve performance rating in the few months." (626)

73. The Claimant raised concerns about the rating when he raised his subsequent grievance. The manager who dealt with his grievance appeal, Louise Greaves, investigated these concerns by interviewing Ms Kyrpo on 6 May 2022 (431 – 435). During that interview, Ms Kyrpo confirmed that in her time of manager the Claimant she had noticed that her level of performance and that of their third team member was higher than the Claimant's and the Claimant needed additional support. She confirmed that Mr Kari justified the rating he had given the Claimant by reference to missed deadlines, but said that he had not given enough emphasis to this and explained that the team were unable to compete projects properly because the Claimant had not done what he needed to do. Ms Kyrpo also told Ms Greaves that Ms Brown had also not been surprised at the rating and had told Ms Kyrpo that the Claimant "*needed to wake up and get to [her] level and to [the third team member's] level*" as they could work on their own but he couldn't.

74. We note that in April 2021, Ms Brown had rated the Claimant as 'good'. In the line manager's comments section, she had said:

"[The Claimant] joined the team in June as part of the PPF changes and he ahs made a huge effort to fit in with the team and to build relationships with the Kent Ops team, which the Kent team appreciate. I know doing Opex has been a new challenge but [the Claimant] worked well with [the third team member] to get up to speed to get the budget done." (617)

75. Ms Roycroft told us that at the performance rating calibration meeting that had taken place following the end of year performance reviews for 2021, there had been a discussion about the Claimant's performance. Although the decision was not to downgrade his rating, it was noted that he was not working at the same level as his peers.

Claimant's Application under the Scheme

76. On 16 September 2021, the Claimant made an on-line application to be considered under the Scheme (333). He applied on the basis that nothing was binding at that stage.

77. The Claimant told us that he put in his application because he believed that his managers wanted him to leave and that he would be taken through an

unfair performance management process or have to challenge the partially achieved rating via the Respondent's grievance process if he stayed.

78. The Claimant's Scheme application was processed and forwarded on to the relevant team. This involved an initial local review by one of several local review Panels set up for this purpose. Once passed through the local review, the next stage was consideration by the executive Review Panel. In the Claimant's case the local Review Panel met and approved his application on 27 September 2021. The executive Review Panel met and approved it on 4 October 2021. We note that neither panel were given information about the applicants' age when considering their applications.

79. A copy of the Claimant's Review Panel Form was included in the bundle (297 – 299). We note that the questions and responses on the form were as follows:

Question	*Recorded on the Form*
Does the individual possess skills, expertise and knowledge that will impact our ability to deliver a safe service to our customers if VS is granted?"	*No*
Does the individual possess a skill that is trainable within a reasonable timescale? (3-6 months deemed reasonable)	*Yes this role could be replaced with another qualified accountant & could be trained within 3-6 months to cover the basics.*
Is there a successor for this role should VS be approved?	*Yes there are other suitable FBP's that can move into this role.*
Does the individual possess skills (technical/soft) that are difficult or impossible to replace? *NR Behaviours & Values*	*No*
Does the individual currently occupy a recognised Network Rail safety critical role?	*Ni*
Have you received volume requests from those in similar roles within the team/Function/Region/Route that could impact service delivery due to loss of capability?	*No – this is only one of two FBP roles within the K&S Finance team received, the other is being proposed to be rejected as it is a unique skill set related to income.*
Will approval of this application affect any strategic activity which impacts the service delivery to our customers?	*No*
What are the plans for the workload of	*Within the new revised finance*

the current role- holder if VS is agreed?	*structure, there will be displaced FBPs that could move into this role to take on the responsibilities. For example the function FBP's go from 4 to 3.*

80. At the end of the form was a section called "*Rationale".* In this section, the form said:

"This individual is a poor performer, he is long-standing within NR & is not going to progress further & is currently a blocker for other folk within the team. This will also enable us to redeploy other good performers within the team into this role to avoid compulsory redundancies." (299)

81. Although the form was signed by Peter Austin, Finance Director Southern Region and Mr Smith, the comments are the comments of Ms Roycroft. She told us that she understood the Claimant to be a poor performer because of the general feedback she had received from Debbie Brown and Cameron Thick in relation to key finance events such as budget and forecasting and as a result of discussions about the Claimant at performance rating calibration meetings. She was aware that he had been given a partially achieved rating that September. She also had some prior knowledge of him from having interviewed him.

82. In describing him as long standing, she told us that said she simply meant that he had been with the Respondent for a significant period of time and she did not connect this with the Claimant's age. She described herself as longstanding having been with the Respondent for 12 years even though she was 34.

83. She told us she did not think the Claimant would progress further because he had failed to do so to date, despite having applied for promotion several times and this was unlikely to change given his current particularly achieved rating. She also told us that her reference to the Claimant as a "*blocker*" was simply a factual matter as he was blocking other Finance Business Partners from gaining experience in the area he was working in.

84. We note that the Claimant did not see the Review Panel Form until 16 March 2022. It was not envisaged that the Claimant would see the form at the time it was written. Mr Smith confirmed that the Executive Review Panel did not spend a great deal of time scrutinising the forms for employees where they were giving their approval. More focus was given to employees that wanted to leave with a severance, but the Respondent was refusing.

Next Steps

85. Following the Executive Review panel meeting Mark Smith, on 5 October 2021, Mr Smith emailed the Claimant to notify him that his Scheme

application had been approved. The letter he was sent told him that his line manager would meet with him to seek to mutually agree a leaving date. It added that once this had been agreed, the Respondent would request a final payment quote before the Claimant would be asked to formally accept the offer of voluntary severance. The letter concluded by saying:

"If you choose to withdraw from the scheme at this point, please be aware that future phases may not be available to you should you change your mind at a later date." (366)

86. On 12 October 2021, Mr Kari and the Claimant spoke about agreeing a leaving date for the Claimant. They agreed that if he left, his last day of work would be 31 January 2022 after the next budgeting and forecasting exercise would be completed, but this was not at all binding at this stage. Mr Kari emailed Mr Smith to confirm this date to him (367). We note that a final date was needed to generate the actual financial offer that was to be made to the Claimant.

87. On 29 October 2021, Mr Smith sent the Claimant a letter formally offering him the opportunity to terminate his employment under the Scheme (369). The letter included the following:

"*If you accept the offer of voluntary severance, then you will leave your employment with Network Rail by mutual agreement under the terms of the scheme on 31.01.2022, which is the leaving date we have agreed with you. As you will be leaving your employment on a specific date we have agreed, you will not be given notice, or have to give notice, to terminate your employment. You will be required to work as normal from the time you sign this formal agreement until the mutually agreed leaving date." (369)*

88. The Claimant was given 5 working days to respond to the offer. The letter said, "*If you do not return a signed copy within FIVE working days of receipt of this letter, we will assume that you have decided to decline the offer*." (369)

89. The severance offer was for a considerable net payment which amounted to more than the Claimant's net annual salary.

Change in Line Manager

90. The Claimant's line manager changed again in mid to late October when Mr Kari moved to a different role. Although his next manager, Ed Salmon, Senior Finance Business partner was not officially appointed until 8 November 2021 there was a handover period in late October/early November 2021. As part of his handover with Mr Kari, Mr Kari told him about the Claimant's performance rating and that the Claimant had been unhappy with it. Mr Salmon kept a log of any concerns he had with the Claimant's performance.

91. On 3 November 2021 at 16:40, Mr Salmon emailed the Claimant to ask him to work with a colleague to make an urgent adjustment to the headcount forecast he was preparing. The Claimant knew that the adjustment was not needed and replied at 17:13 saying he had left a message with the colleague to call him back. He asked for clarification whether he was required to make the change that evening. Mr Salmon replied at 17:16 to say that it could wait until the morning. The following day, after the Claimant had spoken to the colleague, it was agreed that the adjustment did not need to be made. Mr Thick later apologised to the Claimant to say that he had been mistaken about thinking it needed to happen (771 – 774).

92. Mr Salmon made a record of the difficulties he had getting a response to various attempts to communicate with the Claimant on 3 November 2021 in his log as well as some other instances of concern. When he was about to move to a different role in the week ending 4 January 2022, he emailed his log to Mr Thick (328). This was because Mr Thick was taking over the Claimant's line management. Mr Salmon was also aware that the Claimant had submitted a grievance and referenced this in the email saying, "*With [the Claimant] accepting his VSS offer and due to leave at the end of January I had not raised these formally with [him] as it did not seem necessary. However as a grievance has since been submitted I thought I would send these over so there is a record for you*." (328)

8 November 2021

93. On 8 November 2021 at 13:30, the Claimant emailed Mr Smith saying,

    "*Dear Mark*

    Thank you for the offer of voluntary severance; I have been agonising over making such a life changing decision and am hoping that my application will be accepted?" (374)

94. Unfortunately, the version of the agreement attached to the Claimant's email was not correctly executed. The Claimant had not signed in the correct place. He had also not deleted the option saying he wanted to reject the offer and he had dated the agreement 5 November 2022 rather than 2021. Over the course of that afternoon, via three further emails exchanged with Mr Smith he resolved these problems so that by 17:11 he had sent Mr Smith a properly executed agreement. He backdated his signature to 5 November 2021 (368-386).

95. Mr Smith replied to the Claimant at 17:21 attaching a counter signed agreement (382). The final agreement, signed by both parties is the version contained in the bundle at pages 385 – 386. Mr Smith dated his counter signature as 8 November 2021.

9 November 2021

96. On the following morning, on 9 November 2021, at 05:30, the Claimant emailed Mr Smith asking for his Scheme application to be withdrawn. His email says:

"Dear Mark

I have been in turmoil over my decision on voluntary redundancy as I believe that I am still too young to retire and would miss the social interaction of the workplace and the mental stimulation that it provides. I also enjoy the current work that I am doing. Is it possible that I can withdraw my application that I made yesterday?" (382)

97. The Claimant told us that he had acted in haste the previous day because of the pressure of the deadline of five working days. He reflected on his decision overnight however and changed his mind.

98. Mr Smith replied to him at 10:58 saying the following:

"Hi John

Thank you for your e-mail.

I am sure that this has been a difficult decision but, as has been clearly communicated all the way through, once the letter has been signed, it is binding. Therefore, it stands and your leaving date is 31/01/2022.

Thank you again.

Kind regards

Mark" (381)

99. Mr Smith told us that his reason for refusing the Claimant's request was very straight forward at the time and was purely because it was contrary to the Scheme rules. He explained that when these were being developed, the group doing this work had considered whether they would allow anyone to withdraw from the scheme and decided against this because it would cause an administrative nightmare. He later explained this rationale to Ms Greaves as well as why a different approach was taken with regard to extending the acceptance deadline.

100. She asked him, "*Can you confirm how many VSS application were accepted after the agreed date of the 5th November across Southern Region. Can you confirm if any individual has been successful in retracting their mutual agreement post signing of the VSS offer in Southern region*" and he replied:

"In answer to your questions, some 27 people were accepted after cut off for a variety of reason. For instance, wanted more time to consider, were on A/L, were still gaining independent financial advice, waiting for information from pensions to name the most common. The cut off was not a 'hard' cut off per se, it was to assist in getting them returned in a timely manner to know how many people were accepting VS before the scheme was closed overall.

No individual was able to retract once the final letter was signed as it became binding. The overriding reason for offering the scheme was to allow those who wished to leave the company that opportunity which, in turn, would mitigate compulsory redundancies in the following Management Modernisation programme. As the mutual agreed leave dates could be over an 18 month period, depending on work individuals may be carrying out, to accept a request to withdraw would set a precedence and we could have people withdrawing throughout the Management Modernisation programme effecting the agreed guiderails and putting more individuals at risk of compulsory redundancy. Not to mention, the TU implications that would undoubtably arise." (361)

101. He explained that he knew who the Claimant was when he received the request to withdraw from him, but that his decision was not personal to the Claimant. He told us that he did not speak to anyone about the decision or check any of the paperwork.

102. Although it was thought that other employees might also try and withdraw from the scheme, it transpired that no-one else made such a request to Mr Smith's knowledge.

103. The Claimant also rang Mr Salmon to ask him about withdrawing his application. Mr Salmon offered to check with HR for him. He did this by speaking to Mr Smith. Mr Smith told Mr Salmon it was not possible for the Claimant to withdraw his application and so Mr Salmon rang the Claimant back about this.

104. The Claimant also contacted Mr Barnes about his desire to withdraw his application. On 11 November 2021, Mr Barnes spoke to Peter McCurry, HR Director for the Southern Region about this. He followed the phone call up with an email (759 – 760)

105. Mr McCurry responded the following day in an email in which he said:

"*As we discussed on the phone we allowed 6 weeks for people to make their decisions around accepting the Special Voluntary Severance or not and we made very clear that signing the letter was go/nogo decision point for both sides. As I understand there were a number of e-mails between John and Mark Smith in the 36 hours before he finally signed and I am happy John*

had ample opportunity to withdraw before finally signing the paperwork. I have no view on the conversations that took place but from a process point of view I am not going to unpick any agreements after they have been signed as we need to have certainty and will already have put plans in place. (758 – 759)

Claimant's Grievance

106. On 17 November 2021, the Claimant submitted a grievance about the fact that the Respondent would not accept his withdrawal from the scheme (317 - 320).

107. Ed Salmon, who had been appointed as his line manager on 8 October 29021, met the Claimant on 23 November 2021 to discuss his grievance with him on an informal basis. Mr Salmon summarised the discussions at the meeting in an email he sent to him afterwards. (322-333) The Claimant confirmed he wanted his grievance to be considered formally (321).

108. On 23 November 2021, the Claimant contacted ACAS for the purposes of early conciliation. The EC certificate was issued on 21 December 2021 (6)

109. The grievance was allocated to Charlie Walker, a Senior Network Delivery Manager (Band 2B) to consider. He had not had any dealings with the Claimant previously.

110. A grievance hearing took place via Microsoft Teams on 14 January 2022. The Claimant was accompanied by his trade union representative Mr Barnes. Notes of the meeting were included in the bundle (332 – 335 and 344 to 345). Mr Walker undertook interviews with Mr Smith, which provided him with background information, Mr Salmon (346) and Mr Kari (347).

111. On 21 January 2022, the Claimant presented his first claim to the tribunal.

112. On 31 January 2022, the Claimant's employment terminated.

113. On 17 February 2022, the Claimant wrote to Mr Smith to highlight that he had seen an advert for Finance Business Partners at Blackfriars and that he believed this was his role (339).

114. Mr Walker wrote to the Claimant to tell him that his grievance had not been upheld on 14 March 2022 (348 – 350). The Claimant appealed on 16 March 2022 (352) His appeal was considered by Louise Greaves (Band 1). By this time the Claimant had been provided with a copy of the Panel Review Form and so included reference to this in his appeal. Ms Greaves met with the Claimant (393 – 400 & 425) and undertook further investigations, including interviewing Olga Kyrpo (431 – 435). She did not uphold the Claimant's grievance. She confirmed this outcome to the Claimant at a meeting on 8 June 2022 and in writing on 17 June 2022 (439).

115. The Claimant contacted Acas again on 8 June 2022 and a further EC certificate was issued on 9 June 2022 (74). He presented his second claim to the tribunal on 9 June 2022 (75).

THE LAW

EQUALITY ACT CLAIMS

Direct Age Discrimination

116. Age is one of the protected characteristics identified in section 4 of the Equality Act 2010.

117. Section 39(2) of the Equality Act 2010 prohibits an employer discriminating against one of its employees by dismissing him or by subjecting the employee to a detriment. In subsection 212(1) of the Equality Act, a detriment does not include conduct that amounts to harassment.

118. Section 13 of the Equality Act 2010 provides that 'A person (A) discriminates against another (B) if, *because of* a protected characteristic, A treats B less favourably than A treats or would treat others'.

119. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

120. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

121. We must consider whether the fact that the claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

122. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of age. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.

123. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.

124. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's age. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

125. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd* v *Wong [2005] EWCA Civ 142; [2005] IRLR 258* and we have followed those as well as the direction of the court of appeal in the *Madarassy* case. The decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.

126. The Court of Appeal in *Madarassy*, states:

'*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination*.' (56)

127. It may be appropriate on occasion, for the tribunal to take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).

128. In addition, there may be times, as noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, where we are in a position to make positive findings on the evidence one way or the other and the burden of proof provisions are not particularly helpful.

When we adopt such an approach, it is important that we remind ourselves not to fall into the error of looking only for the principal reason for the treatment, but instead ensure we properly analyse whether discrimination was to any extent an effective cause of the reason for the treatment.

129. Allegations of discrimination should be looked at as a whole and not simply on the basis of a fragmented approach *Qureshi v London Borough of Newham* [1991] IRLR 264, EAT. We must "*see both the wood and the trees*": *Fraser v University of Leicester* UKEAT/0155/13 at paragraph 79.

130. Our focus "*must at all times be the question whether or not they can properly and fairly infer… discrimination*.": *Laing v Manchester City Council*, EAT at paragraph 75.

131. By virtue of the operation of section 13(2) of the Equality Act 2010, direct age discrimination is not unlawful where it can be objectively justified. The burden is on the respondent to prove justification. This involves two questions:

- Can the respondent establish that the measures it took was in pursuit of a legitimate aim that corresponded to a real business need on the part of the employer?

- If so, can the respondent establish that the measures taken to achieve that aim were appropriate and proportionate i.e. did it avoid discriminating more than necessary to achieve the legitimate aim?

(*Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317, *Enderby v Frenchay Health Authority and another* [1994] IRLR 591, *Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 6001)

Harassment

132. Section 40(1)(a) of the Act provides that an employer must not, in relation to employment by it, harass a person who is one of its employees. The definition of harassment is contained in section 26 of the Act

133. Section 26(1) of the Equality Act 2010 provides:

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

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

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

(i) violating B's dignity, or

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

134. A similar causation test applies to claims under section 26 as described above to claims under section 13. The unwanted conduct must be shown "to be related" to the relevant protected characteristic.

135. The shifting burden of proof rules set out in section 136 of the Act can be helpful in considering this question. The burden is on the claimant to establish, on the balance of probabilities, facts that in the absence of an adequate explanation from the respondent, show he has been subjected to unwanted conduct related to the relevant characteristic. If he succeeds, the burden transfers to the respondent to show prove otherwise.

136. Harassment does not have to be deliberate to be unlawful. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the *purpose* of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.

137. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has *the effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must consider the factors set out in section 26 (4), namely:

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that affect.

138. The shifting burden of proof rules can also be helpful in considering the question as to whether unwanted conduct was deliberate.

Victimisation

139. Section 39(4)(d) of the Equality Act 2010 provides that an employer must not victimise its employees. The definition of victimisation is contained in section 27 of the Act.

140. Section 27(1) of the Act provides that:

'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'

141. The definition of a protected act is found in section 27(2).

142. If the tribunal is satisfied that a claimant has done a protected act, the claimant must show any detriments occurred because he had done that protected act. The analysis we undertake is in the following stages:

    (a) we must first ask ourselves what actually happened;

    (b) we must then ask ourselves if the treatment found constitutes a detriment;

    (c) finally, we must ask ourselves, was that treatment because of the claimant's protected act.

143. A detriment can encompass a range of treatment from general hostility to dismissal. It does not necessarily entail financial loss, loss of an opportunity or even a very specific form of disadvantage. In subsection 212(1) of the Equality Act, a detriment does not include conduct that amounts to harassment.

144. The test for detriment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was said that it arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.

145. It is only where the necessary link between the detriment suffered and the protected act can be established, that the claim of victimisation will succeed. The protected act need only be one of the reasons. It need not be the only reason (EHRC Employment Code paragraph 9.10). The shifting burden of proof found in section 136 of the Equality Act and explained earlier applies.

UNFAIR DISMISSAL

Was there a Dismissal?

146. The right to pursue an unfair dismissal claim under the Employment Rights Act 1996 only applies where an employee has been dismissed, as set out in section 95(1). An employee who leaves by reason of a mutual agreement is not dismissed.

147. A binding mutual agreement is formed when the constituent elements of offer, acceptance, an intention to create legal relations and consideration are established. Once a binding mutual agreement has been formed, the general rule is that it can only be terminated in accordance with its terms or by agreement between the parties.

148. Distinguishing between a dismissal and a mutual agreement is not always straightforward. Where an employee enters into an express agreement that provides for his or her employment to terminate by mutual agreement, it is

nevertheless open to a tribunal to find that the termination amounts to a dismissal depending on the circumstances.

149. LJ Waite considered the position where an employee appears on the face of it to be retiring voluntarily, but might treated as dismissed, in the Court of Appeal case in *Jones v Mid Glamorgan Council* [1997] ICR 815 as *follows:*

"At one end of the scale is the blatant instance of a resignation preceded by the employer's ultimatum—"Retire on my terms or be fired"—where it would not be surprising to find the industrial tribunal drawing the inference that what had occurred was a dismissal. At the other extreme is the instance of the long-serving employee who is attracted to early retirement by benevolent terms of severance offered by grateful employers as a reward for loyalty, where one would expect the industrial tribunal to draw the contrary inference of termination by mutual agreement. Between those two extremes there are bound to lie much more debatable cases to which, according to their particular circumstances, the industrial tribunals are required to apply their expertise in determining whether the borderline has been crossed between a resignation that is truly voluntary and a retirement unwillingly made in response to a threat." (818)

150. Although the comments are strictly obiter, we consider they provide a useful and accurate summary of the legal position. The same principle is reflected in the other cases which were drawn to our attention by the parties, namely *Birch v University of Liverpool* [1985] ICR 470, *Optare Group Limited v TGWU* [2007] IRLR 931 and *Sheffield v Oxford Controls Co. Ltd.* [1978] ICR 396.

151. Another helpful case which was drawn to our attention was the Court of Appeal case of *Willoughby v CF Capital plc* [2012] ICR 1038. The case considered the circumstances in which an employee or employer should not be bound by an unambiguous expression of a notice of termination, such as a resignation made in the heat of the moment. We were reminded that, as a general rule, a notice of resignation or dismissal, whether given orally or in writing, had effect according to its terms, as interpreted objectively in accordance with the ordinary principles of contract law. However, exceptionally, the circumstances in which the notice was given might require the recipient, before accepting or otherwise acting on it, to satisfy himself that the giver genuinely intended to bring the employment relationship to an end at the relevant time.

Reason for Dismissal

152. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is "either a reason falling within subsection (2) or "some other substantial reason of such a kind as to justify the dismissal of an employee holding the position which the

employee held." We refer to this latter reason as the "SOSR" reason for the sake of convenience below.

153. The task of identifying the real principal reason for the dismissal rests with the tribunal.

Fairness of a Dismissal

154. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

ANALYSIS AND CONCLUSIONS

Did the conduct occur?

155. We first noted whether, based on our findings of fact, the detriments/ conduct which the Claimant was complaining about occurred.

156. Our factual finding was that Mark Smith was not involved in dealing with the Claimant's 2019 grievance and was not aware that he had made a formal grievance. This was because he had left the business area in December 2018. He was also not aware of the contents of the Claimant's appeal.

157. We also concluded that on 7 September 2021, Mr Kari did not comment that the Respondent was looking to recruit *"more fresh young talent"* and that workloads were expected to become more difficult and demanding similar to those expected in private companies. He did, however, ask the Claimant how old he was and whether he had looked at the Scheme.

158. It was not disputed that on 10 September 2021, Mr Kair gave the Claimant a *'partially achieved'* performance rating. Our finding was that it was Mr Thick who had suggested this rating.

159. The next allegation chronologically was whether in 2021, the Respondent applied undue and inappropriate pressure on the Claimant to apply to its Scheme. Before considering this, we focused on the other allegations as we considered that our conclusions on the other allegations would inform our conclusion on this one.

160. With regard to the Claimant's Panel Review Form, it was not in dispute that it contained the rationale that "*this individual is a poor performer, he is long-standing within NR & is not going to progress further & is currently a blocker to other folk within the team*". Our factual finding was that the form was the

view of Ms Roycroft, based on what she had been told by the Claimant's line managers about the standard of his work and her own knowledge.

161. It was also not in dispute that when the Claimant asked to withdraw his application under the Scheme on 9 November 2021, he was not permitted to do so.

Did the Claimant do a protected act?

162. The Respondent did not dispute that there was a paragraph in the Claimant's grievance appeal for his 2019 grievance that raised concerns that he had been subjected to age discrimination. This was a documented dated 1 November 2019.

Was the conduct because of or related to age / or because of the Claimant's protected act?

163. We next considered whether the conduct that occurred amounted to direct age discrimination, age-related harassment and in the case of the Review Panel Form, victimisation.

7 September 2021

164. Mr Kari asked the Claimant about his age on 7 September 2021 in the same conversation when he discussed the Scheme. His conduct towards the Claimant was therefore related to age. Although, when Mr Kari initiated the conversation about the Claimant's future career plans, it was the Claimant who first mentioned his possible retirement, we do not think he intended to invite Mr Kari to ask him how old he was or to mention the Scheme to him. We therefore find that the conduct was unwanted.

165. We do not consider that the conversation amounted to age-related harassment, however, because in our judgment, what was said by Mr Kari was not done with the purpose of violating the Claimant's dignity, or to create an intimidating, hostile, degrading, humiliating or offensive environment for him. Mr Kari was simply trying to understand his new employee's career development plans and it was natural, particularly in light of what the Claimant had said about his retirement to ask him his age and to mention the Scheme to him. This was a business as usual type conversation that was not undertaken in order to upset the Claimant.

166. We also consider do not consider that what Mr Kari had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. In considering this question we have taken into account the context of the conversation and the Claimant's own perception. We note that although the Claimant reported the conversation to Mr Barnes, he did not say that he had found the conversation upsetting or use any language to describe it that would lead

us to conclude he felt offended or had had his dignity violated. On any event however, it would not, in our judgment, have been reasonable for him to feel that way.

167. Having decided that the conduct did not amount to age-related harassment, for the sake of completeness, we considered whether the conduct amounted to direct age discrimination. In our judgment, the Claimant presented no evidence that the conversation took place because of his age. Mr Kari had similar catch up conversations with each of his direct reports. In addition, in our judgment, the topic of age only arose because it was natural for it to do so given the subject matter of the discussion included getting to know more about the Claimant and his career aspirations. Nothing negative or adverse was said about the Claimant's particular age or age group.

10 September 2021

168. We next considered whether the partially achieved rating was given to the Claimant because of or related to age. We concluded that it was not.

169. The Claimant's case was that the lack of justification for the rating, pointed to it being done to put him under pressure to apply for the Scheme which pressure was in turn because of or related to his age. However, he adduced no evidence, except that there had been a conversation when his age had been mentioned a few days earlier. This was insufficient to establish a prima facie case that there was any link between the rating and his age in our judgment.

170. We consider there was no link between the Interim Performance Review and the Claimant's application to the Scheme. The timing of the Performance Review was in line with the normal review cycle. The rating, one it had been communicated to the Claimant, was not used as a way to put pressure on the Claimant in relation to his Scheme. If the Respondent had intended to pressure the Claimant by highlighting performance concerns, we consider more robust performance management steps would have been taken by it as the Claimant's Scheme application progressed. In fact, nothing further happened. The Claimant was not put on a performance improvement plan and there were no further conversations with him stressing his underperformance.

171. In addition, in our judgment, the Respondent has provided a clear rationale for the rating, that demonstrates that it was based on a genuine assessment of the Claimant's performance rather than anything to do with his age. He had missed some significant deadlines a few months prior to the review and was not working to the same standard as his peers. The view taken by Mr Thick of the Claimant's performance was corroborated by Ms Kyrpo and is reflected in the comments made by Ms Brown in April 2021.

Panel Review Form

172. Turning to the Panel Review Form, we have no doubt that it was difficult for the Claimant to read the comments in the rationale. Prior to seeing the comments, the Claimant suspected that his managers did not fully value him. The comments confirmed this.

173. The comments were blunt and to the point. Unlike the criticisms of his performance that were written in careful language in his Performance Review Form, the comments were not written for his eyes. They were written to enable the Claimant's application for voluntary severance to be accepted.

174. The Claimant has not established any link between the comments and his age or his 2019 grievance.

175. The Claimant's age is not expressly mentioned anywhere on the form. Although there is a reference to him being a long standing employee, the author of the comments, Ms Roycroft, provided an explanation to the tribunal for what she meant by this, which confirmed it had no link to the Claimant's age. Similarly, she explained why she described the Claimant as a blocker. This did not derive from any assumptions made about his age, but from her genuine assessment of his likely chances of being promoted based on her knowledge of his current performance and previous applications for promotion.

176. We do not consider the Claimant has established a prima facie case that the comments were made because of or related to his age, but if we are wrong about this in relation to the references to "long standing" and "blocker", we consider the Respondent has provided cogent evidence for the remarks that has nothing to do with the Claimant's age.

177. With regard to the victimisation claim, as Ms Roycroft was not aware of the Claimant's previous grievance, she cannot have been influenced by it when making the comments in the Panel Review Form.

Decision not to Let the Claimant withdraw From the Scheme

178. We turn now to the decision not to allow the Claimant to resile from him his acceptance of the Scheme. This was a decision made by Mr Smith alone on 9 November 2021, but was backed up two days later by Mr McClurry.

179. We consider that there was in sufficient evidence before us that the decision was made because of or related to age, but in any event the Respondent has provided cogent evidence that its decision was nothing to do with the Claimant's age. The decision was made because of the Scheme Rules.

180. The Claimant has highlighted the fact that the proportion of people who applied for the severance under the Scheme was older. In our judgment,

this does not suggest any underlying age related discrimination. It was to be expected that older and long serving employees would have greater interest in the Scheme because these were likely to be the employees who would benefit the most. In addition, anyone over the age of 55 would be able to start drawing down on their pension if they wished.

181. The Claimant also points to the fact that the Respondent allowed some flexibility in relation to the deadline for accepting the offer, but in turn showed no flexibility to the Clamant regarding his withdrawal. His accusation is that the Respondent used the Scheme rules as a cover for age discrimination when it suited them.

182. We do not find this was the case. The situations regarding acceptance and withdrawal were very different in terms of the Respondent's ability to be able to plan. When drawing up the Scheme rules the Respondent had considered how it would deal with withdrawals. It decided to make it very clear that nothing was binding on either side for several weeks before an formal agreement was entered into, but once that step was concluded, no-one could withdraw.

183. The Respondent envisaged that several employees might accept the offer pending an external job search and then change their minds when they were not successful. Although, as it transpired, the Claimant was the only person who actually asked to withdraw, the Respondent could not know this at the time.

Undue and Inappropriate Pressure

184. We now return to the question as to whether there was undue and inappropriate pressure put on the Claimant to apply for the Scheme. We do not find there was.

185. The Claimant's submissions were that the undue and inappropriate pressure consisted of:

- The initial telephone conversation with Mr Kari on 16 August 2021
- The telephone conversation with Mr Thick that took place in the same week
- The meeting with Mr Kari on 7 September 2021
- The Respondent's decision to give the Claimant a partially achieved rating on 10 September 2021
- Ed Salmon asking him to remove six flight engineers from his budget line on 3 November 2021

186. He also argued that the contents of the Review Panel Form and the Respondent's decision not to allow him to withdraw from the Scheme corroborated his case that the Respondent wanted him to leave and were

putting undue pressure on him at the earlier points in time to apply for the Scheme.

187. We do not consider that the three conversations the Respondent had with the Claimant amounted to undue or inappropriate pressure. In large organisations it is always sensible to make several attempts to communicate significant developments to employees. Two of the conversations occurred shortly after the scheme was opened and then there was an in-person updating conversation a few weeks later. After those three conversations, nothing else was said to the Claimant about the Scheme save for the Respondent confirming his application had been approved and agreeing an end date with him.

188. The Claimant points to the request made to him on 3 November 2021 to make a change to his budget line by a deadline which turned out not to be required. We were unconvinced by this argument. In our judgment, the incident was simply an ordinary business as usual exchange. We note that as soon as the Claimant expressed concerns about having to work late, he was told that the work could wait until morning and then later his colleagues apologised to him for mistakenly believing the change was required.

189. As indicated above, we do not consider that the Respondent gave the Claimant the partially achieved rating in order to put pressure on him to apply for the Scheme, but instead reflected the genuine view that Mr Thick and the Claimant's colleagues had of his performance. We also consider that the comments in the Panel Review Form were genuine. They do corroborate that the Claimant's line managers thought he was a poor performer, but this was their view.

190. The decision not to allow the Claimant to withdraw from the Scheme was made by Mr Smith without consulting the Claimant's managers and therefore cannot be linked to what happened earlier.

191. We do not consider the facts of this allegation to be made out. There was not in our judgment, any undue or inappropriate pressure applied to the Claimant in relation to applying to the Scheme. His claim that this was because of or related to age therefore fails.

Unfair Dismissal Claim

192. It follows from our conclusion there was no undue or inappropriate pressure put on the Claimant to apply for the Scheme, or to accept the offer sent to him on 29 October 2021, that we consider that his employment came to an end by way of a genuine mutual agreement rather than his dismissal. He clearly felt himself to be under a great deal of pressure when making his decision, but this was self-generated and not created by the Respondent.

193. For the sake of completeness, we considered whether the Claimant really intended to bring his employment with the Respondent to an end when he emailed Mr Smith on 8 November 2021 or whether it should have been obvious to the Respondent that this was not his intention that day such that no contract was formed thereby allowing him an opportunity to change his mind.

194. The Claimant told us in his witness statement that he was acting in haste on 8 November 2021 because of the pressure of the deadline and therefore he ought to have been allowed a 'cooling off' period. We did not accept this argument.

195. The Claimant had several weeks to think about his application under the Scheme before being sent the formal offer. He then had two weekends and a full week to decide if he wished to accept the offer. Any pressure he felt to respond to the offer on 8 November 2021 was of his own making.

196. More significantly, we interpreted his communications with Mr Smith on 8 November 2021 as providing a clear indication that, having thought carefully about his position, he had made a decision and was keen to ensure his late response was accepted. He expressly said that he hoped his response would be accepted in his covering email. By his actions, he took care during the course of that afternoon, to ensure that he had executed the agreement correctly so that it could be accepted. Objectively, he appeared fully committed to want to enter into a binding legal agreement with the Respondent. In our judgement, there was nothing in his words of actions that ought reasonably to have given the Respondent any pause for thought with the consequence that a binding agreement for his termination by mutual agreement was reached that day.

197. The Claimant's claim for unfair dismissal therefore fails.

Employment Judge E Burns

24 January 2023

Sent to the parties on:
24/01/2023

For the Tribunals Office

Appendix
List of Issues

Unfair dismissal (ss. 94-98 Employment Rights Act 1996)

1. Did the Respondent dismiss the Claimant – if so, by who, when, and how – or did the Claimant's employment end on about 31 January 2022 by mutual agreement with the Respondent?

2. If the Respondent dismissed the Claimant, what was the reason/principal reason for dismissal? The Respondent did not advance a fair reason.

3. Was the reason/principal reason for dismissal a fair reason under s. 98(1) of the Employment Rights Act 1996 ('**ERA'**), including (but not) limited to some other reason of a kind such as to justify the dismissal of an employee holding the Claimant's position?

4. If the Respondent dismissed the Claimant for a fair reason, was the Claimant's dismissal for that reason/principal reason fair or unfair given:

   (a) Respondent's size and administrative resources
   (b) equity
   (c) substantial merits of the case
   (d) the band of reasonable responses open to the Respondent at the time?

Discrimination - Protected Characteristic

5. The Claimant relies on the protected characteristic of age (59 and over).

Direct discrimination – age (s. 13 Equality Act 2010)

6. Did the following conduct occur:

   6.1 on 7 September 2021, did Zubair Kari comment that the Respondent is looking to recruit *"more fresh young talent"* and that workloads are expected to become more difficult and demanding similar to those expected in private companies and the question of how old the Claimant was and if he had looked at the Scheme.

   6.2 on 10 September 2021, did the Respondent give the Claimant a *'partially achieved'* performance rating? This was not disputed.

   6.3 in 2021, did the Respondent apply undue and inappropriate pressure on the Claimant to apply to its Scheme?

   6.4 in 2021-2022, did the Respondent decide to not allow the Claimant to withdraw his application under the Scheme once he had made it? It

was not disputed that the Respondent did not allow the Claimant to withdraw from the scheme when he asked to do this on 9 November 2022.

6.5 did the Claimant's review panel form include the comment that "*this individual is a poor performer, he is long-standing within NR & is not going to progress further & is currently a blocker to other folk within the team*"? This was not disputed.

7. If and to the extent such conduct occurred, did the Respondent thereby treat the Claimant less favourably than it would have treated a hypothetical comparator aged under 30 whose circumstances were not materially different from his other than in respect of age?

8. Was the following a legitimate aim: enabling progression planning at the Respondent?

9. If that was a legitimate aim, was the Respondent's conduct above a proportionate means of achieving that aim?

Harassment – age (s. 26 Equality Act 2010)

10. Did the conduct referred to at paras. 6.1 and 6.2 above occur?

11. If and to the extent it did occur, was that conduct related to age?

12. Was that conduct unwanted by the Claimant?

13. Did that conduct have the purpose or effect of violating the Claimant's dignity?

14. If not, did that conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation (s. 27 Equality Act 2010)

15. Did the Claimant do a protected act under s. 27 (2) of the Equality Act 2010 by submitting a grievance / appeal in 2019?

The Respondent accepted that the appeal dated 1 November 2019 included a paragraph which amounted to a protected act.

16. If that was a protected act, did the Respondent subject the Claimant to a detriment by:

16.1 Involving or permitting Mark Smith's involvement in that grievance

16.2 the review panel form comments

17. If yes, did the Respondent subject the Claimant to the detriment because he had done the protected act?

Remedy - Discrimination

18. What financial loss, if any, has the Claimant suffered as a result of any unlawful discrimination? What award (if any) is it just and equitable to award for such loss?

19. What award, if any, should be made for injury to feelings?

20. Should any other remedy be awarded, including interest or recommendations?

21. Is the ACAS Code of Practice on Discipline and Grievance relevant?

22. If relevant, it is just and equitable for any award to be subject to an uplift / downlift for failure to comply with the Code? In particular, was any failure to follow the Code reasonable in all the circumstances?

Remedy - Unfair Dismissal

23. What financial loss, if any, has the Claimant suffered as a result of any unfair dismissal? What award (if any) is it just and equitable to award for such loss?

24. Did any culpable conduct on the Claimant's part cause or contribute to his dismissal? If yes, should any award be reduced to reflect such conduct? If yes, by how much?

25. Did the Claimant take reasonable steps to mitigate any financial loss arising from his dismissal?

26. Is the ACAS Code of Practice on Discipline and Grievance relevant?

27. If relevant, it is just and equitable for any award to be subject to an uplift / downlift for failure to comply with the Code? In particular, was any failure to follow the Code reasonable in all the circumstances?