



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Wycliff Odoyo

**Respondent:** James Finlay Limited

**Heard at:** London Central Employment Tribunal (by video)

**On:** 25, 26, 27, 30 and 31 January and 13 February (in chambers) 2023

**Before:** Employment Judge E Burns  
Ms G Carpenter  
Mr S Hearn

## Representation

**For the Claimant:** In person

**For the Respondent:** Tim Walker, Counsel

## JUDGMENT

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

## REASONS

### THE ISSUES

1. The issues to be determined had been agreed in advance of the hearing. They are set out in the appendix to this judgment.

### THE HEARING

2. The Claimant gave evidence. He also provided witness statements for:
  - Ms Nelly Choge, his wife

- Dr Timothy Bond, Founder and Lead Consultant, Tea and Herbal Solutions Limited (former employee of the respondent)
  - Kazuya Matsumoto, Former Buyer for Mitsui Norin Co. Ltd, a customer of the Respondent
  - Mark Peters, Tea Specialist for the Respondent
  - Huafu Wang, former colleague
3. Mr Matsumoto was unable to appear as a witness as he was located in Japan and did not have permission to give evidence in the jurisdiction of England and Wales by video. The Respondent did not object to the Tribunal reading his witness statement which we did.
  4. All of the Claimant's other witnesses were available to be cross examined, but the Respondent chose not to do so and they therefore were not required to attend to give oral testimony. We did, however, ensure we read their witness statements and have them into consideration where relevant.
  5. For the Respondent we heard evidence from:
    - Rachael Steed, Group Head of HR
    - Frieda Dehrmann, Group Director of Quality and Analytical Science
  6. There was a hearing bundle of 1701 pages. 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.
  7. When the Claimant gave evidence he said several times that the contents of the bundle had been "cherry-picked" by the Respondent to show him in a bad light and we are therefore recording our observations on this matter here.
  8. The Claimant, while legally represented had made a subject access request for all his personal data held by the Respondent dating back to 2020. We were told this had generated a large number of documents.
  9. At a case management hearing on 9 August 2022, the parties were ordered to disclose documents to each other by 14 October 2022. The Respondent was ordered to prepare the hearing bundle and send it to the Claimant by 28 October 2022. At this date, the Claimant had not asked for any particular documents to be included in the hearing bundle. He wrote to the tribunal to ask for an extension of time to identify relevant documents. Although he was given an extension to 23 December 2022, he failed to make any additions to the bundle. The Respondent wrote to the Tribunal about this and Employment Judge Davidson decided that as the Claimant had chosen not to send any documents to the Respondent, the bundle would only contain the Respondent's documents. The Claimant did not challenge this decision.

10. We consider that if there were any additional documents that were relevant, the Claimant was given every opportunity to provide these, but did not do so. We therefore made our findings of fact based on the evidence that was before us. In many cases, we do not consider the Claimant was correct to say that there were missing documents. Our decision, based on reading the documents before us, was that the chains of correspondence were more likely than not to be complete.
11. In view of the length of the hearing, we had to set a time limit for the Claimant's cross examination of two and half days. Even then there was no time in the listing slot for the hearing for the Tribunal to complete our deliberations. We had to list a separate date for this and reserved our judgment accordingly. Part of the reason for the length of time the Claimant's cross examination took, was the time it took him to locate pages in the bundle and to understand the questions being asked of him. We were careful to ensure that he was given time to respond and able to take breaks when he needed them. We also sought to ensure that he was not legally disadvantaged because he was unrepresented.

### **FINDINGS OF FACT**

12. Having considered all the evidence, we find the following facts on a balance of probabilities.
13. 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**

14. The Respondent is a leading independent business to business manufacturer and supplier of tea, coffee and botanical solutions to beverage brand owners worldwide.
15. The Claimant is black. He is originally Kenyan and speaks with a Kenyan accent.
16. The Respondent is a global organisation with operating units in Argentina, the USA, the UK, Kenya, Malawi, Dubai, Indonesia, Sri Lanka, and China. The diversity of the organisation means that different accents are the norm within the business. It employs 6,000 people globally and almost 5,000 of these individuals are based in its Kenyan facilities. Of the remaining 1,000 employees, 50% are based in the UK and US facilities with the remaining 50% being based out of other international sites. It had a small, dedicated HR function.

17. The Respondent has a written Performance Capability Policy and Procedure (83 – 89) and a calendar year annual appraisal process. Objectives for the year are agreed at the start of the year. Performance against objectives is reviewed in around July, but no rating is given at this stage. At the end of the year, a full review is undertaken and a rating is given. The rating options are:
- 5 Exceptional Performance – Far Exceeds Expectations
  - 4 Successful Performer – Exceeds Expectations Consistently
  - 3 Firm Performer – meets Expectations Consistently
  - 2 Developing Performer – meets in some areas but Improvement Needed in Others
  - 1 Not meeting performance Expectations – Consistently Below Expectations (121)

Bonuses paid to employees reflect the individual performance rating as well as taking into account the overall performance of the business.

18. The Claimant was originally employed in the Respondent's Kenyan business (James Finlay Kenya) from 1 June 2004 to 12 June 2011. The Claimant commenced employment with the Respondent's UK business (James Finlay Limited) on 13 June 2011. This was a promotion for him and he relocated with his family to London as a result.
19. At this time, the London Head Office was very small. It had grown to over 75 employees by 2018, however. The growth had led to significant changes in the ways that employees were expected to carry out their roles, driven by the appointment of several technical experts and scientists. There was an increased emphasis on data, analytics and structured methods of measuring and reporting performance. In addition, the group was in the process of transitioning to being a more customer facing and innovative company and had adopted a project called 1Finlays to implement this.
20. The Claimant's role was Technical Manager. He was responsible for managing the compliance of the Respondent's product portfolio and for maintaining a database of applicable regulations. The Claimant was also responsible for engaging with industry technical working groups, supporting customer technical enquiries, managing the sustainable supply chain certifications, product sampling and quality auditing.
21. Throughout 2018, the Claimant reported to Global Head of Quality, Idwin Bouman. Mr Bouman had agreed certain objectives with the Claimant for 2018. When conducting his end of year 2018 performance review in December 2018, Mr Bouman gave him a level 2 rating. The Claimant disagreed with the rating, but did not challenge it and was paid a bonus that reflected this rating (90-94).

22. The document reads as a balanced constructive critique of the Claimant's performance with praise for the Claimant's positive contributions. The key criticisms of the Claimant by Mr Bouman were:

- the Claimant was not adapting to the new ways of working that were being adopted in the Respondent;
- the Claimant needed to be more proactive to ensure his colleagues fully understood the documents he was responsible for producing, rather than just emailing them;
- the regulatory checks he was undertaking were only being done at a superficial level;
- sometimes the Claimant was jumping to conclusions or making quick decisions without consulting leading to his line manager reaching conclusions based on incomplete information;
- in addition, the information he was providing was not always complete and/or accurate;
- the Claimant was failing to keep his line manager in the loop when dealing with queries and not using him as a source of support or help to achieve his objectives. He described him as "*still working too much on an island.*"

23. The Claimant told us that he considered the criticisms were unfair. His main reason was because he considered that the information in documents he prepared was clear. He suggested that the reason the information was not understood was because the new starters, who had joined the Respondent more recently, did not have the necessary experience and understanding of the Respondent's business. In our judgment, this explanation demonstrates a failure by the Claimant to understand the point that Mr Bouman was trying to make. He was trying to get the Claimant to appreciate that he needed to adapt to the growing organisation and the needs of the new starters.

24. Mr Bouman conducted the Claimant's 2019 Mid-year Review in July 2019. He noted the following on the form:

*"After the 2018 rating, underperformance, I would have expected that you would have come to me and asked for support and guidance how to change, improve. This has not been happened and it looks like you keep in the same pace of working. As Finlay's is rapidly changing, you need to work more in a matrix, and need to share information, even when this is not requested. .... I see that you still work too much on an individual basis, where you don't share or ask for feedback when you answer questions.*

*Your position was created six years ago, and now we are in a new 1Finlay's way of working. This new organisation requires transparency and sharing of knowledge, meaning that we all need to share information/knowledge proactive, even when people don't ask. Double check your comments, to ensure that what you are telling is correct. Again, in the last couple of months*

*you made regulatory statements who are not correct, or it took far too long to prepare the statement.*

*Your wordings as, why should I give information when people don't ask me, this is not okay, expect that you come with information and share.*

*You delivered good work in several areas, as mentioned by you in your performance and milestones and work was appreciated by Finlay's.*

*Wyclif, you have a lot of knowledge, gathered from the past, this is valuable for the company, we need to make sure we use this knowledge in the right way. This can only when we were transparent and assure we do all first time right"*

25. In addition, he noted four specific action points for the Claimant for the future, as follows:
  1. *"Involve the Group Heads of technical in the work you do, as described above...*
  2. *Communicate proactive to the business. In case you have possible information that can be used.*
  3. *Assure that the documents you prepare are correct and complete, and seek for assistance, asking for help and support is always a positive thing.*
  4. *All regulatory and/or compliance statements, documents, emails et cetera need to be reviewed by Group Head Scientific and Regulatory Affairs to assure compliance before sending out."* (106)
26. Mr Bourman left the Respondent shortly after this. This led to a restructure. The Respondent's Group Innovation and Group Quality Functions were merged to create a new Group Technical Function. As a result of this, the Claimant's line manager became Dr Rhodri Evans, Group Head of Scientific Regulatory Affairs. Some slight changes were made to the Claimant's job description and he had a change in job title to Scientific Regulatory Affairs and Quality Assurance Technical Support Officer (1652).
27. Dr Evans conducted the Claimant's end of year review for 2019 in December 2019. He rated the Claimant at level 3 (113-119). The Claimant was paid a bonus that reflected this rating. This was not the maximum bonus he could have been paid.
28. The comments in the end of year review were generally favourable and positive about the Claimant. Having been managing him for six months, Dr Evans did not have any concerns about the Claimant's performance. He notes in the form that some of the Claimant's objectives were not met, but attributes this to the priorities of his previous line manager and his objectives not being clear enough, rather than reflecting the Claimant's performance.

He does, however, note that the Claimant was spending a lot of time responding to ad hoc queries and mentions working with him to find ways to address this that are less labour intensive in the future. He concludes the document saying:

*“My assessment is based on the time during which [the Claimant] has reported to me and does not take into account the assessment undertaken by his previous line manager (Idwin Bourmann) at the mid-year review stage. I have found [the Claimant] to be very engaged with the work of the SRA team, and proactively seeks advice and guidance where necessary, whilst also applying his knowledge of Finlays systems and processes to good effect. I look forward to working with [the Claimant] going forward during 2020.”* (119)

29. Dr Evans agreed the Claimant’s Business and Development Objectives with him for 2020 on 18 February 2020 (147 – 148).
30. From 23 March 2020, the Respondent’s UK Head Office Staff began working from home. This included the Claimant.
31. Dr Evans resigned in April 2020. He continued to line manage the Claimant during his notice period and conducted the Claimant’s mid-year review for 2020 in June 2020 (183-186). His assessment of the Claimant’s performance was: *“Overall [the Claimant] has had a very good first half of 2020 and is performing in line with expectations for the role.”* He added, *“I received unanimously positive feedback from colleagues within Finlays from whom I sought comments. [The Claimant] is a well respected colleague and his expertise is of great support to colleagues across Finlays.”* (186)
32. In the section of the appraisal form entitled “actions, support and assistance agreed to continue or improve performance including timescales”, Dr Evans identified three matters:

*“We discussed that [the Claimant] should seek to work more closely with colleagues in the applications team when he receives requests for support from commercial team members, to ensure the applications team “lead” product development work with his expert input available as necessary. This will also help to increase their technical knowledge of our products.*

*[The Claimant] should also seek to make information he has gathered over the years more readily available via central systems so that they can be accessed by other colleagues where appropriate, and thus decrease the burden placed directly on him to supply the information to multiple colleagues.*

*The completion of the documentation packs for all Finlays products will help to reduce some of the time spent on responding to customer requests for*

*information, something that can take up a considerable amount of [the Claimant's] time at the moment" (186).*

33. The Claimant's new line manager was Dr Frieda Dehrmann, Group Head of Quality and Analytical Science. She became his line manager with effect from 6 July 2020. Dr Dehrmann had started working for the Respondent in 2018. She was initially recruited to implement the 1Finlays project. By July 2020 she was managing a team of direct and indirect reports who were based in the UK, USA, Argentina, Sri Lanka, China, and Kenya. Her direct reports included a black Kenyan woman. The Claimant was the only black man of Kenyan origin reporting to her.

### **Informal Performance Management Process**

34. Dr Dehrmann became concerned about the Claimant's performance in key areas quite soon after taking over his line management. In particular, she identified that the Claimant seemed to be failing to respond to requests for information in a timely manner (295, 303 and 304). She was also concerned about the quality of some of the Claimant's work.
35. A significant concern that Dr Dehrmann had was related to the Claimant's involvement in a project which was exploring the degree to which the Respondent's products could be marketed as health and wellbeing products. The Claimant had provided some information to the project Working Group that had led his sales colleagues to believe that quite robust health claims could be made for some products. This was not, however, supported by scientific data (307 – 309).
36. When asked about this at the hearing, the Claimant thought it was unfair to criticise him for this misunderstanding and noted that Dr Dehrmann was not part of the relevant project group. The issue had been raised with her by colleagues prior to her managing the Claimant and as it transpired was ongoing throughout the Autumn of 2020.
37. In addition to the concern outlined above, Dr Dehrmann formed the view that the Claimant was spending a lot of his time on reactive work, responding to queries from his colleagues and the Respondent's external customers. She described this as "firefighting" and offered to try and find ways to help the Claimant manage this demand. She was concerned that he was often not responding to queries or providing his input when it was sought by others in a timely manner.
38. On 11 August 2020 Dr Dehrmann emailed the Claimant to gently raise her concerns with him about his work (317). The tone of the email she sent was very friendly and supportive.
39. Dr Dehrmann also wanted to find a way to promote collaborative working between the Claimant and herself and her other direct reports. She formed



the view that the Claimant was doing a lot of his work in isolation. Her way of addressing this was to hold weekly team meetings where progress against tasks could be discussed as a team. She asked the members of her team to complete a Quality and Assurance Action tracker in the form of an Excel spreadsheet in advance of their weekly team meetings to provide the framework for the discussions.

40. Dr Dehrmann decided to create an extra tab on this spreadsheet to capture all external and internal technical queries. This was in line with the actions identified by Dr Evans. The plan was to track and collate the types of questions the Claimant was being asked regularly so that some customer focused standard response documents could be created. These could then be sent to external customers by the Claimant's colleagues without involving the Claimant, thus leaving him with more time to focus on more unusual or complex queries.
41. In addition to introducing the tracker and the weekly team meetings, Dr Dehrmann also proposed a short weekly one-to-one meeting between her and the Claimant. The purpose was to discuss matters that were relevant solely to him so that they did not need to tie up the other Team members in those discussions. These would be supplemented with monthly one-to-one meetings where they would take a broader view of the Claimant's progress against his objectives.
42. The discussions with the Claimant about various aspects of his performance continued throughout September 2020. During this month, the Respondent had begun a phased return of Head Office staff to working for part of the week in its offices rather than from home. Inductions were arranged for staff members, but the Claimant did not attend one of these. On two occasions, despite having arranged to attend, he did not attend on short notice.
43. This prompted Dr Dehrmann to write to the Claimant on 16 September 2020 to say:

*"I am seeing a pattern of later delivery of reports, and customer information (of which we have received complaints) as well as a lack of planning and attention to diary details. Given that in the meeting that we had on tips and tricks about diary and time management, you indicated that you didn't need this, I think its time that we talk through this again. I will discuss with [Ms Steed] what support we can give you to better manage your outputs." (327)*
44. Two meetings were arranged with the Claimant following this. Dr Dehrmann met with him on 28 September 2020 to go through his current work with him and Ms Steed met with him on 29 September 2020.
45. Dr Dehrmann summarised the discussions with him in an email she sent to him later. One issue that was discussed was the process of ensuring that a

particular blended product was meeting the correct standards. Dr Dehrmann's expectations were not being met by the Claimant and she had to arrange for another member of her team to assist the Claimant with capturing the relevant data. Dr Dehrmann concluded the email saying:

*"We also spoke about the changing work requirements, and the frustrations of questions being posed to you, by the business and people not having confidence in the responses of the designated teams needing to pick you the work. I could see that this is really troubling you, and we spoke about how we play you to your strengths to ensure that you have time to do the work that will add the value. I want to reiterate that your value is seen and recognised. We spoke about mentioning this to [Ms Steed] in the meeting that she booked with you." (351)*

46. At the meeting with Ms Steed, the Claimant reiterated that he was being asked to support with queries relating to projects that he had not been briefed on and was finding this frustrating. Ms Steed fed this back to Dr Dehrmann. Ms Steed suggested to Dr Dehrmann that it would be beneficial for all three of them to meet together. This meeting was arranged for 16 October 2020. A copy of the notes Dr Dehrmann prepared in advance of the meeting were contained in the bundle at pages 1585 -1586. The last paragraph of the notes says:

*"So this conversation is about acknowledging you as the tea expert, and wanting to work together to harness this insight. And it is important for you to see that newcomers, who may not have all the experience you have, also have different but equally valuable input into making Finlays a better place. So, as we transition to a new and better for the customer way of working, how can we help you to make this transition?" (1586).*

47. Ms Steed emailed Dr Dehrmann and the Claimant after the meeting summarising the discussions at the meeting (363). She identified that the key concerns Dr Dehrmann had about the Claimant's performance were in two areas: Time Management / Prioritisation and his way of Engaging. Dr Dehrmann had provided a number of examples of times where these concerns had arisen at the meeting, but had also acknowledged that she was requiring the Claimant to adopt new ways of working and to do things that he had not been required to do previously, such as complete the QA Tracker. A number of follow up actions were agreed, including that Dr Dehrmann would arrange a workshop session for her team to discuss and agree common ways of working. This was organised and various protocols were agreed. The Claimant was also invited to identify if there was any training he felt might help him.
48. In addition, Ms Steed arranged a further one-to-one between her and the Claimant which took place on 28 October 2020. Ms Steed sent the Claimant a note of the meeting by email which she also forwarded privately to Dr

Dehrmann with some additional comments. Amongst the observations she noted:

*“My overall assessment is as follows:*

*He doesn’t feel that his opinion/experience is valued or respected and doesn’t feel that he is being listened to.*

*I get the sense that he feels he should be consulted on all decisions and is feeling frustrated that he is not being made aware of projects and decisions. As we have discussed, I think this harkens back to the fact that he has had very little management historically and has been empowered to make decisions without consulting.*

*There is a lack of accountability and ownership for his actions – this was especially clear when we were discussing diary management. He tried to deflect on a number of occasions.*

*He was very open to taking a more structured approach to his 121s and seemed to genuinely take on board my recommendation that he use this time to ask questions about some of the projects/requests that he doesn’t fully understand. I have explained that on occasions, the feedback may be ‘it’s confidential and I can’t give you more information’ – he seemed okay with that.*

*When asked about next steps, he said ‘let’s give it 5 weeks and see how things are going’.*

*She concluded: “Whilst I don’t necessarily agree with [the Claimant’s] feedback, I do understand why he is feeling the way he is. I should imagine that his ego has taken a bit of a battering over the past few months. I would recommend that you continue to focus on the deliverables and making sure that he is prepared for meetings etc... Ultimately, this is the best way for him to rebuild his confidence.” Ms Steed recommended that Dr Dehrmann, “Continue to track his deliverables [and] if there are further incidents of non-delivery, poor time-management etc.... let me know” (392).*

49. Dr Dehrmann replied saying:

*Thank you Rachael. A good summary and it feels like we are dealing with the building blocks so lets push this to get it right. I agree with your summary on the points, and will work to build confidence in when things are done well, and to reduce the feeling of victimisation as appropriate. (392)*

50. On 30 November 2020, Dr Dehrmann conducted the Claimant’s End of Year Review. She told us at the hearing that she awarded him a level 3 rating,

although strictly speaking she considered he was performing at a level 2 (498 – 506).

51. She wrote on the form:

*“This has been a difficult year with COVID, and in addition with several reporting changes, and with Rhod leaving. We have worked to ensure that the communication channels are open, and that both Wycliff and Frieda are clear on expectations and deliverables, and I believe that this is now clear. Although some of the goals were not met, and some it was obvious that the focus on these had been lost in the course of the year, we should be back on track for 2021. My ask is that we focus on the “what” and the “how” in that we ensure that we follow the objectives through the course of the year, we pay attention to detail, and we work to deliver in a transparent and data driven way, doing the detail so that our customers don’t have to.*

*With all of the challenges in place, the objectives have just been met. The recognition for Wycliff’s way of working in the Value awards positions Wycliffs performance as a 3.” (503)*

52. The nomination for the award referred in the Claimant’s appraisal document was a nomination for the Respondent’s newly introduced Living our Values awards. The Claimant was nominated by the Respondent’s Managing Director. He was one of around eight hundred employees across the global business who received a nomination.
53. Dr Dehrmann travelled to South Africa for Christmas 2020. She got stuck there because of the COVID-19 pandemic restrictions until April 2021 and had to work remotely from South Africa.
54. The Claimant took leave in December 2020. He also had planned surgery on 23 December 2020. During his absence and as a consequence of it, a number of concerns came to light. One of the key issues was where the Claimant failed to provide a response to colleagues who were trying to obtain urgent information for a prospective customer in a timely manner.
55. We note that at the start of the year, by the end of January, Dr Dehrmann had prepared objectives for the Claimant for that year. The form that contained these objectives was not signed off by both of them, however. (704)

### **Formal Performance Capability Process - Stage One (10 February 2021 to 19 April 2021)**

56. As a result of the issues that had arisen, Dr Dehrmann (with Ms Steed’s support) decided to commence a formal Performance Management process with the Claimant. At the same time, she decided to pursue a disciplinary process in relation to three allegations of possible misconduct.

57. Dr Dehrmann and Ms Steed met with the Claimant on 10 February 2021 to explain this to him. They then confirmed the next steps in two separate letters to him, the first dealing with the formal management process and the second dealing with the disciplinary process.
58. The letter regarding the Performance Capability Process was emailed to the Claimant on 11 February 2021, and invited him to a meeting on 17 February 2021 (694 – 695). The letter described the meeting as a stage one formal meeting being held under the Respondent’s Performance Capability Process. It summarised the key concerns about the Claimant’s performance and set out the potential outcomes from the meeting. The Claimant was advised that he was entitled to be accompanied at the meeting by a colleague or trade union representative if he wished. The email attached a copy of the Performance Capability Policy and Procedure.
59. The key areas of concern were identified as follows:
- *“Timeliness of responses: Actions not being turned around within agreed timeframes, for both internal and external customers. In some instances, this has resulted in customer complaints being escalated to me and/or emergency actions being taken to resolve the issue.*
  - *Understanding and accuracy: Providing incorrect, incomplete, or inaccurate information to stakeholders. This raises a concern for me that you may not fully understand some of your core responsibilities.*
  - *Self-Management: As per our previous discussions, you do not always accept meeting invites or make it clear to me and other stakeholders whether you will be attending meetings. On some occasions you have joined meetings late, which is disruptive to the team. You have also not updated our internal trackers as requested, which both slows our progress and also results in your colleagues losing time because your updates are not complete.”*
60. The disciplinary process was also progressed. In a letter dated 12 February 2021, the Respondent informed the Claimant that Dr Dehrmann was undertaking a disciplinary investigation into two allegations of misconduct against him (699 – 701 and 1587). The allegations were that:
- (1) He had failed to supply information required by a prospective client when initially requested to do so by a member of the sales team and subsequently by Dr Dehrmann in the timescale required
  - (2) He was failing to update the action tracker for the weekly Quality Team meetings either in a timely manner or at all.

Subsequently a third allegation was added, namely that the Claimant gave false information to Dr Dehrmann in relation to missing a meeting with her on 19 February 2021.

61. Once Dr Dehrmann had completed her investigation, the Claimant was formally invited to attend a disciplinary hearing on 12 March 2021. The hearing was conducted by Darren Jayatilaka, Group Head of Operations Finance. The Claimant was able to respond to each of the allegations at the meeting. He chose to attend without anyone accompanying him, despite having been informed that he could be accompanied.
62. The conclusions Mr Jayatilaka reached were set out in an outcome letter dated 15 March 2021, which was sent to the Claimant on 22 March 2021 (822-827). Mr Jayatilaka upheld the first allegation of misconduct. He found that the Claimant had failed, without justification, to respond to the requests made by his sales colleague and then Dr Dehrmann for information required by a prospective client. He did not uphold the second allegation. Although he found that the Claimant had not updated the tracker on some dates, the Claimant had had IT issues and Mr Jayatilaka concluded that there was insufficient evidence to uphold the allegation as one of misconduct. Finally, he found that the Claimant had not deliberately missed the meeting on 19 February 2021, but that he had provided inconsistent explanations as to why which demonstrated a degree of dishonesty and lack of transparency. Mr Jayatilaka issued the Claimant with a first written warning to remain live for a period of twelve months. Although the Claimant was informed that he could appeal against the warning, he chose not to do so.
63. In the meantime, the Performance Management meeting had proceeded as planned on 17 February 2021. The Claimant had attended without anyone accompanying him. Dr Dehrmann had gone through her concerns with the Claimant in some detail, providing examples to him. She was supported at the meeting by Ms Steed.
64. The Claimant was not given a formal warning as a result of the meeting, but was told that his performance would be reviewed after a couple of months and unless he improved, the next stage would be a first written warning under the Performance Management Procedure. Dr Dehrmann identified that the Claimant had three “buckets” of work that he was required to deliver and that the Team Action Tracker should be used to track his performance. The Claimant was to have meetings with Dr Dehrmann on a Monday morning and in the afternoon after the Quality and Assurance Team meeting.
65. The Claimant was offered the opportunity to undertake self-directed learning in MS Office, Time Management and Prioritisation and Communication with Impact. It was also agreed that he would go through the Respondent’s 360 feedback process (708).

66. The new weekly one to one meetings largely proceeded as planned, although the Claimant missed the first of these on 19 February 2021, hence the reason it was incorporated into the disciplinary process.
67. The 360 feedback was also progressed. This process was coordinated by Ms Steed. The Claimant and Dr Dehrmann were given the opportunity to name people with whom the Claimant worked, who could provide feedback about his performance. The Claimant named ten people, eight of whom were selected to provide feedback. Dr Dehrmann named four people in addition. The Claimant was able to agree the questions that were to be asked. The 360 feedback process was not concluded until May 2021.
68. On 9 April 2021, the Respondent sent the Claimant a letter inviting him to a Stage 1 Performance Capability Review Meeting (1601 and 864) on 15 April 2021. The letter informed the Claimant that he was entitled to be accompanied at the meeting by a colleague or trade union representative if he wished. The email attached a copy of the Performance Capability Policy and Procedure.
69. The meeting proceeded on 15 April 2021. The Claimant chose to be unaccompanied. Dr Dehrmann went through her concerns with the Claimant and he was given a full opportunity to respond to them. Dr Dehrmann did not decide the next steps straight away. Instead, the meeting paused so that she could consider what to do and was reconvened on 19 April. Dr Dehrmann explained that she had decided that the Claimant should be given a first written warning for performance which would remain live for a period of 6 months.
70. The outcome of the meeting was confirmed to the Claimant in a letter that was sent to him by email on 23 April 2021 (899). The letter was incorrectly dated 20 March 2021 (it should have been 20 April 2021) (900 – 902).
71. The letter confirmed the reasons for Dr Dehrmann's decision and the objectives that would need to be met to enable the Claimant to show that he had successfully improved by the end of the next review period. It was agreed that the Claimant and Dr Dehrmann would continue to meet on Monday morning with the Monday afternoon meeting being cancelled. The letter included details of how to appeal against the warning, but the Claimant chose not to appeal. The letter included the following paragraph:

*"I appreciate that this may be a difficult time for you, and may I therefore remind you that there are a number of sources of confidential support available to you if you wish to use them, further details please contact the Employee assistance programme"*

72. The letter confirmed that the Claimant had a right of appeal against the warning and informed him how to exercise it. The Claimant did not appeal. He told the tribunal that he did not think that Dr Dehrmann's criticisms of his performance were accurate or justified, but he did not feel like having an argument with her about them. In his mind, he envisaged a peaceful reconciliation with Dr Dehrmann once she had gained a better understanding of the business.

**Formal Performance Capability Process - Stage Two (20 April 2021 to 19 May 2021)**

73. The planned weekly meetings took place, but there were ongoing problems with the timeliness of the Claimant's completion of the Action tracker. As a result, the Claimant was asked to ensure that he sent his updated Action Tracker to Dr Dehrmann ahead of their weekly Monday morning meetings, ideally on a Friday afternoon. This was to ensure that the meetings were more effective.
74. The Respondent wrote to the Claimant by email on 4 May 2021 to invite him to the next formal review meeting under the Performance Management process on 19 May 2021 (934 - 936). The letter described the meeting as a Stage 2 Performance Capability Review Meeting. It summarised the key concerns about the Claimant's performance and set out the potential outcomes from the meeting. The Claimant was advised that he was entitled to be accompanied at the meeting by a colleague or trade union representative if he wished. The email attached a copy of the Performance Capability Policy and Procedure.
75. The key areas of concern were identified as:
- Timeliness of responses: Actions not being turned around within agreed timeframes, for both internal and external customers.
  - Understanding and accuracy: Providing incorrect, incomplete, or inaccurate information to stakeholders.
  - Self-Management: This includes diary management and ensuring that trackers and actions are managed effectively.
76. The meeting took place on 19 May 2021 as planned. The Claimant chose to attend unaccompanied. Dr Dehrmann went through her concerns with the Claimant and he was given a full opportunity to respond to them.
77. The outcome of the meeting was confirmed in writing to him in a letter (965-968) sent by email on 26 May 2021 (1607). The Claimant was given a Final Written Warning which was to remain on his file for twelve 12 months. The letter informed the Claimant that he had a right of appeal but he chose not to exercise this.



78. In her letter to the Claimant, Dr Dehrman said that although she could see that the Claimant was making a concerted effort to address the improvement areas that she had raised, she did not believe that he was fully delivering on his key responsibilities to the standard expected and explained why she was of this view.

**Formal Performance Capability Process - Stage Three (20 May to 22 July 2021)**

79. The 360 feedback was ready to be shared with the Claimant shortly after this. Ms Steed emailed the Claimant on 27 May 2021 to arrange a meeting with him.
80. The 360 feedback contained a number of positive comments about the Claimant. This included recognising that he has good interpersonal skills and accumulated knowledge. However, it also highlighted that the concerns being raised by Dr Dehrmann were consistent with the views of others that had been consulted. The feedback highlighted that the Claimant needed to pay greater attention to detail and accuracy. It also identified that the Claimant needed to be more proactive and improve the speed with which he did things (986).
81. On 28 June 2021, Dr Dehrmann conducted the Claimant's mid-year appraisal review. At the meeting, she went through the Claimant's performance against his objectives. She praised him where she felt praise was due, including that his sharing of information about the work that he was doing had improved, although was still not ideal and still not fully entrenched. In addition, she praised him for showing recent leadership in two key areas.
82. She also, however, highlighted areas where he was not delivering on his objectives. The Claimant complained at one point that he felt that that he was being required to deal with all of the really difficult issues, but Dr Dehrmann sought to reassure him that this was not the case and that the new ways of working she had introduced were designed to ensure that he was better supported. Although not required to grade him, she informed the Claimant that she considered that overall, his performance was inconsistent and that he was working at a level 2 (1085).
83. The Claimant was off sick for 4 days at the start of July 2021 for a planned operation. He was certified as fit to return to work, but needed physio for a four week period (1612). Unfortunately, it transpired that the operation was not successful and the Claimant continued to have mobility issues.
84. On 13 July 2021, the Respondent emailed the Claimant to invite him to the next formal review meeting under the Performance Management process on 22 July 2021 (1100, 1113 and 1608 - 1611). The letter described the meeting as a Stage 3 Performance Capability Review Meeting. It summarised the key concerns about the Claimant's performance and set

out the potential outcomes from the meeting. The Claimant was advised that he was entitled to be accompanied at the meeting by a colleague or trade union representative if he wished. The email attached a copy of the Performance Capability Policy and Procedure.

85. The meeting proceeded as planned on 22 July 2021. The Claimant attended unaccompanied by choice. The outcome of the meeting was confirmed in writing to the Claimant in a letter dated 27 July 2021 (1621-1623).
86. Dr Dehrmann and Ms Steed observed a change in the Claimant's demeanour at the meeting and more generally at this time. They felt he was not as engaged as usual and appeared to be distracted and were concerned that this might be an adverse reaction to the scrutiny that his performance was being put under. As a result and because of improvements in his performance Dr Dehrmann decided to pause the ongoing performance management process.
87. Under the Respondent's policy, this meant that the Claimant was put into a period of "Sustained Recovery" 12 months. As confirmed in writing, this meant that he was no longer being formally performance managed, but the Respondent reserved the right to recommence the performance management process at the same stage if the improvement observed was not maintained. This was explained to the Claimant as follows:

*"Having reflected on your performance during this process and over the past 2 months, I believe there have been some improvements. However, I do not believe that the improvements have been consistent or to the standard expected. There are still gaps between your delivery and the expectations of this role. However, when deciding the outcome of this review, I have also considered the current situation. Specifically, the fact that we have been unable to work together in person due to Covid restrictions. I believe that the current working from home arrangements have hampered your performance because you have not benefitted from face-to-face contact with me or your colleagues.*

*Taking into account the mitigating circumstance (i.e. lockdown), I have decided to cease the current performance capability process and to move into Sustained Performance period, which will last for 12 months. During the Sustained Performance period, we will continue to monitor your performance and I will work with you to agree key milestones and deliverables. Failure to deliver to the standard expected, or to achieve these deliverables and milestones may result in us reverting to the Performance Capability process. Your final written warning, which was issued following the 2nd formal Performance Capability review will also remain on file until 19 May 2022."* (1623)

88. The Claimant did not initially understand this and so the Respondent met with him to explain it on 23 July 2021 (1624-1625). His mood was observed to be similar at this meeting and after it, Ms Steed wrote to him to say that the Respondent wanted to arrange for the Claimant to see the Respondent's OH provider to understand if he needed any additional support. In addition, Ms Steed reminded the Claimant that the Respondent offered a confidential advice service and provided him with the contact details and a brochure for the service (1127 – 1129).
89. The Claimant took two weeks annual leave in August 2021. On his return from annual leave, on 10 August 2021, Dr Dehrmann spoke to him about how he was feeling. He said he was well rested and feeling much better. He also informed Dr Dehrmann that he had downloaded the app for the EAP service and intended to contact them. (1140) In fact, he did not do so, He told the Tribunal that having read the brochure he did not feel the support the EAP service offered would be helpful to him.
90. At the meeting, Dr Dehrmann also discussed the Claimant's agreed objectives with him. She provided him with a marked up copy showing where they had been changed since January. The key changes were a transition from a leadership role to a support role in relation to two key areas, Legal Registers and the PIMS project. Dr Dehrmann had appointed other members of her team to take-over the lead roles because the Claimant was not delivering on them (1142).
91. The Claimant's occupational health assessment took place on 8 September 2021. The report dated 10 September 2021 (1199 – 1200) was provided to Ms Steed, but for some reason, according to the Claimant was not shared with him. The OH adviser reported that the Claimant was continuing to experience mobility issues, but he had confirmed that he had not been experiencing any stress and that his mental health was good. The Respondent made the recommendation modifications to assist the Claimant with the ongoing mobility issue.
92. On 17 September 2021, following discussions with the Claimant that week, Dr Dehrmann emailed him to summarise her expectations of him (1146). The Claimant did not meet those expectations. A number of the items referred to on the email of 17 September 2021 were not completed when they were meant to be. She raised this with him in an email she sent to him on 21 October 2021 and informed him that as a result she had decided to restart the formal Performance Management process when Ms Steed returned from annual leave. She noted that the report from the OH advisers had said that there were no medical reasons why the Claimant could not perform his duties, but invited the Claimant to let her or Ms Steed know if he considered this was incorrect (1239-40)

**Re-starting Stage 3 of the Performance and Capability Process (1 November)**

93. On 1 November 2021, Ms Steed and the Claimant met. She summarised the discussions at the meeting in a subsequent email to him dated 4 November (1264) The email records that Ms Steed informed the Claimant that Dr Dehrmann intended to restart the formal Performance and Capability Process with him and that she would be writing to him about this. It also records that the Claimant raised concerns about his treatment by Dr Dehrmann. It says:

*“I did also want to follow up with you regarding some of the comments that you made during the meeting. Specifically, that you feel you are treated unfairly and you wonder whether this may be related to race. Clearly, both these allegations are very serious and it’s important that we address any such concerns.*

*During our meeting, I asked you if you had any examples that you could share. Whilst you didn’t provide specific examples, you did reference that other members of the team are often late with actions and you don’t believe they are ‘hounded’ in the same way.*

*As we discussed, I do recall you mentioning this in one of our previous meetings. At that time, Frieda explained that the difference is that when the other team members are behind on actions, they keep her in the loop and seek approval to delay activities. The concern that she raised in relation to your situation is that you don’t keep her up-to-date on delays or changes to your priorities. As you know ‘timeliness of response’ is one of the areas that Frieda has highlighted during the Performance Capability process, so it stands to reason that she will call this out during performance review meetings and 121s.*

*Wycliff, if you are able to share examples of unfair or racist behaviour, I will ensure that your concerns are fully investigated. I appreciate that I have been quite heavily involved in the Performance Management Process, so if you would feel more comfortable with another member of the HR team investigating this matter, I would be happy for Lorraine Dodge or Liz Wilkinson to discuss any concerns with you.”*

94. When sending her summary email to the Claimant. Ms Steed attached a copy of the Respondent’s Harassment and Bullying Policy for the Claimant’s reference and concluded the letter saying that if he had any questions or if he wanted to discuss, he should not hesitate to contact her. The Claimant initially replied to say he wanted to speak to Ms Steed further, but did not take this matter any further. He failed to provide any examples to Ms Steed and did not raise the concerns again.
95. When asked about this at the Tribunal hearing, the Claimant said that Dr Dehrmann told him that he was “explaining things like a Kenyan”. He was

unable to give examples of when she had done this, however. Dr Dehrmann denied saying this, but acknowledged that she had spoken to the Claimant about the need to explain things in a coherent way. She did not associate his lack of ability to do this with his race. In light of the Claimant's vagueness, we find that Dr Dehrmann did not use this expression.

96. The Claimant also told us that he felt excluded at Q and A team meetings. He said that the team would often be laughing about things that he did not understand. He did not say that he believed he was the subject of the laughter.
97. On 9 November 2021, the Respondent met the Claimant to formally tell him that it was restarting the Performance Management Process. He was later emailed a letter dated 3 November 2021 confirming this (1274 and 1255 – 1256). The Respondent decided to restart the process at Stage Three of its process.
98. The letter invited the Claimant to a formal meeting under the Performance Capability process on 15 November 2021 (1100, 1113 and 1608 - 1611). It summarised the key concerns about the Claimant's performance and set out the potential outcomes from the meeting. The Claimant was advised that he was entitled to be accompanied at the meeting by a colleague or trade union representative if he wished. The email attached a copy of the Performance Capability Policy and Procedure.
99. The meeting on 15 November 2021 proceeded as planned. The Claimant chose to attend unaccompanied. At the meeting, Dr Dehrmann proposed that the Claimant's objectives should be reduced to some key tasks that he should deliver by the end of the year. Dr Dehrmann created an excel spreadsheet containing the reduced objectives and sent this as an attachment to an email sent to the Claimant on 17 November 2021 (1353 – 4). She informed the Claimant that there would be no formal end of year review as the appraisal process had been superseded by the performance management process.
100. The reduced objectives included:
  - Seven actions associated with the PIMS project
  - A requirement that the Claimant complete three documents, namely the Standard for Good Storage Practice, a Protocol called Fair Trade and the Rain Forest Alliance and a Standard Specification Management for Tea
  - The Claimant should document the process for verification of the Fairtrade submissions
  - Continuing to respond to all customer enquiries in the agreed turn around time and ensuring that these were captured in the customer enquiry list in a meaningful way (1354)

101. On 6 December 2021, Dr Dehrmann and Ms Steed met with the Claimant. The Claimant had leave booked in the lead up to Christmas so Dr Dehrmann and Ms Steed were keen to ensure that he handed over all activities that would need attention while he was away. His failure to do this the previous year had led to several issues arising. In addition, they informed him that they would be undertaking the next formal review under the Performance and Capability Procedure at the end of January 2022. This was to allow him more time to work on his deliverables and in recognition that he had leave booked. Following the meeting on 6 December 2021, Ms Dehrmann emailed the Claimant to summarise the discussions. She noted that he had not completed what they had agreed he would and that deadlines had slipped for the 3<sup>rd</sup> week.
102. Although Dr Dehrmann and Ms Steed had taken the precaution of trying to ensure that handover arrangements were in place for the Claimant's leave, this did not prevent an issue arising with missing documentation required to support a shipment of tea. Although the Claimant had been aware of the requirement for the documentation since 29 November 2021, he did not action anything until his last day in the office, which was 10 December 2021. It was then necessary to await the results of samples that had to be tested before the documentation could be issued. The Claimant did not inform Dr Dehrmann of the potential issue so that a contingency arrangement could be put in place.

### Dismissal

103. On 17 Jan 2022, Ms Steed sent the Claimant an email diary invitation for a meeting on 27 January 2022 said to be a "Performance Capability Review Meeting" (1484)
104. She then sent him a letter dated 17 January 2022 (1436 – 1437) by email on 19 January 2022 (1441). The letter invited the Claimant to attend a formal Performance Capability Review Meeting on 27 January 2022. The letter said:

*"The purpose of the meeting will be to assess progress against the performance improvement plans and development areas. You are currently on a final written warning; therefore, the potential outcomes of the meeting, as outlined in the Performance Capability Policy, are as follows:*

- *Recovery Successful – enter into a 12-month sustained performance period*
- *Demotion*
- *Dismissal"*

It added:

*“You may, if you wish, bring a colleague or other individual of your choice (such as a trade union representative) along with you to the meeting. If you would like to bring someone with you to the meeting, please confirm details by the end of day on Tuesday, 25 January 2022.” (1436)*

105. On 21 January 2022, Dr Dehrmann sent the Claimant a document (1443 – 1446) setting out her current view of his performance against his objectives by email (1441). The latest version of the reduced objectives was embedded in the document. The document was in the form of a letter which Dr Dehrmann concluded saying:

*“In summary Wycliff, I am very sad to indicate that I do not believe that the performance review process has delivered the improvements we had spoken of and hoped for. This is despite all efforts being arranged to support you, it is now at the point where I am no longer able to ask team members to support you, as you are not delivering your outputs, nor acting as part of team, and this is impacting on all of our delivery in support of the customer.*

*We will discuss further in our meeting arranged for 27th January 2022. Should you require an extended deadline please indicate so by no later than 3pm on Monday 24 Jan 2022.” (1446)*

Dr Dehrmann also offered the Claimant extra time to prepare for the meeting in the covering email if he needed it. He did not request any extra time.

106. On 24 January 2022, Dr Dehrmann and the Claimant had their usual weekly one to one catch up meeting. Dr Dehrmann emailed him afterwards to summarise their discussions (1466). As well as discussing current work tasks, she reminded him at the meeting and in the subsequent email, that the Performance Review meeting was taking place on Thursday and that he could have extra time to prepare if required, but he needed to let her or Ms Steed know that day if he wanted to take up this offer.
107. The Claimant did not respond to Dr Dehrmann’s emails or say anything to her at their catch-up meeting about wanting to delay the meeting. On 25 January 2022, however, the Claimant declined the meeting invitation that had been sent to him by Ms Steed, saying he had to go to hospital for an urgent blood test (1484). It transpired that actually all the Claimant had to do was to pick up some forms on 26 January 2022 and then present himself for a blood test when convenient for him at some point that week. The Respondent therefore decided to proceed with the meeting on 27 January 2022 at 3:30 pm and communicated this to the Claimant (1483).
108. Notwithstanding that the Respondent had communicated that the meeting was proceeding, the Claimant did not initially attend it on 27 January 2022. Dr Dehrmann rang him and he then joined the video meeting.

109. When asked if he was content to proceed unaccompanied, the Claimant said that he wanted to be accompanied but his preferred companion could not attend the meeting. The Claimant was thinking of his colleague Mark Peters who was absent on holiday. The Claimant then said that he intended to speak to his trade union and ask them to represent him. The meeting was adjourned to enable the Claimant to do this. At 18:13 that evening, he emailed Ms Steed to say that the union was not able to provide someone to accompany him the following day and that he wanted to “*go it alone*” (1485). The Claimant confirmed to us at the hearing that he voluntarily decided to proceed without being accompanied (1485).
110. The meeting therefore took place on 28 January 2022 at 12 pm. At the Claimant’s request the meeting was recorded and a transcript was included in the bundle (1637-1646). Dr Dehrmann went through the issues in her letter with the Claimant and he was given a full opportunity to respond to them.
111. Dr Dehrmann considered that the Claimant had failed to complete the seven actions required of him in connection with the PIMS project. He had purported to have completed some of the documents for the project, but these had mistakes in them or missing information. She also noted that he regularly arrived late to meetings to discuss the project.
112. She noted that the Claimant had not completed the two Standards that he had been asked to complete by the end of the year and that the deadline for these had now been extended to the end of February 2022. The process for the verification of the Fairtrade submissions had however been completed together with the associated protocol.
113. With regard to dealing with ongoing customer queries in a timely manner, Dr Dehrmann raised the issue that had arisen with the documentation for the tea shipment. The matter had continued to be an issue even after the Claimant had returned from leave, including his communication with Dr Dehrmann about it. Dr Dehrmann said that she had lost trust that the Claimant would do what he said he would do because he had told her that certain things were happening when they were not. Dr Dehrmann highlighted that there also other instances of failures by the Claimant to respond to queries in the required time frame.
114. Finally, she noted that the Claimant had failed to complete the Action Tracker as requested and had not communicated his whereabouts correctly to her or his team the previous week.
115. Dr Dehrmann said that she felt she was now at the point where she did not believe the performance management process could deliver the performance improvements that she had hoped for. She also considered



that she could not ask members of her team to continue supporting the Claimant when he was failing to deliver his outputs.

116. In response, the Claimant defended his position in relation to the shipping matter by saying that there had been a problem with the delivery company being used. He acknowledged however that he had not communicated this to Dr Dehrmann and left her with a different impression. He believed that the issue was not as serious as Dr Dehrmann considered it to be.
117. He acknowledged that he had been late completing the Action Log that week and said that it had been for personal reasons. He then referred back to his previous sixteen years of experience with the Respondent and highlighted the nomination he had had for the prize. He also made the point that as far as he was aware there had been no actual complaints from external customers as he believed he was responding to them in the timeframes they requested.
118. There was then a short adjournment during which Dr Dehrmann considered her decision. The meeting was reconvened to enable her to deliver the outcome. This too was recorded and transcript provided in the bundle (1647-1651).
119. When delivering her decision on the outcome, Dr Dehrmann did not say whether or not she had considered demotion as an alternative to termination. She told the Tribunal that she and Ms Steed had discussed this. There were no existing vacancies at the Respondent for which the Claimant would have been suitable. They had considered whether they could reduce the Claimant's role, but felt that they had effectively tried this when reducing his objectives down and converting him into doing a supportive role rather than a leading role in relation to some projects. As this had failed, they did not believe that a reduced role would be effective.
120. The outcome of the meeting was that the Claimant was to be dismissed with a payment in lieu of his contractual entitlement to 3 months' notice. His last day of employment was 28 January 2022. The Claimant was informed he had a right to appeal against his dismissal, but did not exercise this right. The outcome was later confirmed to him in writing.
121. The Claimant contacted Acas on 15 March 2022. The EC certificate was issued that day (1). He presented his claim to the tribunal on 27 April 2022 (2).

### **Additional Relevant Facts**

122. It is also relevant for us to briefly note that the Claimant told us that another of his colleagues had left the business as a result of Dr Dehrmann's line management. The colleague was Huafu Wang. The Claimant said he believed that Dr Dehrmann had bullied Mr Wang into resigning. Dr

Dehrmann told us that she had initiated a similar performance management process for Mr Wang, whose ethnic origin was Chinese, to that of the Claimant. Mr Wang had resigned, however. She denied bullying Mr Wang. She explained that she had needed him to coordinate a project to align the outputs from a number of different laboratories used by the Respondent, but he had struggled with this.

## THE LAW

### EQUALITY ACT CLAIMS

123. Race is one of the protected characteristics identified in section 4 of the Equality Act 2010. Section 9(1) of the Equality Act 2010 says race includes colour, nationality and ethnic or national origins.

#### Direct Race Discrimination

124. 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.

125. 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'.

126. 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.

127. 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.

128. 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.

129. 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 race. 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 he was.

130. 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.
131. 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 race. 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.
132. 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.
133. 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)
134. 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 asserts 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).
135. 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.

136. 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.
137. 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.

### Indirect Race Discrimination

138. Subsection 19(1) of the Equality Act 2010 provides that:

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

139. Subsection 19(2) provides that for the purposes of subsection 19(1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (a) A cannot show it to be a proportionate means of achieving a legitimate aim.

140. In establishing whether a PCP places persons of a protected characteristic at a particular disadvantage, the starting point is to look at the impact on people within a defined “pool for comparison”. The pool will depend on the nature of the PCP being tested and should be one which suitably tests the particular discrimination complained of (*Grundy v British Airways plc* [2008] IRLR 74. The EHRC Employment Code provides useful guidance on this question. A strict statistical analysis of the relative proportions of advantaged and disadvantaged people in the pool is not always required. Tribunals are permitted to take a more flexible approach.

141. The Claimant must also establish that he is actually put to the disadvantage.
142. Indirect 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 were 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)*

## **UNFAIR DISMISSAL**

### **Reason for Dismissal**

143. 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.” Capability, which is argued here, is one of the fair reasons found in section 98(1).

### **Fairness of a Dismissal**

144. Under s98(4) ‘... the determination of the question whether a 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.’
145. In a case where the respondent relies on capability, the tribunal should ask itself whether the employer had reasonable grounds for thinking that performance was below what was required. We should examine whether the employer undertook a reasonable investigation to reach that conclusion and followed a reasonably fair procedure. A fair procedure requires the employer to notify the employee of where the deficiencies lie and what needs to be done to improve. The employer should give the employee a fair chance to reach the required standard.

146. If we are satisfied this was the case, we should then ask ourselves whether the decision to dismiss, rather than take some other form of action (demotion, redeployment) was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision in place of a reasonable decision made by a reasonable employer.
147. In reaching our decision on unfair dismissal, we must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

### Remedy Issues

148. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, enables an employment tribunal to adjust any award for an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures. The award can be increased or decreased by up to 25% if it is just and equitable in all the circumstances.

### Polkey

149. In accordance with the principle established in *Polkey v AE Dayton Services Ltd* [1988] ICR 142, if we decide the dismissal was unfair, we are required to consider the possibility that the respondent would have been in a position to fairly dismiss the claimant and reduce the compensatory award by an appropriate percentage accordingly. This includes considering when a fair dismissal would have been able to take place (*Mining Supplies (Longwall) Ltd v Baker* [1988] ICR 676 and *Robertson v Magnet Ltd (Retail Division)* [1993] IRLR 512).

### Did the Claimant's Conduct Contribute to the Dismissal?

150. Section 122(2) of the Employment Rights Act 1996 says: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."
151. Section 123(6) says: "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

## ANALYSIS AND CONCLUSIONS

### Direct Race Discrimination

152. The Claimant pursued a single allegation of direct race discrimination which was that the Respondent required him to attend frequent one to one meetings and spend time doing preparatory paperwork for each of these meetings. His claim was based on the fact that others in Dr Dehrmann's team, who were not black or of Kenyan origin, did not have to do this.
153. The Respondent accepted that the Claimant was treated differently to other members of Dr Dehrmann's team, but said this was nothing to do with race. The Respondent's explanation for the difference in treatment was because the Claimant was being performance managed by Dr Dehrmann and the meetings were part of the Performance and Capability process.
154. The Respondent did not accept that there was a significant difference in treatment in relation to the preparatory paperwork however. All members of Dr Dehrmann's team had to complete the Team Action Tacker on a weekly basis. The only differences were that the Claimant was required to complete a separate tab in order to record the details of certain queries with which only he dealt and had a slightly different time for completion to fit in with the one to one meetings.
155. In our judgment, the Claimant adduced no evidence of the required '*something more*' that suggested that the difference in his treatment might be because of his race. As such, the burden of proof did not shift to the Respondent to provide an alternative non-discriminatory explanation for its treatment of the Claimant.
156. The only allegation where he mentioned race was his allegation that Dr Dehrmann told him on several occasions that he was explaining things like a Kenyan. We did not find this allegation to be proven on the facts and therefore it does not lead to the shifting of the burden of proof.
157. The other allegation was that he often felt left out of some of the discussions at the team meetings. There could be a number of different reasons why this occurred, not least because the other members of his team were doing different jobs to him.
158. When the Claimant met Ms Steed on 21 November 2021, he told her that he felt that Dr Dehrmann was being unfair and/or racist towards him. He did not provide her with any specific examples. Ms Steed took this seriously, including sending the Claimant a copy of the Respondent's relevant policy and telling him in writing that if he raised specific examples these would be investigated. He did not pursue this option. In our view, this also cannot amount to the required "something more" to shift the burden of proof.

159. Even if we are incorrect about the burden of proof not shifting, we consider the Respondent has adduced cogent evidence in support of its non-discriminatory explanation for the Claimant's treatment in any event.
160. As discussed in more detail below, based on the evidence presented to us, the Respondent was right to view the Claimant as not fully performing his role to the required standard. The decision to take the Claimant through a performance management process was genuine and justified.
161. The requirement for frequent one to one meetings was part of that performance management process and therefore had nothing whatsoever to do with the Claimant's race.
162. The requirement to complete the Action Tracker applied to everyone equally in Dr Dehrmann's team, but to the extent to which the Claimant had to do it slightly differently, this was demonstrably because of the responsibilities of his role and the performance management process. It also therefore had nothing whatsoever to do with the Claimant's race.
163. We also consider it was significant that Dr Dehrmann's team was made up of a racially diverse group of people. In addition, the other person who the Claimant said had been the subject of a personal vendetta by Dr Dehrmann was not black, but was Chinese. We consider this to be evidence that Dr Dehrmann was motivated by the performance issues presented by both employees regardless of their races.
164. Our decision is therefore that the Claimant's claim of direct race discrimination does not succeed.

### **Indirect Race Discrimination**

165. The Claimant's indirect race discrimination claim relies on the Tribunal finding that the Respondent had a policy, criterion or practice of requiring employees to speak coherently without an accent. Although we found that the Respondent required its employees to communicate coherently, our factual finding was that this did not extend to speaking without an accent. In our judgment, the opposite was true. The Respondent employed lots of people across the globe that spoke with accents.
166. The Claimant's indirect race discrimination claim therefore fails without no further consideration.

### **Unfair Dismissal**

#### ***The Reason for the Claimant's Dismissal***

167. We find that the Respondent's genuine reason for dismissing the Claimant was because his performance was not meeting the required standards for



his role. The performance issues arose because the Claimant lacked the necessary skills to do his role rather than because of any misconduct on his part. The Respondent therefore had a fair reason for dismissing the Claimant within section 98(1) which was capability.

168. Before we reached this conclusion, we gave careful consideration to the Claimant's submission that the reason for his dismissal was a personal vendetta by Dr Dehrmann, that may have been influenced by her attitude to his race. He said that throughout the time she managed him he was performing his role to the required standards and met all of his business objectives. We rejected this submission.
169. We concluded that the Claimant's specific allegations of race discrimination did not have any merit for the reasons set out above. In addition, we did not agree with Claimant's submission that he was performing his role to the required standard and had met all of his business objectives at the time he was dismissed. This was not borne out by the evidence.
170. Although the Claimant had been doing his role for many years, he had not adapted to the key changes within the Respondent in recent years which had had an impact on his role. The three key changes were the growth in the numbers of people working in the Head Office, the drive to ensure that technical information was backed by data and the increased focus on the customer.
171. The combination of these key changes resulted in an increased demand to produce clear information, that could be understood by people with less experience of the Respondent's business. There was also a drive for that information to be supported by relevant data and to be written with a customer focus in mind. The increased focus on customer service was also driving a desire to ensure that customer queries were responded to within prompt timescales.
172. The Claimant's poor performance in his role had first been highlighted by Mr Bourman. Although Dr Evans had been positive about the Claimant's performance, it is notable that in the appraisal feedback he gave the Claimant he identified a number of areas of development for the Claimant. This included the better know-how management systems so as to enable the Claimant to better manage the large number of queries he received.
173. When Dr Dehrmann took over the Claimant's management, her style was more interventionist than the Claimant's previous managers. She immediately recognised that he had not been closely managed previously and that therefore his performance had not been properly monitored. Such monitoring would not have been necessary if the Claimant had been doing his job to the required standard but it quickly became evident that there were

issues and the Claimant had not adapted to the changes that had taken place in the Respondent.

174. We do not consider that Dr Dehrmann set out to get rid of the Claimant as he suggested. In our judgment, she recognised that the Claimant's experience and knowledge were valuable assets and therefore she worked hard to try and to help him adapt, but he did not respond positively to this.

***Was the Claimant's Dismissal Fair?***

175. The performance management process adopted by the Respondent was extremely fair. Prior to commencing the formal process, the Respondent first tried an informal approach. However, when this failed, it moved to a formal process and went through each of the stages carefully in line with the requirements of the Acas Code.
176. At each stage the Claimant was provided with detailed information about what was happening. He was given plenty of advance written notice of formal meetings and what would be discussed at them. He was informed that he could be accompanied at such meetings by a work colleague or trade union representative, but chose to attend alone except for the last one.
177. At the formal review meetings, the Claimant was informed in what ways Dr Dehrmann considered he was failing to meet the Respondent's expectations. She gave him with concrete examples based on recent issues rather than simply made vague assertions. He was given a full opportunity to disagree with what Dr Dehrmann was saying, but it is notable that he very rarely challenged her. He appears to have believed that Dr Dehrmann would 'see sense' at some point or might leave like others who had been critical of him.
178. The Claimant was offered a right of appeal each time the level of warning he was given escalated, but chose not to exercise that right. This was also the case when the decision was to dismiss him.
179. The Respondent did not rush the performance management process, but allowed reasonable periods of time between stages for the Claimant to demonstrate improvements. He was given clear guidance as to what was required of him and support in the form of weekly one to one meetings with his manager. The Respondent also identified helpful training opportunities for him to attend. Overall the process took more than a year.
180. When the Claimant demonstrated some improvement, this was acknowledged by the Respondent. It paused the performance management process as a result, at the same time, enabling it to review whether the process was having a negative impact on his mental health. It concluded that it was not, based on what the Claimant told its OH adviser.

181. When the process was restarted in November 2021, Dr Dehrmann reduced the Claimant's objectives to achievable deliverables in consultation with him. Although the Claimant says he had delivered all of his objectives by the time he was dismissed, this was not correct based on the evidence before us. A number of the reduced objectives had still not been met.
182. Before us, the Claimant said that his previous bonus payments, the award nomination and the 360 feedback demonstrated that he was performing his role excellently. We disagree. His bonus payments had reflected that he had been meeting expectations rather than exceeding expectations. The award nomination was for one particular piece of work, which while valuable, did not lead to an actual prize. Finally, the 360 feedback was mixed and although some contributors had positive things to say about the Claimant, some highlighted areas of concern as well.
183. The Claimant also argued that his dismissal should be found to be unfair because of irregularities with the final meeting held in January 2022, but we disagree. He contradicted himself in this regard, because on the one hand he said that he did not realise that the meeting was a formal meeting at which he could be dismissed, but also that he knew that the outcome of the meeting would be that he would be dismissed.
184. The invitation to the final meeting told the Claimant that it was a formal meeting being held under the Respondent's Performance Capability Policy and Procedure and that termination of his employment was a possibility. We consider he realised this as this was the only meeting where he asked to be accompanied. With regard to the Respondent's decision to proceed with the meeting even though the Claimant was not accompanied, he expressly asked that meeting proceed rather than be delayed.
185. One criticism made by the Claimant of the Respondent's process was that the Respondent failed to apply its usual annual appraisal process to him for 2021. This was correct. Although the Respondent had agreed objectives with him at the start of 2021, and these were documented, Dr Dehrmann did not provide the Claimant with a signed off agreed objectives document as had been put in place for him in previous years. In addition, she did not undertake an end of year review against those objectives for 2021. The Respondent's reason for not doing this was because it had been superseded by the performance management process. We consider this was a reasonable decision for it to take.
186. At the time of reaching the decision to dismiss the Claimant, the Respondent did not have any other roles that the Claimant could perform. This meant that demotion was not an option available to it, unless it created a new job for him. We consider it was reasonable for the Respondent to decide against this.

187. The only other alternative was to give the Claimant more time to improve. We consider it was reasonable for the Respondent to terminate when it did. If anything, in the few months before his employment was terminated, the Claimant's performance had deteriorated rather than improved.
188. Taking into account all of the above, we consider that the Respondent's decision to dismiss the Claimant fell well within the range of reasonable responses of a reasonable employer and was therefore fair. We have therefore not gone onto consider any of the remedy issues that would normally be considered at this stage.

---

**Employment Judge E Burns**  
**28 March 2023**

Sent to the parties on:  
28/03/2023

.....  
For the Tribunals Office

**Appendix  
List of Issues**

**Unfair dismissal**

1. Was the claimant dismissed?
2. If so, what was the reason or principal reason for dismissal?
3. Was it a potentially fair reason?
4. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
5. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
  - a. The respondent adequately warned the claimant and gave the claimant a chance to improve;
  - b. Dismissal was within the range of reasonable responses.

**Remedy for unfair dismissal**

6. If there is a compensatory award, how much should it be? The Tribunal will decide:
  - a. What financial losses has the dismissal caused the claimant?
  - b. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
  - c. If not, for what period of loss should the claimant be compensated?
  - d. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - e. If so, should the claimant's compensation be reduced? By how much?
  - f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
  - g. Did the respondent or the claimant unreasonably fail to comply with it?
  - h. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
  - i. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
  - j. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
  - k. Does the statutory cap of fifty-two weeks' pay apply?
7. What basic award is payable to the claimant, if any?

8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

**Direct race discrimination (Equality Act 2010 section 13)**

9. The claimant's race is black and he compares himself with people who are not black.
10. Did the respondent require the claimant to attend frequent 1:1 meetings and spend time doing preparatory paperwork for each of these meetings?
11. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says he was treated worse than all his white colleagues.

12. If so, was it because of race?
13. Did the respondent's treatment amount to a detriment?

**Indirect discrimination (Equality Act 2010 section 19)**

13. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: Requiring employees to speak coherently without an accent
14. Did the respondent apply the PCP to the claimant?
15. Did the respondent apply the PCP to white employees or would it have done so?
16. Did the PCP put black people at a particular disadvantage when compared with white people?
17. Did the PCP put the claimant at that disadvantage?
18. Was the PCP a proportionate means of achieving a legitimate aim? The respondent does not reply on a legitimate aim. It says it did not have the PCP.

**Remedy for discrimination**

19. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend? What financial losses has the discrimination caused the claimant?
20. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
21. If not, for what period of loss should the claimant be compensated?
22. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
23. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
24. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
25. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
26. Did the respondent or the claimant unreasonably fail to comply with it?
27. If so is it just and equitable to increase or decrease any award payable to the claimant?
28. By what proportion, up to 25%?
29. Should interest be awarded? How much?