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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101497/2022

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**Final Hearing Held in person in Dundee on 18, 19 and 20 April 2023 at
10.00am**

Employment Judge Russell Bradley

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Mrs Maria Alegandra Aguado

**Claimant
In person**

Aviva Employment Services Limited

**Respondent
Ms L Kaye
Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that the claim of unfair dismissal does not succeed;
it is dismissed.

REASONS

Introduction

1. On 8 March 2022 the claimant presented an ET1. At that time she was not
5 legally represented. On or about 7 April 2022 an ET3 with grounds of
resistance was lodged. On 5 May 2022 a case management telephone
preliminary hearing took place. By that time the claimant had solicitor
representation. On or about 20 May via her solicitor she applied to amend her
claim (**pages 37 to 40**). It was by then a single claim of unfair dismissal. On
10 8 June the respondent lodged amended grounds of resistance (**pages 48 to
52**). The dismissal of the claimant was admitted. The respondent relied on
capability as its reason.

2. For the start of this hearing an indexed joint bundle was prepared and lodged.
15 It contained 87 documents extending to 421 pages. It included an agreed list
of issues (**page 29**). I set them out below. It also included a schedule of loss
with supporting material (**pages 382 to 405**).

3. The notice fixing this hearing was issued on 14 February 2023. On or about
20 6 April the claimant's solicitor indicated that he would not be representing her
at it. It appears that in the period between 5 May 2022 and 6 April 2023 she
had that solicitor representation. Her solicitor was involved in the preparation
of the indexed bundle, agreeing the issues, preparing witness statements and
in compiling the claimant's loss schedule. It is regrettable that she did not
25 have legal representation at the hearing.

Issues

4. The agreed issues for determination were:-
 1. Did the Respondent genuinely believe that the Claimant was under-
performing?

2. Did the Respondent give the Claimant adequate opportunity to improve in terms of both time and support (having regard to their status, length of service and the nature of their role)?
 3. Did the Respondent act reasonably in not finding alternative employment for the Claimant?
 4. Given the degree of under-performance, was dismissal within the range of reasonable responses open to the Respondent?
 5. Did the Respondent and the Claimant comply with the ACAS Code of Practice?
- 10 If her claim succeeded;
6. What remedy does the Claimant seek? The Respondent understands the Claimant seeks compensation and a recommendation.
 7. What financial compensation is appropriate in all of the circumstances?
 8. Should any compensation awarded be reduced in terms of ***Polkey v AE Dayton Services Ltd*** [1987] ICR 142 and, if so, what reduction is appropriate?
 9. Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?
 10. Has the Claimant mitigated her loss?

5. It was agreed before hearing evidence that given the claim being made, it was not possible for the remedy to include a recommendation.

Evidence

6. The preliminary hearing ordered the use of witness statements. From the respondent, evidence was heard from (1) Cheryl Rigden at the relevant time a commercial property manager with the respondent; (2) Diane Storie a

commercial claims supporter; (3) Francesca Sterpaio, a commercial property front line leader; and (4) KellyAnn Reid, operations manager. All spoke to their witness statements and were cross examined. The claimant spoke to her witness statement and was cross examined. She had lodged a statement from her son, which I had read before the start of the hearing. In discussions with her, I left it to her as to whether she wished to call him. She did not. I took no account of his statement in determining the issues.

7. Helpfully, the claimant agreed that there was no dispute as to the accuracy of the notes of meetings which she attended on 10 August, 7 October and 10 and 19 November, all 2021.

Findings in Fact

8. From the tribunal papers and the evidence I found the following facts admitted or proved.

9. The claimant is Maria Alejandra Aguado Munoz Gardiner. She is from Mexico. She is married. She has immediate and extended family in Mexico. Her mother resides there.

10. The respondent is the employing company of Aviva Plc within the UK. The respondent, Aviva Insurance UK Limited, Aviva Healthcare Limited and Aviva Life and Pensions Limited are “*group companies*” of Plc.

11. As per a written statement of terms and conditions of employment effective from 1 April 2021 (**pages 88 to 97**) the respondent employed the claimant at grade B. Her continuous service began on 22 September 2008. The claimant was employed at the respondent’s Perth Office. Her statement recognises the “*highly regulated environment*” in which the respondent operates. That was a reference to being regulated by (at least) the Financial Conduct Authority and the Prudential Regulation Authority.

12. She worked as a claims handler. Her role and responsibilities included being responsible for dealing with commercial property claims and liaising with insurance brokers and customers by phone and email to progress them. The

commercial claims department investigates and validates claims from commercial policy holders. The nature of claims varies. They include theft, escapes of water, and other business interruptions. Her role is primarily telephone-based. There are three main “*work streams*” within the department; (1) telephones; (2) post; and (3) new claims. The claimant worked on all of them. She also had responsibility for a caseload of claims. Some cases required to be allocated to surveyors employed by the respondent. Other cases were allocated to external loss adjusters. Telephone work is the priority because when a handler is assigned to it they are dealing with incoming calls from a variety of sources. They include brokers, customers, suppliers and loss adjusters. Invariably, those callers require an instant response.

13. The claimant worked in a team of about ten staff. Ordinarily, the claimant’s work (along with colleagues) was carried out at the respondent’s Perth office. Prior to her dismissal, the claimant worked in the commercial property claims team for about four and a half years.

14. From 21 April 2021 her gross annual pay was £21,541.88 (see **page 89**).

15. The respondent operates an “*Improving Performance*” procedure (**pages 98 to 103**). In the main it regulates the manner of seeking improvement in performance in a formal process. It provides that for employees employed for over 12 months the formal process will “*usually last around two months.*” Under the heading of “*Finding an alternative role*” it provides that, “*Throughout the process you and your leader may agree that you are not suited to your current role and therefore you should look for an alternative role. If you take up another role it could result in a change in your terms and conditions, including a reduction in salary. If you do not secure an alternative role, we may have no other option but to end your employment on the grounds of capability.*”

16. The performance of a commercial claims handler is assessed against Customer and Claims Step Pay guidelines (**pages 104 to 109**). The Claimant

was a “*Step 3*” within the guidelines. She was required to meet the guidelines/expectations set out on **page 108**. They included:-

1. Able to operate in the live environment with support where necessary
 2. Take ownership of developing own skills and knowledge
 - 5 3. Recognise the need to pull on support and identify correct sources of support
 4. Know when to refer outwith your authority level
 5. Being able to follow guidelines around estimating and understanding the financial implications of not updating reserves correctly.
 - 10 6. Demonstrating good housekeeping with regards to claim files and diaries
 7. Claim costs are validated correctly, using tools and technical support
 8. Positive interaction with customers/brokers
 9. Considers fraud and recoveries and pulls on support
 - 15 10. Takes part in team huddles.
17. On 23 March 2020, the Prime Minister of the UK announced the first lockdown ordering people to “*stay at home*”. As a result, the respondent required the claimant and her team (amongst other staff) to work from home. Staff (including the claimant) were provided with equipment to work from home (page 38, paragraph 4). At that time, the claimant’s line manager was Marie-Claire Morrison, frontline leader.
18. As a result of the lockdown, there was an increase in the volume of work required of the claimant and her team.
19. In about May 2020, the claimant carried out her mid-year review with Ms Morrison. Comments from both the claimant and Ms Morrison for that review were recorded (pages 227 to 232). Those comments related to three “*Goals*”.
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The first goal was *“Cost: I will ensure that I pay claims fairly and accurately using all tools available to me and continually update estimates.”* Ms Morrison commented that this had been performed well by the claimant. She also commented that the claimant was *“particularly great”* at *“quick settlements”* and *“same day”* settlements when in isolation because she had *“the space to take the claims as far as possible.”* Ms Morrison’s comment continued, *“The rest of the year needs to focus on ensuring you allow yourself the same thinking when dealing with claims on the phones.”* The claimant’s comment on this goal was that *“estimating still needs work on as I need to follow the guidelines to check after 1 weeks that after appointing a surveyor/la the estimates are correct(providing they too update the system).”* The second goal was *“Customer: I aim to get it right first time, Have a clear understanding of what matters to our customers. If it goes wrong I will take ownership and work to provide a resolution.”* Ms Morrison commented that this goal required attention for the rest of the year. The claimant’s comments included a recognition of the need to; reduce her call volume; stop taking back to back calls; take *“wrap time”* when needed; and ensure DPA is carried out at all times. Ms Morrison commented that *“DPA is an area that was identified as an area you have not been performing in this year. Following our discussion in May we have seen an improvement and hopefully this will continue. This needs to be one of your main focuses for the rest of the year as if you continue to not perform in this area could affect your overall performance.”* *“Wrap time”* is time after a call which is used to conclude the recording of relevant information from it. It is expected to be limited. *“DPA”* refers to data which is sourced in order to ensure compliance with data protection legislation and best practice. The third goal was *“People: I will encourage and support my peers to help us become the best version of ourselves. I will trust and respect others. I will demonstrate that I continually work within my Step pay rating and the company values.”* Relative to this goal, Ms Morrison said, *“The area in this particular goal that requires focus for the rest of the year is being receptive to feedback. As discussed this behaviour has been observed by myself, your supporters and the wider desk/capability team.”* The claimant’s

comments included *"I have taken on board to consider to improve to be perceptive of feedback."* Ms Morrison summarised three main areas on which the claimant required to focus. They were (1) Ensuring you are not taking too many things on at once when you are on calls to ensure you are progressing demand as far as possible; (2) DPA; and (3) being receptive to feedback.

20. In June 2020 line management of the claimant was taken over from Ms Morrison by Cheryl Rigden. At the time she was a commercial property manager. At or about that time, Ms Rigden read the claimant's previous review (**pages 227 to 232**).

21. The respondent reviewed the performance of claims handlers against the Customer and Claims Step Pay guidelines/expectations (**pages 104 - 109**). As the Claimant was a step 3, the guidelines on **page 108** (noted at paragraph 16 above) applied to her role. In order to assess how a claims handler is performing against these guidelines the respondent completed *"method reviews"* of their work. A pro forma document is used and populated with information relevant to the review. A review is of a cross section of the handler's work. It is done by listening to calls, and reviewing emails. There are no targets for claims handlers to pick up a set number of calls or respond to a certain number of emails per month. The method review process considers five different areas. The overarching question is; is there a *"development opportunity"*? In other words, is there an area which requires improvement? The five areas are; (1) Has the employee identified what matters to the customer? (2) Has the employee exhausted all avenues with the customer? (3) Has there been a *"clean flow"*? (4) Have any communication issues been identified? And (5) Have any areas of risk been identified? If no issues are identified, an individual will receive 0% development opportunity. The respondent's aim is to get staff to at least 20% (meaning only 20% of claims had a development opportunity). At or soon after Ms Rigden took on the role of managing the Claimant her development opportunity percentage was at 80%.

22. By June 2020 the claimant worked condensed hours. As a result she ordinarily did not work on a Friday. On Wednesday 29 July 2020 the claimant asked Ms Rigden if she could work on Friday 31 July and instead take the following Monday as her day off. The reason for the request was the fact that the claimant's husband was on holiday on the Monday, a Bank holiday. Ms Rigden did not accede. She said "*if there are no holiday hours available, we can't do it Alex sorry we can't authorise any more than two off at a time x.*" The further exchange between them ended with the claimant's comment, "*ok no worries thank you for looking into it.*" (pages 330 and 331)

23. On 2 September 2020 Ms Rigden messaged the claimant to say, "*I can't have you in wrap for that length of time Alej and you need to communicate in the chat if you need time. Caseload only works if we all take our share on the phones x.*" (page 332)

24. In October 2020 three members of the claimant's family in Mexico (uncle, aunt and cousin) died. She did not mention any of this to Ms Rigden at the time. This was because she did not feel she was approachable such that she could confide that information to her. Her impression was that Ms Rigden was not receptive to what she saw as personal issues. The claimant was worried that Ms Rigden would think that she was making excuses to compensate for issues to do with her performance. At the end of October 2020 a very close friend of the claimant in Scotland died. Relative to it, Ms Rigden messaged the claimant (page 336) "*let me know if you need time off for the funeral or anything its always horrible when someone passes but right now it's worse with everything else going on.*"

25. On 2 December 2020 Ms Rigden and the claimant exchanged a number of messages (pages 337 to 339). In one of them Ms Rigden said, "*you had 2 hours to complete your oldest dates where you were off the phones and either in available or in caseload. I am not asking you to work over your lunch and have been very clear I need you to take a lunch. But you need to understand zero bits of post with two hours off the phone is not acceptable.*" The claimant

replied to say, *“No, I will work over my lunch and see how many I can do - I am sorry for being so slow.”*

26.22 December 2020 was the completion date of the claimant’s end of year review document (**pages 233 to 237**). It was carried out by Ms Rigden. Those pages record comments from both Ms Rigden and the claimant. Ms Rigden’s
5 comments begin, *“Throughout this year and specifically over the last few months you have had consistent feedback around not updating estimates. You are not checking the estimates each time you go into a file and you are not updating them when you get new information. It has been evidenced throughout the year that you are not pushing demand as far as possible and often are doing nothing with any demand you get and are instead looking for ways not to progress the demand. You have had leakage recently and are pushing back unnecessarily for information on claims. You are not on top of your caseload and your wrap sits the highest in the team.”* The claimant’s
10 status on each of the three goals was *“not achieved”*. On goal 2, Ms Rigden noted, *“You have caseload time 2-3 times a week to complete your work and whilst I appreciate there are times you need to jump on the phones during caseload, this is the same for everyone. I am happy to agree that whilst you are in caseload but you need to be progressing demand. You are currently asking for a lot of unnecessary information that drags claims out and when you do get a call, you are not progressing anything on the calls. There has been recent feedback from three different brokers this month that you sounded offended that they asked you to do something(one of them was call the customer) and two examples this month where you have failed to leave a note on the system or do anything with the demand on your method reviews.”*
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The claimant’s corresponding comment suggested that Ms Rigden’s advice (to be more available) was the complete opposite to Ms Morrison’s advice (that she was taking too many calls). She accepted that her *“DPA had failed again.”* A DPA (or data protection) failure has negative implications for the respondent. Those implications include a breach of the rules of their
30 regulatory regime. Ms Rigden noted (**page 235**) *“You are not meeting your risk goal due to the fact you fail dpa month on month and consistently fail*

estimating. This is an area you have continuously struggled with and it is not improving. The risk goal is completely within our gift to achieve and you are choosing not to on each call.” On goal 3, Ms Rigden commented, “You do not act as a team player and are very single minded in your thinking at times. I need you to work with the team to achieve the standards set out. When you have a query you feel it is urgent and expect answers there and then, often not following processes to get the answers you want.” She then gave examples. In her summary Ms Rigden noted, “I understand the feedback you have had has not been easy however it is evident you are not taking it on board and are not learning from it”, and “Your estimating and DPA levels are not acceptable and this has been something that has been highlighted throughout the whole year. You have had coaching on this and there has been no improvement throughout the year. This is a choice you are making as it has been made clear to you that you cannot be failing this and yet you consistently fail”, and “You do not take feedback on board and are not accepting of change”, and concluded, “after the Christmas break, you will be invited to a meeting regarding placing you on a formal performance improvement plan where I must see improvement.”

27. Some time in January 2021 the claimant sent to Mr Rigden her Goals and review documentation for that calendar year. In it the claimant had recorded a goal as being “she should just forget about her bereavements and accept that she was not performing.” In Ms Rigden’s view, goals are generally focused on career and performance as opposed to personal issues. She discussed them with the claimant. Ms Rigden said that the document could not be submitted as it did not meet the requirements of identifying how she planned to meet her goals across each area.

28. January 2021 was a particularly busy time for the claimant and her team. This was as a result of a number of winter storms. The number of business interruption claims increased as a result.

29. On 9 February 2021, Ms Rigden sent two messages to the claimant (**page 344**). Both were complimentary about the way she had handled certain parts of her work.
30. On 18 February 2021 the claimant and Ms Rigden exchanged messages to do with her family in Mexico including the death of a cousin; the impact of COVID-19 in Mexico; and travel to Mexico for the funeral. Ms Rigden reminded the claimant of EAP and wellbeing advice which assistance the respondent makes available online. EAP is an outsourced employee assistance resource.
31. On 5 March 2021 a claims handler colleague, Rachel Watson emailed the claimant (**page 119**). In it, she reminded the claimant about the procedure and timing about reporting complaints.
32. On 8 March 2021 Ms Rigden and the claimant exchanged messages (**page 346**). Ms Ridgen said that; she was trying to help and support the claimant; the claimant needed to be able to accept feedback; she did not want to use any sort of formal route; and suggested that to avoid that route the claimant *"needed to work with"* her. The claimant replied and said, *"I am sorry I lost it Cheryl, but I am going crazy (really) to the point of break down - I honestly don't what to do next - you are telling me since October I am constantly failing and nothing has been improved?- you keep bringing issues you told back in October and keep telling I am constantly not moving claims new or old and I am going round and round in my head what have done wrong and what claims I am not moving forward? (I stay awake at night about this) else I can do - you are telling me that I am got failure in all my claims I have touched or logged since October and I have taken lots of claims - since October I had one single positive comment from you and that was when you thought I had a zero claim - that is the only positive comment - you keep telling me that I failed in LA appointments, in fraud process, surveyors - I don't participate in huddles? how could I am afraid to speak or move because anything I said or do is wrong E I need to speak to someone about this Cheryl I am so upset*

about it - I don't how many I have logged and answer calls relevant to commercial claims since the last feedback and you are telling they are all wrong? Oh god = every single one of them?" On 9 March Ms Rigden replied in two messages. (page 346). She said "I will schedule in your method review and I am happy to go over everything with you again, I have given you claim numbers at each method review and have given you detailed feedback which I am happy to provide the claim numbers for. I think it is really important we agree a plan to move forward from here and as I said yesterday, I want to support you to get to where you need to be but right now there is areas you need to work on which have all been highlighted to you. I understand it is not easy to hear and again, I am happy to give you any support you feel you need" and "I have offered further training and asked if you are struggling with the role both of which you have said no, I have also asked if there is any further support you need but you have declined. Please have a serious thought about your performance prior to our next chat and we will agree a plan going forward from there."

33. On 6 April 2021 the claimant and Ms Rigden discussed matters by telephone. Following that discussion, Ms Rigden emailed to the claimant an action plan (pages 124 to 132). It noted four "performance concerns." The first was called "behavioural". It set out a number of examples of situations in which the claimant had allegedly failed to follow instructions and take on board feedback. The second was "soft skills." It was suggested that her telephone tone was accusatory. It alleged that there had been complaints about her tone. Ms Rigden's noted suggestion was that a colleague (Kimberley Murray) provide training. The third was "Method". The focus included not doing everything that could be done for a caller and choosing not to complete work/better time management. The fourth was "Regulatory". It set out three bullet point comments. First, a failure to keep estimates (for claims) up to date. Second, regular failure on DPA checks. Third, failure to identify complaints "month on month". The document noted one to one coaching with another colleague (Rachel Watson). It noted the claimant's comment that she

did not need additional support on DPA or estimating. Training was provided to the claimant by various colleagues.

34. On 13 April one of the claimant's claims handler colleagues (Lauren Wright) emailed Ms Rigden (**page 133**). She noted a complaint from an insured to do with an alleged failure by the claimant to revert to the insured since 3 March 2021 and the impact of that delay. It noted the insured's claim for resultant compensation.

35. Ms Rigden and the claimant carried out a method review in week beginning 15 June. On 22 June Ms Rigden emailed to the claimant the notes from that discussion. (**pages 143 to 146**). The overview referred to evidence from internal sources of the claimant not following instructions. It included Ms Rigden's advice not to work beyond the claimant's shift end and the health and business related reasons for the advice. It noted that the claimant was on a *"formal performance management program and there is little development each week. I have provided you with additional soft skills training, complaints training and have continued to do increased method reviews and some side by sides. Unfortunately, as of yet, I am yet to see you improve in many of the areas identified."* A formal process to manage the claimant's performance began on or about 15 June.

36. On or about 3 July 2021 the claimant's husband fell from scaffolding while at work. He sustained injuries which required attention at hospital. The claimant was unhappy about the extent to which she was allowed time away from her duties to attend to his injuries and hospital appointments.

37. On or about 9 August the claimant had an exchange of messages with a colleague, Andrea Whalley. The claimant believed that Ms Whalley was a trade union representative. Ms Whalley advised that she no longer held that role. Notwithstanding that change of role, Ms Whalley suggested that the claimant contact EAP which she described as providing *"amazing emotional support"*. Ms Whalley also suggested that if the claimant's relationship with her line manager had broken down, she could use another internal resource,

“*resolution*”, to try to repair it. The claimant did not use either resource at that time.

5 38. On 16 August 2021 Ms Rigden met again with the claimant. A transcript of it was produced (**pages 159 to 173**). It appears to be verbatim. It notes that Kimberley Murray attended as support for the claimant. It is a fair representation of the discussion at the meeting. It had been convened by a written invitation along with a copy of the Improving Performance procedure. The note recorded; the areas of expected improvement on 6 April; the start of the formal process on 15 June; 10 areas of expected improvement; a
10 summary of reviews over the previous 8 weeks (on 25 May, June 1,8,15, July 11,18, 26 and 2 August); a 95% development opportunity rating on the claimant’s reviews; and the outcome of a formal warning. The note recorded the suggestion that the claimant shadow Rachel Watson in the office the next day. Ms Watson was to be asked to go over the “*routing tool*” and templates
15 with the claimant at that time.

39. On 20 August Ms Rigden emailed the note of the meeting and a letter dated 18 August to the claimant (**pages 157 and 158**). The letter noted; Ms Rigden’s finding that the claimant’s performance continued to be below what was required; the imposition of the formal warning with a life of 12 months; the indication that a failure to improve within six weeks could result in
20 dismissal; and advice as to the claimant’s right of appeal. She did not exercise that right.

40. On Monday 23 August Ms Rigden emailed to the claimant a method (development opportunities) summary (**pages 174 to 176**). In her overview,
25 Ms Rigden said, “*This week I can see some of the feedback you have been provided has been taken on board and there have been examples where I can see you are using the routing tool and are using the template. There were no dpa issues this week and I can see improvements on the way in which the DPA questions are being asked. Taking demand as far as possible*”

continues to be a problem area for you and failing to call the broker or customer also continues to be a trend. There were several examples again where the template has not been used or you are shortening it. There are three instances where you have either misunderstood cover or have given incorrect information. As discussed above, I can see improvements being made however the reviews still fall short of being an acceptable standard. We recently met for yours formal performance management and you were issued a warning, you requested some support on this call which I expect to see imbedding in your subsequent reviews. I will meet with you tomorrow to discuss this support along with the reviews below.” The email said that they would meet the next day to discuss it.

41. Sometime in August 2021 Ms Rigden was seconded to another part of the respondent’s business. The team reporting to her (including the claimant) was split between team leaders. As a result, the claimant then reported directly to Francesca Sterpaio, Frontline Leader. On 2 September, Ms Rigden emailed Ms Serpaio and the claimant (**pages 177 to 178**). It noted the warning. It referred to the period of 6 weeks for improvement. It set out ten areas in which there was a need for improvement to be seen. The email was copied to Diane Storie, Commercial Claims Supporter. This was because Ms Storie was to assist by carrying out reviews of the claimant’s work and giving her feedback on it.

42. On 24 September Ms Sterpaio emailed the claimant, copied to Ms Storie (**page 180**). In it she said, “Here is a copy of your feedback from this week along with the summary of actions agreed for next week to support you to demonstrate what has been outlined in your plan”. The document attached (**pages 181 to 185**) was headed “Method (Development Opportunities) Summary – Performance Improvement Plan”. It repeated comments previously made by Ms Brigden. It recorded feedback on a number of specific (number coded) calls. It contained a summary which said, “Improvements seen on DPA with only 1 review highlighted where it wasn’t completed correctly: Evidence that estimate was being refreshed as per discussions last

week: *The correct version of the template has been used but areas still highlighted where areas missing and not fully updated correctly: Improvement on soft skills but better call control still highlighted as an area of development.* For the following week, the plan said, “*We have agreed that Diane will carry out remote reviews next week rather than side by side*”
5 *Alejandra hasn’t gone into the office for side by sides but is still keen to arrange to listen to someone. We have discussed listening to calls on teams which will be planned Fran to link with Michelle Ness as Alejandra has asked for side by side coaching from her. I have explained that this may not be possible, but I would explore.”* Ms Storie reviewed up to 10 pieces of the claimant’s work each week across different work streams. As part of that review, she selected a cross section of the Claimant’s work at random. It included listening to her calls, picking at random a call from a list of calls, reading the notes she had added to the file following that call, and reviewing
10 *“existing demand”* email actions or new claim work. Ms Storie also completed remote coaching with the claimant where they shared screens and discussed her process. Ms Storie provided tips and support on those occasions. She sat with her individually for extended periods of time. She did “*one on one*” work with the claimant on top of normal daily referrals.

20 43. On 29 September Ms Ness emailed Ms Sterpaio (**page 186**). She noted; that she had been “*side by side*” with the claimant that day; and the various work that she had witnessed. Her overall feedback was, “*Routing tool must always be used, no matter how limited the info is you have. Make your next steps clear. Keep control of the call, don’t let them talk over you, but don’t overshare information, there can sometimes be too much of an explanation. Keep it short and sweet.*” She concluded by saying (amongst other things), “*I think Alejandra is trying really hard to get things right first time. There were no DPA fails there are a couple things I noted for feedback and she agreed.*” The email attached (**pages 188 to 191**) a document which contained some
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30 detail on various number-coded calls.

44. On 30 September Ms Sterpaio emailed the claimant and Ms Storie (**page 192**). In it she said, *“Here is the feedback form that we covered today which includes the data”*. That form was **pages 193 to 197**. It also repeated the comments previously made by Ms Brigden. Its summary said, *“Improvements on DPA over the sample of reviews: Evidence that estimate was being refreshed as per discussions last week: Further examples where call control has been highlighted: Inappropriate comments made to broker/soft skills: Template not always followed.”* The Plan noted a summary of the support which had been put in place for the claimant. It concluded, *“Next week we will continue to carry out reviews and will arrange an invite to your formal meeting as we are reaching the end of the formal performance improvement process.”*
45. On 4 October Ms Sterpaio wrote to the claimant (**pages 198 to 199**). In it she; invited her to a final formal improving performance meeting to take place at 2:30pm on 7th October 2021 via Teams; advised that its purpose was to review her performance during the improvement plan; and noted the possible outcomes as being an alternative role; extending the process; or the contract of employment being ended.
46. On 7 October Ms Sterpaio duly met with the claimant. A transcript of the meeting was produced (**pages 200 to 205**). It appears to be verbatim. It noted that Shauna Stewart attended as support for the claimant. It is a fair representation of the discussion at the meeting. The note recorded; a recap covering 6 April to formal review on 15 June and the 10 areas for improvement; the support provided; reference to the 6 week review period from 16 August; and a recap of the notes from those 6 weeks. The note recorded Ms Sterpaio saying, *“the basic elements like DPA we have marked and for at least 3 weeks of this plan you failed on DPA over a selection of reviews. Following on, Issues with estimating which again is a very basic thing on each claim that must be done is not something we can agree for one person can or cannot do it, everyone must do it and complete these correctly. Templates are again an issue you sometimes choose to not fill in or delete sections of the template showing gaps in files. You were not following*

instructions as we have asked everyone to ensure these are complete ...".

The note recorded the claimant's assertion that *"it seems that it doesn't matter what I do or my opinion that I am improving, and I know I have as from the hundreds of calls I take, you chose only the negative ones."* Ms Sterpaio clarified that calls are selected at random. The note recorded that in answer to a question the claimant advised that she had not reviewed the respondent's resource to see if there were any alternative internal roles which may have been suitable for her. In answer to the claimant's comment *"cut to the chase, I know where you are going with this"* Ms Sterpaio said, *"from considering the circumstances and lack of improvement during the development plan, I have no option but to terminate your employment due to capability with immediate effect."* The claimant replied, *"You are not sorry this has been planned for a long time and you all want this I will send you champagne to celebrate as this is what you want. I need a reference to get another job, I want to hand my notice in, then I can get recommendation for a new job."* Ms Sterpaio advised that the claimant would be paid 12 weeks in lieu of notice. She declined the claimant's offer to resign.

47. By letter dated 7 October Ms Sterpaio confirmed the outcome of the meeting that day to the claimant (**pages 206 and 207**). She confirmed that despite an amount of (listed) support, the claimant had not reached an acceptable and sustained level of performance. She specified eight areas which continued to be requiring development. They included; failure to comply with data protection; lack of call control; concerns over soft skills; estimating errors; not taking demand as far as possible for customers; not completing customer actions; not always following clear instructions; and not using the template which is required as a claims check list and to capture full and accurate notes. She explained that she had reviewed all of the method reviews during the previous 6 weeks and on average there had been *"fundamental development opportunities"* in around 90% of the claimant's claim files. The claimant was reminded of her right of appeal. Ms Sterpaio's view was that as a result of the claimant's level of performance, she was not confident in recommending her for any alternative role.

48. By letter dated 27 October (**page 270**) the claimant appealed “*against the disciplinary penalty imposed*” on her. She set out her reasons for her appeal as being; “*Over the last 12 months I feel I have been personally targeted and as such bullied, harassed and victimised causing a reduction in my work capabilities and performance eventually leading to a dismissal due to poor performance*”, and “*Cheryl Rigden was appointed my team’s front leader in June 2020. Since then I feel un-supportive conduct and relentless negative feedback has been provided along with general poor behaviour not expected from someone of a management position.*” She set out examples. She then referred to her service and work record.
49. The claimant provided an additional supporting document (**pages 412 to 417**). While it is undated, the bundle index suggests that it was prepared on 9 November. In it she said that she was not looking for her job back and said “*I do feel that the treatment I received during these months has affected my mental health like never before, so much so that I have a sick line for stress as I am unable to focus and look for a new job while this is ongoing.*”
50. On 10 November the claimant’s appeal was heard by KellyAnn Reid, Operations Team Leader. A transcript of the appeal meeting was produced (**pages 303 to 311**). It appears to be verbatim. It notes that Michelle Ness attended as support for the claimant. It is a fair representation of the discussion at the meeting. The meeting adjourned without a decision being made. The notes include the claimant referring to; the way that Ms Rigden spoke to her and dealt with her situation; her tone and manner being difficult; their discussion on goals for 2021; her attempts to improve and her perception of feedback being negative; her belief that Ms Rigden was listening to all of her calls but telling her they were “*random*”; her perception that every call with Ms Rigden was “*a telling off*”; no support between January and March 2021; lack of coaching; lack of rotation from phone work; the fact that she did not seek assistance from any other source; and her feelings of being intimidated and bullied.

51. Ms Reid believed that prior to the meeting on 10 November, she had reviewed; the claimant's appeal letter and later document; the material from the meeting of 7 October; the review document at pages **227 to 243**; and the method feedback from 23 and 26 October.

5 52. On 15 November in the period of the adjournment, Ms Reid spoke with Ms Rigden (**pages 418 to 419**). Ms Reid asked a number of questions to do with the management of the claimant. She did not say that the claimant had alleged that she had been bullied.

10 53. The appeal meeting reconvened on 19 November at 2.00pm. A transcript was produced (**pages 312 to 315**). It appears to be verbatim. It is a fair representation of the discussion at the meeting. The stated purpose was to address the specific points she had raised in her appeal, and to reach an independent decision. The note records Ms Reid saying, "*I can now confirm my decision not to uphold your appeal and the original decision to dismiss you stands. I have reviewed the evidence you provided to substantiate this allegation/documentation provided to me and have found no evidence to support this. Whilst I appreciate this has been a difficult time for you, the improving performance process was extended to take this into account and I am satisfied that a number of supportive measures were put in place for you in order to help you succeed, such as weekly performance conversations, retrospective feedback following call listening as well as live call listening. You were also given soft skills and compliance training. Despite all of this your performance did not improve to an acceptable level. You were provided with the Employee Assistance Programme number but chose not to make use of this service. Cheryl also asked you in January if you were fit to be working and you said you were.*"

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54. By letter sent on or about 23 November 2021 (erroneously dated 23 October) (**pages 249 to 250**) Ms Reid confirmed the outcome of the claimant's appeal. She repeated the first ground from the claimant's first appeal letter. In substance, she then repeated what she said at the meeting on 19 November, quoted above. She then continued, "*You have mentioned that your perceived*

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issues between yourself and Cheryl affected you and your performance. You and Cheryl spoke about this and she advised you on routes available to resolve this, specifically to speak to her leader or HR, however this is something you chose not to pursue. I believe that there was more that you could have done for yourself to help with the issues you described, especially given the fact that you felt they were affecting your ability to perform effectively. I do not uphold this point.” Ms Reid then noted that she did not uphold the appeal point which referred to the claimant’s service and work record taking account of; the claimant’s acknowledgment of her performance levels, a review of that performance between July 2020 and October 2021 and her opinion that the claimant had failed to improve to an acceptable and sustainable level.

55. The claimant was paid in lieu of notice (see **page 379**).

56. The claimant was “signed off” by her GP as unfit for work for 3 months from 7 October 2021 (see **page 368**). She was then signed off as not fit for work from 7 January for a further 3 months (**page 365**). The stated reason on each occasion was “stress”. From about 12 November 2021 until about 31 March 2022 she received Employment Support Allowance. From about 11 April 2022 until about 10 October she received Job Seekers Allowance. From about 30 November until about 22 February 2023 she again received Employment Support Allowance. In her period of recovery, the claimant obtained a college Food and Hygiene Certificate. In the summer of 2022, she began volunteering for PKVAS (Perth and Kinross Association of Voluntary Service). She has not found alternative paid employment since 7 October 2021.

Comment on the evidence

57. The claimant was passionate and sincere in her evidence and in presenting her case. Occasionally, she was reminded to focus on the question that was being asked of her as she had a tendency to “slide off” the question into tangential matters. One particular point from the claimant’s witness statement

is worthy of note. She said that in her view weekly reviews of work was the respondent's "*strategy to get rid of staff (put unnecessary pressure specially when we were so busy) as they either broke them down to the point of resigning or at the end got dismissed like me for not getting enough work done.*" Two points occur. First, this is an unsubstantiated opinion. The claimant adduced no evidence to support it. Second, such a strategy would be entirely at odds with the needs of a busy team, operating with internal and external customers in a regulated environment. Put shortly, it would not make sense to have done so.

58. To the extent relevant, I found the respondent's witnesses credible and reliable. The two obvious restrictions on a full appreciation of those issues were (i) the use of witness statements and (ii) cross-examination by the claimant representing herself. The latter point is not at all a criticism, but simply a recognition that cross-examination is not easy, even for an experienced legal practitioner.

59. In cross-examination Ms Rigden at times appeared a little defensive. She was on occasion quick to justify her actions within the period of her involvement with the claimant, which in turn appeared critical of the claimant.

Submissions

60. Ms Kaye made an oral submission. Her structure was broadly to follow the agreed issues.

61. The claimant read from a prepared statement which she submitted by email following the end of the hearing. It is clear from the written version that she embellished it orally when she spoke to it.

62. I mean no disservice to either side by not repeating the detail of either submission. To the extent relevant I say something about them below.

The Law

63. Section 98(1) of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal and that it is a reason which falls within subsection (2) or is for some other substantial reason. Subsection
5 (2)(a) provides that a reason is one that “*relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.*” Subsection (3) provides that ““*capability*”, *in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality*”.

10 64. Section 98(4) of the 1996 Act provides that “*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.*”

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65. I note that it was said recently in the employment tribunal decision in the case of **Maxwell v HBOS Plc** 4105793/2022 (judgment dated 23 February 2023)
20 that “*in a dismissal for capability, the classic test is set out in **Alidair Ltd v Taylor** 1978 ICR 445, which requires the Tribunal to consider whether the employer honestly believed the employee was incompetent or unsuitable for the job; and if so, whether the grounds for that belief were reasonable.*” **Alidair** was a decision of the Court of Appeal. In that case, the employee was a
25 qualified commercial pilot. While flying an aircraft in broad daylight and reasonable weather conditions with 77 passengers on board, he made a faulty landing causing much damage to the aircraft. On the employee's unsuccessful appeal to the EAT, Lord Denning then Master of the Rolls said, “*The industrial tribunal have to consider the employer's reason and the*
30 *employer's state of mind. If the company honestly believed on reasonable grounds that this pilot was lacking in proper capability to fly aircraft on behalf*

of the company, that was a good and sufficient reason for the company to determine the employment then and there.”

Discussion and decision

5 66. The agreed issues provide a useful point of reference for deciding the fairness of the claimant’s dismissal. It is important to focus on the respondent’s reason for dismissing the claimant. It is also important to note that it would be an error of law for me to substitute my decision for that of the respondent. An important issue from section 98(4) of the 1996 Act is the reasonableness of the employer’s decision.

10 67. I was satisfied that the respondent had shown that the reason for the claimant’s dismissal was capability.

15 68. On the first agreed issue, did the respondent genuinely believe that the claimant was under-performing? It is clear from the evidence of both Ms Sterpaio and Ms Reid that they held that genuine belief. That evidence is most obvious from the contemporaneous material to which they spoke.

20 69. On the second question, did the Respondent give the claimant adequate opportunity to improve in terms of both time and support (having regard to their status, length of service and the nature of their role)? The answer is also “yes.” The claimant had worked for the respondent for 12 years. She had worked in the commercial property claims team for over 4 of them. In May 2020 and prior to the involvement of Ms Rigden, the claimant’s mid-year review noted a number of areas which required an improvement in performance. Those areas included estimating, data protection, wrap time, and being receptive to feedback. There is little doubt that the relationship
25 between the claimant and Ms Rigden was poor. The claimant’s position was that she felt; bullied; and that there were several occasions where Ms Rigden did not show sympathy for what were very difficult domestic episodes. Certainly, looked at in isolation some of Ms Rigden’s messages appear blunt (see for example those noted at paragraphs 23 and 25 above). The claimant
30 felt that Ms Rigden’s approach was intimidating. But they are not indicative of

a consistently negative or uncaring position. A contrast can be seen between the claimant's evidence on one episode (paragraph 15 of her witness statement) "*when I told her of my [family and friends' bereavements] losses, her response was "she had a business to run" and "my bereavements were not Aviva's problem, because my problems were there before Covid". There was no empathy or consideration of how I was feeling*" and a related message from Ms Rigden on 5 November 2020 (**page 336**) "*let me know if you need time off for the funeral or anything its always horrible when someone passes but right now it's worse with everything else going on.*" Both Ms Sterpaio and Ms Reid said in their respective outcome letters that additional support had been provided to the claimant. Both noted that the timeframe for improvement had been extended. Their view was (at least by implication) that both in time and support what had been provided was adequate. I have no reason to dispute their view. From about May 2020 the claimant knew that she required to improve her performance. That point was reiterated in December. Issues were again pointed out in March and April 2021. Formal performance management began in mid June. On 16 August a formal warning was issued. The whole period in which improvement was expected was thus over a year. Formal management began in June and ended in early October, that period being longer than anticipated in the procedure (around two months). In my view, the period of time given for improvement was adequate and reasonable. The claimant's evidence was that she was being deliberately badly treated (see for example paragraph 64 of her witness statement). There was no other evidence to support that assertion and it was not put to Ms Rigden or any other witness. There was no evidence of any reason why the respondent would do so. In my view it was not a credible suggestion. It had no factual basis.

70. Did the Respondent act reasonably in not finding alternative employment for the Claimant? Three issues are in my view relevant in answering this question "yes". The first is what is said in the respondent's policy; "*Throughout the process you and your leader may agree that you are not suited to your current role and therefore you should look for an alternative role*" (**page 102**). While

it is not clear whether there was an express agreement that the claimant was not suited to her role, her evidence was that prior to her dismissal she had looked for alternative roles within the respondent's business but not found one. Second, Ms Sterpaio's evidence in re-examination was that, given her views on the claimant's levels of performance, she was not at all confident that she could have recommended her for another role in any event. Third, by the time of her appeal, the claimant said that she did not want to return to her work with the respondent. By that time and standing that position, it was reasonable for the respondent to be no longer considering the possibility of alternative employment with it.

71. Given the degree of under-performance, dismissal was in my view within the range of reasonable responses open to the Respondent. Self-evidently, a range of responses includes others short of dismissal. Ms Sterpaio's letter of 4 October (**page 198**) noted two possible alternative outcomes being an alternative role and extending the process. Clearly she concluded that dismissal was appropriate. In the letter of 7 October (**page 206**) she noted that on average over the previous 6 weeks there had been fundamental development opportunities in around 90% of the claimant's claim files. That statistic was not challenged, on appeal or in this hearing. Given Mr Rigden's unchallenged evidence that the respondent's aim was to have about 20% development opportunities, dismissal of the claimant with that percentage was not outside the range of responses open to Ms Sterpaio.

72. The fifth issue concerns compliance with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. In its introduction, it says, "*Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.*" The respondent in this case had a separate "*Improving Performance Procedure*". No serious suggestion was made by either party that the other had not complied with either that procedure or the Code. In her

written statement the claimant appeared to quote the Code by saying employees should try to “*make efforts to gain their employees commitment through*”. That quotation does not appear in the Code. It does however appear in the ACAS Guide on Disciplinary and Grievance, published in July 2020. An employment tribunal is not obliged to take the Guide into account (contrast the Code). In my view the fifth issue is not relevant given the parties’ position on it.

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73. The claimant was not unfairly dismissed. It is unnecessary for me to decide issues 6 to 10. However, I noted that the schedule of loss did not give credit (as it should have done) for the payment in lieu of notice.

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74. Both in her witness statement and in her written submission the claimant noted issues to do with mental health and what she believes the respondent should be doing about them. These were not issues for me to determine. It might appear odd for them to be raised within these proceedings when the claimant did not formally raise them with the respondent during her employment.

75. The claim does not succeed. It is dismissed.

Employment Judge : Russell Bradley

20 Date of Judgment : 8 May 2023

Date sent to parties : 9 May 2023