# THE EMPLOYMENT TRIBUNAL

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| **SITTING AT:** | **LONDON SOUTH** |
| **BEFORE:** | **EMPLOYMENT JUDGE K ANDREWS** |
| **MEMBERS:** | **Miss N Murphy**<br>**Ms C Oldfield** |

**BETWEEN:**

**Ms D Jhuti**

**Claimant**

and

**Transport for London**

**Respondent**

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| **ON:** | **16-19 May 2023**<br>**15 & 16 August 2023 in chambers** |

**Appearances:**
**For the Claimant:** **Miss J Twomey, Counsel**
**For the Respondent:** **Miss I Ferber, King's Counsel**

## RESERVED LIABILITY JUDGMENT

The unanimous decision of the Tribunal is that:

The claimant was unfairly dismissed.

The claim of victimisation fails and is dismissed.

A remedy hearing will take place on 13 November 2023. Directions for that hearing are given below.

### REASONS

1. In this matter the claimant complains that she was both unfairly dismissed and victimised. The respondent admits that the claimant was dismissed but says it was fair, because of some other substantial reason, and denies victimisation.

2. The issues arising in these claims were identified at a previous hearing as:

Victimisation

1. Did the Claimant undertake the following protected act(s):

1.1 The Claimant raised a grievance in October 2018, alleging, amongst other things:

1.1.1 She had been subjected to bullying behaviour by Mr Reed and Mr Spence because of her requests for reasonable adjustments required because of her disability (this was not upheld);

1.1.2 She had been subjected to a lower performance and rating score because of absences that were related to her disability (this was upheld);

1.1.3 This grievance was widened to include that the Claimant alleged she had been subjected to victimisation by Ms Gupta as a result of raising the October 2018 grievance (this was not upheld).

This grievance has since been accepted by the respondent to be a protected act.

1.2 The Claimant appealed the parts of the October 2018 grievance which were not upheld alleging again that she had been subjected to disability discrimination and victimisation (the Claimant's appeal was partially upheld albeit the Respondent stated the treatment the Claimant had been subjected to did not amount to discrimination).

1.3 The Claimant raised a grievance in December 2019 (which was upheld) alleging disability discrimination and victimisation in relation to:

1.3.1 Deductions from the Claimant's wages resulting from absences from work related to the Respondent removing agreed reasonable adjustments needed because of the Claimant's disability;

1.3.2 Deductions from the Claimant's wages resulting from absences from work arising from the way the October 2018 grievance was handled.

This grievance has since been accepted by the respondent to be a protected act.

1.4 The Claimant raised a grievance in June 2020 alleging disability discrimination and victimisation by Mr Reed and Ms Gupta.

1.5 In August 2020 the Claimant challenged her performance and rating score which the Respondent treated as a grievance. During this grievance process the Claimant alleged that she had been subjected to disability discrimination and victimisation by Ms Gupta.

2. Did the Respondent subject the Claimant to the following detriments:

2.1 Failing to consider alternative employment prior to the Claimant's dismissal;

2.2 Dismissing the Claimant;

2.3 Failing to consider alternative employment as part of the Claimant's appeal against dismissal process.

3. If so, was she subjected to this treatment because she had undertaken the alleged protected acts?

Unfair Dismissal

4. What was the reason or principal reason for dismissal?

5. Was that reason a potentially fair reason within the meaning of s98 ERA 96? The Respondent relies upon SOSR of a kind such as to justify the dismissal of an employee holding the position which the employee held, namely the fundamental breakdown of relations between the Claimant and the Respondent. The Claimant does not accept that there was a potentially fair reason for dismissal.

6. Was the decision to dismiss substantially and procedurally unfair within the meaning of s98(4) ERA 96?

7. If the Claimant's dismissal was procedurally unfair what are the chances that the Claimant would have been fairly dismissed in any event?

8. If the Claimant's dismissal was unfair did the Claimant contribute to her dismissal?

**Evidence & Submissions**

3. For the claimant we heard from her and also Ms C Poole, Service Performance Manager and TSSA union representative.

4. For the respondent we heard from:
   a. Ms C Gupta, Senior Product Manager;
   b. Ms L Preston, Senior Product Manager;
   c. Mr S Reed, Head of Technology and Data for Transport Services; and
   d. Ms L Sager-Weinstein, Chief Data Officer.

5. We had an agreed bundle of documents before us and both Counsel made submissions on the conclusion of the evidence.

**Relevant Law**

6. Unfair Dismissal: by section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

7. In this case as the claimant's dismissal is admitted by the respondent it is for the respondent to establish on the balance of probabilities that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the 1996 Act. If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

8. The respondent relies upon 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held' as the reason for the dismissal (SOSR). An irretrievable breakdown in the employment relationship can amount to some other substantive reason for dismissal although the Employment Appeals Tribunal has reminded Tribunals to be careful to consider whether an employer is using SOSR as a pretext to conceal the real reason for the employee's dismissal (Ezsias v North Glamorgan NHS Trust [2011] IRLR 550).

9. In determining whether the dismissal was fair, the Tribunal's task is to consider all of the relevant circumstances including any process followed by the respondent. The ACAS Code of Practice on Disciplinary and Grievance procedures does not apply to a dismissal because of a breakdown in the employment relationship unless the respondent proceeded on the basis that it amounted to a disciplinary situation or involved culpable conduct or performance that required correction or punishment (Holmes v QinetiQ Ltd UKEAT/0206/15/BA). The principles of the ACAS code may however still be a useful guide as to a reasonable approach to be taken in a non-disciplinary situation. It is also relevant where a grievance was raised during the course of the employment.

10. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

11. If the Tribunal finds that a dismissal was unfair, it is open to it to reduce any compensatory award to reflect that the employee may have still been dismissed had the employer acted fairly (known as a Polkey reduction following Polkey v AE Dayton Services Limited [1988] ICR 142). In assessing such a reduction regard is had to the principles set out in Software 2000 Ltd v Andrews ([2007] IRLR 574). In reaching its conclusion, the Tribunal needs to consider both whether the employer could have dismissed fairly and whether it would have done so. Furthermore, the enquiry is directed at what the particular employer would have done, not what a hypothetical fair employer would have done (Hill v Governing Body of Great Tey Primary School [2013] ICR 691, EAT.)

12. Further it is open to the Tribunal to reduce compensation if it is just and equitable to do so having regard to any blameworthy conduct of the claimant that contributed to the dismissal to any extent. This reduction can apply to both the basic and compensatory awards (section 122(2) and section 123(6) of the 1996 Act.) This is an issue for the Tribunal to decide on the balance

of probabilities from the evidence it has heard and is separate to the consideration of whether the dismissal was unfair.

13. In order to justify a specific reduction, the Tribunal has to find:
    a. culpable or blameworthy conduct of the claimant in connection with the unfair dismissal;
    b. that that conduct caused or contributed to the unfair dismissal to some extent;
    c. that it is just and equitable to make the reduction.

    (Nelson v BBC (no 2) [1979] IRLR 346)

14. As to the amount of any reduction, case law suggests that there are four appropriate categories:
    a. where the employee was wholly to blame – 100%;
    b. where the employee was largely responsible – 75%;
    c. where both parties were equally to blame – 50%;
    d. where the employee is to a much lesser degree to blame – 25% (Hollier v Plysu [1983] IRLR 260).

15. There is a difference in the statutory wording on how to apply the reduction to the basic and compensatory awards but it is accepted that it is very likely (though not inevitable) that the reduction on the compensatory award will applied in the same or similar way to the basic (Steen v ASP Packaging Ltd [2014] ICR 56).

16. Victimisation: section 27 of the Equality Act 2010 (the 2010 Act) states:

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

    (2) Each of the following is a protected act—
    (a) bringing proceedings under this Act;
    (b) giving evidence or information in connection with proceedings under this Act;
    (c) doing any other thing for the purposes of or in connection with this Act;
    (d) making an allegation (whether or not express) that A or another person has contravened this Act.

17. Something will amount to a detriment where a reasonable person would or might take the view that the act or omission in question gives rise to some disadvantage.

18. The word ‘because’ in this context does not equate to ‘but for’. Rather, the Tribunal has to determine whether the protected act, consciously or unconsciously, was the motivation for the relevant treatment. The protected act need not be the sole reason for the detriment in question; it is sufficient if it was a significant (i.e. more than trivial) influence on A’s decision.

19. As for the difference between doing a protected act and the manner of doing it, in Martin v Devonshire's Solicitors ([2011] ICR 352), the EAT stated the underlying principle to be whether the detriment in question was imposed in response to the doing of a protected act or some feature of it which can properly be treated as separable e.g. the manner in which it was done. This approach was approved by the Court of Appeal in Page v Lord Chancellor and anor ([2021] ICR 912).

20. In determining a victimisation claim, the burden of proof provisions of section 136 of the 2010 Act apply:

    (1) This section applies to any proceedings relating to a contravention of this Act.

    (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

    (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

21. It is generally recognised however that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with these provisions and the guidance set out in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246). It is important in assessing these matters that the totality of the evidence is considered.

**Findings of Fact**

22. Having assessed all the evidence, both oral and written, and the submissions made by the parties we find on the balance of probabilities the following to be the relevant facts.

23. The claimant commenced employment at the respondent on 1 May 2013 as an IT Business Partner. She was previously managed by Mr Tooke with whom she said she had a very good relationship. We did not hear from Mr Tooke although Ms Gupta told us that he had told her there were issues in managing the claimant and in later correspondence between him and Ms Dixon - who dealt with one of the claimant's grievances - he did say in reference to annual performance reviews:

    'She had always managed to achieve a pass each year but it was not without a lot of hands on management to achieve it.'

24. The claimant had a heart attack in 2015 and considers herself thereafter to have an underlying medical condition. She subsequently also had a variety of other medical conditions from time to time. Following an operation in August 2017 the claimant initially returned to work two days per week in the office and the remainder working from home as well as adjusted hours to allow her to avoid travelling in the rush hour.

25. The claimant was absent on sick leave during a reorganisation at the respondent. As a result she was moved, outwith the normal competitive process, into the Technology and Data Surface Team, headed by Mr Reed, but reporting to Ms Gupta. Mr Reed in turn reported to Mr Verma, Chief Technology Officer. The claimant's appointment was effective from 16 October 2017.

26. Ms Gupta commenced a period of maternity leave on 17 November 2017. Mr Spence, a contractor, assumed responsibility for the claimant's line management from January 2018, with Mr Reed managing her in the meantime.

**2018**

27. The claimant was absent from work effectively from mid December 2017 to the end of February 2018 due to a combination of annual and sick leave.

28. An occupational health ('OH') report dated 7 March 2018 confirmed that the claimant had recovered from her recent ill health and was fit for her full office-based role, None of her absences were related or deemed as underlying medical conditions and no adjustments were necessary. A fit note subsequently provided by the claimant's GP, however, indicated that she had ischaemic heart disease and may be fit for work with adjustments. In light of the contradiction between this fit note and the OH report Mr Reed requested a further OH assessment. A report dated 26 April 2018 recommended a return to working from home two days per week, avoiding rush-hour travel and that the adjustments stay in place for the foreseeable future. The report also referred to the claimant saying that she was experiencing some stress at work and recommended that this be discussed with her directly and any issues to be addressed/resolved as soon as possible.

29. Consequently the recommended adjustments regarding the claimant's working pattern were put in place from 30 April 2018 but there was no evidence of any discussion with the claimant regarding her self-reported stress or any action in that regard.

30. Indeed, to the contrary on 2 May 2018 Mr Reed emailed Ms Bhaimia of HR stating:

> 'Following six emails today, I met with [the claimant] this morning over the tone and allegations in her first email today all of which she, of course, denies.
>
> So I got her to read one of them in front of me.
>
> She now understands:
> a) How upset I am over her behaviour and allegations about me, personally
> b) The management plan we have had in place:
>  a. OH Recommendation in March - no Flexible Working arrangements required. So these were withdrawn
>  b. OH Recommendation (last week) in April - Flexible Working Arrangements required. So these have been restated

c. Between a and b (above) she was tasked with ensuring that she only came to work when she was not ill and when she did feel ill she was not to attend and we recorded these events as such

d. The fact the Attendance at Work policy is very clear about medical appointments.

c) We had a lengthy discussion on her other 'feelings' of bullying, persecution, and such like and she is concerned that her mental outlook has changed and this is resulting in her self-isolating etc. I have suggested to her that she talks to one of the Mental Health first aiders outside of the team.

If I have any further allegations against me and/or the team about me denying her access to medical treatment I will be taking action as per our disciplinary process.'

31. It is acknowledged that rapid receipt of six highly critical emails would be upsetting and/or irritating for Mr Reed. However, his reaction in asking her to read one of them out to him – given that he was on notice that she had said she was suffering from stress – was highly inappropriate. It is noted that he suggested she talk to a mental health first aider but also noted is his reference to her 'feelings' which suggests a dismissive reaction to what he was being told. (This incident is referred to again below in the context of Ms Dixon's grievance investigation.)

32. The claimant and her union representative met Mr Reed, who was supported by HR, on 9 August 2018 for a reasonable adjustments review. It was agreed that the adjustments then in place would continue but subject to three monthly reviews. When notes of this meeting were sent to the claimant she made considerable amendments and comments which Mr Reed acknowledged on 25 September 2018. He categorised them as either further background and other items that were not discussed at the meeting or matters of detail. He said:

'I don't have the time to take further action on these comments and were I to do so there would be no change to the outcome of the reasonable adjustments review.'

and informed her that her version would be kept alongside the original minutes and the matter was closed.

33. Whilst this approach was not in itself inappropriate in the interests of efficient use of time, the language used by Mr Reed is indicative of a generally robust approach to management and an impatience with what he regarded as inefficiency. It also displays a not naturally sympathetic approach to line management.

34. In the meantime Mr Reed and the claimant had been due to meet to discuss her 2017/18 performance review but she did not attend due to sickness. Consequently Mr Reed prepared a draft review on the basis of the claimant's self-assessment. The claimant was notified in a letter from Mr Spence in August 2018, that she had been assessed as performing at level 2 (i.e. 'demonstrated good standard of performance and behaviours in some areas, improvement needed in others').

35. On 12 September 2018 the claimant emailed Mr Reed seeking to appeal that rating. He replied that there was no right to appeal as such but he was happy to discuss it with her and that if following that discussion she

remained unhappy she would need to raise a formal grievance. It appears from the terms of her subsequent grievance that a very short meeting to this effect took place on 1 October but with no satisfactory outcome.

36. On 1 October 2018 the claimant raised a formal grievance, sent to Mr Verma, regarding the rating as well as bullying in the workplace by both Mr Reed and Mr Spence. This is conceded by the respondent as being a first protected act.

37. Ms Gupta returned from maternity leave on 1 October 2018 and resumed line management of the claimant.

38. Ms Dixon, Head of Customer Information, Designs and Partnership, was appointed to deal with the claimant's grievance and she held an initial meeting with the claimant and her representative on 30 October 2018. It became apparent during that meeting that the scope of the grievance also included a complaint about Ms Gupta's behaviour towards her during a meeting on 15 October 2018. Accordingly Ms Gupta was contacted on the same day by HR and told not to have any further contact with the claimant. Ms Gupta emailed Mr Reed to inform him of that development. In the exchange that followed on 30 October 2018, Mr Reed referred to this as being 'sooooo interesting' to which Ms Gupta replied:

> 'Ha! Ha! Now it's not just both of you, I am in the group as well. Having only one one to one meeting and another 15 minutes conversation with her in past one month!'

Mr Reed replied:

> 'It is a popular club'

This exchange shows an unprofessional and light-hearted reaction by the claimant's management, who were senior enough to know much better, to her grievance. It betrays an attitude of not taking the grievance seriously nor respecting the process and the individual's right to make a complaint.

39. Arrangements were put in place for an intermediate line manager to deal with personnel and well-being matters for the claimant as well as passing instruction/information etc as required between her and Ms Gupta. Ms Preston performed that role from early November 2018 to February 2020 when she was replaced by Mr Olafare.

40. In the course of Ms Dixon's investigation, she met Mr Reed, Ms Gupta (and received subsequent additional information and comment from both of them) and Mr Spence as well as an exchange of emails with Mr Tooke (in which he made the comment regarding the claimant requiring a lot of hands-on management referred to above).

41. In an email dated 3 December 2018 to Ms Dixon, Mr Reed said:

> 'In my opinion, [the claimant] has a 'victim' complex that clouds every single engagement. This leads to terribly complex responses that can be accompanied by aggression, subterfuge and often straight lies.

When dealing with any item that she has to take responsibility for we see a number of outputs

evasiveness - not providing required output
denial or worse - that's not what you asked for or she makes things up
histrionics -
sickness or allegation of mistreatment.

These reactions can occur in sequence or in parallel.

I had one such episode on 5th May when she started emailing me with a variety of accusations of not letting her take medical appointments. I stopped her in the corridor and made her come to a room to explain. She couldn't, I had tears and similar things as I made her read her own words direct to me face-2-face.
Apologies etc- but no real change.

Below email- another example. This one has made up stuff in the middle (highlighted in yellow) – to illustrate how she is the victim. What I did - and have the evidence to back it up - is to refer her to the Attendance at work policy that governs us all. She simply cannot see this.

In September after the successful (if you take working at home for two days as success) Reasonable Adjustment review case, she started taking time out of work to write a response to the notes. Why would you do that - from a performance management perspective I warned her that she could not drop the instructions that she had in delivery to respond in work time to a personal matter. She did do the notes and when they arrived they were mainly about other items not discussed at the meeting - hence were not in the write-up of the note taker. She cannot separate events at a meeting - and all the other things in the universe that maybe of interest.

I raise these points not as a total list of issues. but to illustrate that l believe that [the claimant] will not comply with her contract of employment as far as management is concerned. I believe, that this is nothing to do with her underlying medical condition…'

**2019**

42. Ms Dixon's factfinding and conclusions document produced in January 2019 was thorough, detailed and analytical. Subject to one significant matter – see below – we find her approach to have been appropriate. Overall her conclusions were that she had not found any evidence of victimisation, bullying or harassment and that the claimant was not insulted on the grounds of any protected characteristic. Further:

'She was not set up to fail, in fact her Portfolios and workload were adjusted to accommodate her capabilities and the time that she was at work, steps were taken to ensure she was treated fairly, for example changes were made to team meetings so that she could participate. I found no evidence of overbearing supervision, there were the expected 1:1s, team meetings and training, in fact the only point that I do uphold is the lack of formal feedback on performance and the lack of a formal action plan to address areas of under performance, but this I do not feel this was done with the intention of setting DJ up to fail but mismanagement during a period of significant change across several departments. I consider the day to day management of DJ to have been reasonable and tasks were explained to DJ and these tasks and short term objectives were within DJs capability and appropriate to her grade and ability.'

43. Our one concern about Ms Dixon's findings is that given the contents of Mr Reed's own email to her dated 3 December where he said he 'made' the claimant come into a room and 'made' her read out her own words and that

this led to 'tears and similar things', we find her conclusion that there was no evidence of overbearing supervision to be remarkable.

44. In any event, Ms Dixon recommended that the claimant's end of year rating for 2017/18 be changed to '3' and that she return to her substantive post with the reasonable adjustments in place to continue and other steps be taken regarding her general management to ensure a successful reintegration into the team. She also said that the claimant should have a clear set of agreed objectives and that she would be happy to act as an independent reviewer of those objectives for the performance year 2019/20. Further, that there should be regular reviews of the claimant's performance against those objectives with a minimum of quarterly meetings to review progress and that any gaps in performance should be discussed and an action plan put in place and kept under review.

45. The claimant submitted an appeal against that outcome on 4 February 2019. The alleged second protected act. The grounds were stated to be fairness in fact-finding process, inadequate investigation, new evidence, use of language in the report and credibility. There was no express reference to any breach of the 2010 Act however under the heading 'inadequate investigation', the claimant referred to statements during the grievance hearing that other people had expressed their concern about the claimant's treatment but felt uncomfortable coming forward and that this was 'telling of the hostile environment'. Her complaint was that 'no one was asked or questions raised in any way… on this point'.

46. Mr Evers was initially appointed to hear that appeal but had to be replaced for various reasons by Mr Mather. There was a regrettable delay in this happening as Mr Mather did not come on board until July 2019. Mr Reed emailed Mr Mather on 18 July asking for confirmation that he had picked up the grievance and asked what the plan was and expected timescales. The claimant criticises this intervention as inappropriate. In the circumstances where there had been such a delay in the grievance being processed, it is understandable why Mr Reed asked these questions although it may have been more prudent to do so via HR. Similarly the claimant is critical that Mr Reed later in July 2019 sought advice from HR regarding her sick leave. Again, these queries and the way they were raised were reasonable given the amount of her sick leave.

47. In the meantime, an issue had arisen regarding costs incurred on the claimant's work mobile. This led to an exchange of emails between the claimant and Ms Preston on 17 April 2019 which was forwarded to Mr Reed and he said:

'Cannot even reply to that without playing the victim can she?'

and Ms Gupta said:

'Seems to go in the next appeal meeting!'

Again, this exchange was inappropriate.

48. An OH report dated 26 April 2019 noted that the claimant had reported ongoing work-related issues which were causing her some stress.

49. On 20 May 2019 the claimant commenced sick leave due to work-related stress.

50. Mr Mather met the claimant and her union representative on 29 July 2019 and it was noted that the next steps were for him to speak to Mr Reed and others. There was then, however, further contact by Mr Reed to Mr Mather as evidenced by Mr Reed's email dated 5 August 2019 to Ms Gupta, Ms Preston and Mr Spence in which he asked them to provide specific further information. It is apparent from that email that on this occasion Mr Reed was not asking simply for an update on process but on the substance of the grievance although it does appear likely this was in response to his meeting with Mr Mather and was a valid part of the appeal process.

51. On 31 October 2019 Mr Mather met with the claimant and her union representative following which he again sought further information from Mr Reed and others. Mr Reed asked for clarification about the topics that would be covered at their next meeting and this was provided by Mr Mather by email. Again the claimant has suggested that this was an inappropriate interference by Mr Reed in the process. We do not agree. This was simply an efficient way of ensuring the right information was available for their discussion.

52. Mr Mather wrote to the claimant on 29 November 2019 with the appeal outcome. In summary it was not upheld although he found there were instances where policies and processes had been confused and proposed that the managers in the claimant's team undertake further training in managing absence from work to ensure flexible working, phased return and reasonable adjustments were well understood. He also proposed that the setting and management of objectives be monitored closely within the team. He acknowledged that the business could have handled her ill-health better and felt that an opportunity had been missed by both the claimant and her managers to address the root cause of the issue of her productivity.

53. There was no written evidence of the training recommended by Mr Mather having taken place and the oral evidence of Ms Gupta and Mr Reed was less than satisfactory. Ms Gupta's was confused and contradictory. She acknowledged that the claimant would have felt let down if the training was not done properly. Mr Reed was clearer and did say that the team took part in standard annual training on basic policies and also did dedicated training on the bullying and harassment policy as a result of the claimant's case. There was no evidence of that having taken place however and even if it did, it seems unlikely that this approach is what Mr Mather had meant by his recommendation.

*54.* In the meantime, a long term sickness review meeting was held with the claimant by Mr Paye on 7 October. It is apparent from the notes of this meeting, and also from Ms Preston's notes of her meetings with the claimant, that the claimant was saying a lot of this long absence of stress, if

not all, was because of the long delays by the respondent in dealing with her grievance appeal.

55. The claimant returned to work on 11 November 2019 and Ms Preston requested an OH report on her fitness to work.

56. On 18 December 2019 the claimant submitted her third grievance. It was a complaint about the deduction of wages, use of the sickness policy and incorrect recording of sick days. This grievance is accepted by the respondent to be a protected act.

57. Mr Gray dealt with the grievance (in February 2020) and it was upheld. It is apparent that the claimant's line management team had been advised incorrectly by HR as to how to record sick absence when a person becomes ill during the working day. On this occasion therefore there can be no criticism of the claimant's management as they were acting on advice. It was during the handling of this grievance that, despite Mr Reed encouraging the claimant to return to his team, it was agreed Mr Olafare would take over from Ms Preston as the claimant's interim line manager.

58. We found Ms Preston to be an impressive witness. It is clear from her various contemporaneous notes of her discussions with the claimant that she offered her support and advice on numerous occasions. One particular aspect of that advice was that the claimant should not assume the worst in her managers and that she had a responsibility to meet them halfway in trying to repair the relationship. Despite this Ms Preston's view was that the claimant was 'incredibly suspicious' of instructions from her managers and would challenge them. Further that with her experience and seniority, the claimant should have been able to complete tasks as instructed but did not.

**2020**

59. An OH report dated 3 January 2020 recorded that the claimant had said she had been experiencing work-related stress due to an ongoing grievance which although resolved in November 2019 had left some ongoing issues. It was confirmed that the claimant was not open to medical redeployment.

60. On 17 January 2020 Mr Reed emailed the claimant asking her to call him so that they could talk about her returning to his team. She replied, by email, to say that she felt this was inappropriate whilst there was an outstanding grievance. After having consulted HR, Mr Reed acknowledged that there was a grievance but said there did not appear to be a justification for her to remain elsewhere in the business and that she should return to his team into her substantive role with immediate effect.

61. This led to a meeting on 5 February 2020 between the claimant and Mr Reed with HR in attendance. It was agreed that the claimant would not return to her substantive role until various outstanding points could be discussed although it was noted that the original grievance and appeal was closed and that the long-term sick case had also closed. In the meantime it

was agreed that the claimant would continue to spend her office days working at another location.

62. On 26 February 2020 the claimant emailed Mr Olafare with comments on her current workload and a number of criticisms on the way she was being managed. Mr Olafare forwarded that to Ms Gupta who forwarded it to Mr Reed for his information. She also said:

> 'She just doesn't want to work! Howsoever long emails I write of no use. I need to discuss this separately with you and I'll set up some time to discuss below.
>
> - What are the next steps?
>
> - What is going on overall re this case?
>
> - Plan of Action
>
> - How can we end this?'

63. Ms Gupta's evidence was that her reference to 'end this' was a reference to ending whatever grievance was ongoing in March 2020 rather than ending the employment relationship. Despite these views there is no evidence of Ms Gupta seeking to performance manage the claimant even indirectly through Mr Olafare.

64. A further OH report dated 24 April 2020 anticipated that the claimant would be able to resume her normal duties once outstanding work-related issues were resolved. In addition, it recommended that a stress risk assessment (SRA) would be beneficial to ensure that any areas of stress at work were identified and actioned accordingly.

65. This was of course at the time of the first national lockdown. The claimant was furloughed from 27 April to 31 July 2020.

66. On 29 June 2020 the claimant, via her union representative, raised a grievance against Mr Reed (the alleged fourth protected act). The complaint was that agreement had been reached that the SRA would be carried out prior to the claimant's return to the business area but they had been notified that the claimant had been transferred with immediate effect from Mr Olafare back to Ms Gupta and Mr Reed without any consultation. It was also requested that the claimant's three day working from home reasonable adjustment 'is honoured' and 'implemented… as a matter of urgency'.

67. Mr Verma acknowledged receipt of this grievance stating that he would revert with 'our way forward on this'. There is no indication that this grievance was ever investigated despite chasing by the union.

68. On 6 July Mr Reed emailed Ms Bissell, a previous manager of the claimant, asking if she knew that the claimant had raised another grievance. The subject line of this email was 'My favourite HR case'. Again, another inappropriately flippant comment by Mr Reed.

69. A first meeting was held in respect of the SRA on 14 August. In advance of the meeting Mr Taylor sent to the claimant a blank form together with some guidance on how to complete it. He indicated that there were six main hazard areas for discussion and that the aim was to proactively identify and control potential causes of work-related stress rather than deal with them once they have occurred. At the meeting itself Mr Taylor repeated that message and proposed that those six hazard areas would be discussed in the first part of the meeting and that a more specific discussion on the claimant's triggers would follow. He emphasised that the meeting was concerned with the future but agreed it would be useful to briefly use past situations as illustrations of triggers. A series of meetings then followed and various versions of the SRA were produced with each reflecting new comments since the last version.

70. Completion of an SRA is a sensitive matter and can be challenging to get right in the most straightforward of cases and we recognise that in these circumstances in particular it was a very difficult process for both parties to handle smoothly. The respondent's case is that the claimant's approach to the SRA was unreasonable and that she used it as an opportunity to refer back to matters that had already been dealt with by grievances and thus was further evidence of her inability to move forward. The claimant says that as she had been told to identify her stress triggers she had to talk about past events.

71. We find that there is some logic in the claimant's position especially given what she had been told by Mr Taylor, i.e. to use past situations as illustrations of triggers, however she went too far and was unable to deal with them briefly as he had indicated and also recognise the difference between identifying a trigger and describing the detailed events behind that trigger. As a senior manager, clearly intelligent and articulate, she should have exercised more discretion and sought to be as non-inflammatory as possible. It is unfortunate, however, that the form used by the respondent did not always encourage a conciliatory approach. For example, in the first iteration of the form in relation to the hazard of 'relationships', one of the questions asked was 'are there problems with bullying/harassment?'. It is not surprising therefore that the claimant answered that question as she did especially after she was advised by Mr Taylor at the end of the first meeting to put her outstanding matters into an email which he suggested would then inform the completion of the SRA form.

72. When the format of the form was later changed those specific questions were removed but the claimant's answers retained. This could give a misleading impression of her approach. What cannot be justified however are the very extreme comments entered by the claimant in January 2021 in the final version of the form where, amongst other allegations, she directly attacked the honesty and integrity of her managers accusing them of terrorising her, leaving her feeling as if she was about to be 'physically attacked' and speaking to her 'as if I am a dog'.

73. During the course of the completion of the SRA form, an email from Ms Gupta to Mr Taylor on 26 November 2020, copied to Mr Reed, demonstrates

the impact upon her of the comments being made by the claimant. She said:

> 'Given the situation where the individual has to come back to her substantive role, but is carrying so many emotions, when we hardly spent days together in office, i am not sure how this would work. There are few things that individual strongly believes have happened or perceives in a certain way, while neither the incidence happened, nor had any malicious intent. it would really be helpful to get some advice here as this is an absolute case of broken trust relationship.
>
> Also, as an individual I have been at the receiving end for past two years now and my dignity has been questioned every now and then with false allegations. It feels awful to read such things, when neither you are such a person, nor have you said any such things. There is a limit to which one can take false allegations and the words that are being used here are very hurtful. I was back from maternity and I needed support as had small baby to manage, plus I was back after an year break. I was being pulled into this case, while I had nothing to do with it as I wasn't there in the first place. This did take a toll on my mental well-being at that time as I was a new mother, back to work after break and then was pulled into this. But of course as a line manager it was my responsibility, which I have taken with full vigour.'

74. In the meantime on 21 August 2020 the claimant's trade union representative emailed Mr Verma to raise a complaint about a performance rating of 2 given to the claimant for the 2019/20 year. Mr Verma reviewed the position with HR and replied confirming that the claimant had chosen not to participate in the process and that he was confident that there was sufficient evidence to demonstrate that clear objectives were set and feedback provided but the work was not completed to the appropriate or required level.

75. The claimant submitted an appeal against that decision. This is the alleged fifth protected act. It is a relatively long document with many sections and also has a number of emails embedded within it. This makes it a little difficult to follow but the overall thrust of the document is arguing that rating the claimant as 2 was incorrect and rather that she should 'at the very least' have a rating of 3.

76. Ms Guerno, Head of Technology Service Operations, was appointed to consider that appeal and she met the claimant and her union representative on 11 December 2020. Following the meeting Ms Guerno conducted further enquiries with Mr Olafare and Ms Gupta.

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77. She wrote to the claimant on 5 January 2021 informing her that her appeal was partially upheld in that the temporary arrangement whereby line management responsibilities were passed to Ms Preston and then Mr Olafare, whilst introduced for the right reasons, was not ideal and not conducive to fully exploiting her full potential in her role. All other aspects of appeal were not upheld and the rating of 2 stood.

78. Further, Ms Guerno noted in her letter that:

'I have found no evidence, from the documents I have seen and our meeting on 11 December of any apparent willingness to positively engage and proactively undertake the work that was required of you. Instead, it appears that you have consistently refused to accept that the objectives set by your line manager were reasonable and relevant to your role.'

and

'It is my view that the tone of your emails suggest suspicion and an assumption of bad faith on the part of your managers and I am concerned that continuing to demonstrate this mindset in the future will prevent you from building a positive working relationship in particular with your direct line manager.

I am concerned that this lack of willingness to work as instructed and build a good rapport with your line manager is not sustainable for either party in the longer term. Therefore, I strongly encourage you to work towards establishing a constructive relationship with your line manager.'

Consequently she proposed and strongly recommended that mediation be entered into by the claimant and Ms Gupta. Her letter concluded:

'Moving forward, I suggest that more focussed and regular monitoring of your performance is put in place accompanied by the relevant support to mitigate the possible negative impact of this temporary line management arrangement with a view to ceasing that arrangement as soon as possible.'

79. The claimant agreed to participate in mediation and it was arranged in respect of both Ms Gupta and Mr Reed. It is noted that Ms Gupta, on 21 January 2021, expressed strong reservations about the value of the process expecting it simply to result in more grievances, nonetheless she did participate.

80. The mediation sessions took place on 1 & 8 March 2021, the contents of which were and remain confidential. The mediation with Mr Reed was considered, by the mediator, to be successful with both agreeing to draw a line under the past and move forward. The mediation with Ms Gupta was unsuccessful. The mediator recorded that new joint ways of working had been proposed 'by a party' however due to the number of grievances, trust had irretrievably broken. The claimant's evidence was that it was she who had proposed new joint ways of working. Ms Gupta said she could not remember who had said that but denied that she said trust had broken down due to the number of grievances. In all the circumstances it seems more likely that the claimant did propose new ways of working but it is not clear from the mediator's letter whether it was her view that trust had broken due to the number of grievances or someone had actually said that.

81. On 10 March 2021 Mr Taylor wrote to Mr Reed confirming that he had spoken to Ms Gupta at length about her experience of the mediation. He said he had also had a long talk with the redeployment manager but redeployment was not open as it would be based on medical and fitness organisational displacement. He also stated:

'…consideration of 'suitable alternative employment' would need to be raised at the meeting, form part of your rationale for the decision you make and would also need to be addressed in any 'final letter'.'

It is apparent that Mr Taylor and Mr Reed had already discussed in some form before this email was sent that a review meeting would be taking place and that consideration of the claimant being moved out of her current role was already on the table.

82. On 17 March 2021 Mr Reed wrote to the claimant inviting her to attend a review meeting whose purpose he said was to:

> '…make a decision on your future working arrangements and want to discuss this with you. This meeting will have as its focus future working arrangements, including how and whether the business can reasonably make arrangements in circumstances where there seem to be such deep-seated differences within the team.'

The claimant was advised that a possible outcome of the meeting would be termination of her employment and she was advised of her right to be represented.

83. In advance of the meeting Mr Reed asked Ms Gupta to summarise the claimant's work progress which she sent in an email chain whose subject line was:

> 'You need to see this before your 'People' meeting'

One email attached a detailed task list and a summary of her work output from April to December. In another she described the situation as:

> 'Absolutely Appalling! She has done absolutely zero work'

and

> 'Insane reasons honestly, only if you wanted to write a book on '101 reasons of not doing work'!

84. At the review meeting the claimant was accompanied by Ms Poole. Mr Taylor and Mr Olafare were also present as was a note-taker. The structure of the meeting broadly was discussion about and consideration of:

    a. Attendance – it was confirmed that there were no outstanding OH issues or health barriers to the claimant's return to work.

    b. Health - during which the claimant advised that she was undertaking counselling to help with her reintegration to the team.

    c. Current workload – during this discussion Mr Reed expressed the view that the number of clarifications the claimant was seeking was not working and she was unable to fulfil the role that her job description entails. In reply to the union representative who queried why a 'forensic delve' into the claimant's workload was required when the focus should be on future working, Mr Reed said:

        > 'These issues need to be understood - can we get through the workload, are there any problems in achieving her work. I think this is worth exploring. As we are working at the moment it is not effective for TfL or any of us.'

d. Other processes – Mr Reed said he wanted to check that they had gone as far as was needed and referred to the mediation session, noted that one recommendation was to improve rapport with Ms Gupta and asked:

> 'The first thing is to work towards building a good relationship with the line manager for going forward. Would you like to add to the adjudication comment at all?'

In the conversation that followed Mr Reed said:

> 'The grievances are done and dusted and closed now...We are focussing on what happens now… Work going forward, performance work levels, relationship with team manager and that is what we need to discuss and make decisions about.'

He also asked the claimant for any further comments on the 'here and now' and in her reply she said:

> '…My work is quite exciting and it is a unique role and I do thoroughly enjoy it. I have worked on improving the relationship with my 'line manager. I had the mediation with [Ms Gupta] and with yourself. I started engaging with [Ms Gupta] at meetings. There have been about 5 team meetings where this has happened and I think that has gone well. I would hope that [Ms Gupta] would agree with that. Communication is the key, the more we engage the better it will be. The long period of being away has not helped.'

Mr Reed replied:

> '…you are saying if only we could move forward in a positive way it would be fabulous. I have not heard enough to support that that is the case but I will be checking that it is likely to be like that.'

Ms Poole said:

> 'I agree it will not all be okay immediately. We have tried to focus with [the claimant] on her not looking back, moving forward and building positive working relationships. In regard to the work there are mechanisms to deal with those issues.'

Just before the meeting ended the claimant said:

> 'I have done a lot of thinking and the counselling has been with a view to reintegration to substantive line management with yourself […] and [Ms Gupta]. I asked for that based on the premise that it would help me to prepare for that transition and provide support after that. Looking forward I am open to receiving feedback from the wider team if there is nervousness about working with me. If there is a problem talk to me, either through you or directly.'

And when asked if she thought it was 'too late' she said:

> 'No, I don't think it is ever too late'

85. Following the meeting Mr Reed conducted a number of further enquiries. This included email exchanges with two product managers who had been due to hand over a portfolio to the claimant but it had not happened. Mr Reed asked:

'… I am interested as to why they have been so many delays/challenges/clarifications. Could you provide me with a brief summary of the problems from your perspective?'

86. Mr Reed also emailed Mr Olafare and Ms Gupta on 26 March. He confirmed that the three 'main topics' of health related issues, work output & performance and formal processes had been discussed at the review meeting and asked for help with regard to identifying 'tangible points' in respect of her work output and performance. He again did not make any express enquiries about the state of the working relationship between the claimant and Ms Gupta or consider the suggestion that a mentor be appointed.

87. An outcome meeting was first arranged for 7 April but the claimant became ill and in due course was signed off work until 7 June 2021 (later extended to 2 August 2021). She was referred to OH and the subsequent report, dated 20 May 2021, confirmed that the claimant was unfit to attend a meeting and recommended a review with OH in 4-6 weeks plus supportive contact after one month.

88. Mr Reed wrote to the claimant on 30 June 2021, setting out a detailed summary of complaints raised by her and several statements regarding the unsatisfactory state of working relationships with her management. In relation to the October 2018 grievance he said:

'It is clear to me that the conclusion of this investigation did not have the effect of "drawing a line' under your complaints about your managers and your ongoing feeling that you were being poorly treated by them.'

89. He also referred to the claimant's poor performance and said:

'The matter of your performance - the amount of work you have been prepared to undertake and the standard of the work you have produced - has in large part been an ever-present issue throughout your various complaints since 2018. Indeed, it has been in the attempt to manage your performance by means of direct discussions with your line managers and performance appraisals pursuant to what end-of-year score is awarded that many of your complaints have emanated. Given that failing professional relationship, the gradual and (in hindsight) irretrievable erosion of trust, while also having to work around ongoing complaints processes or sickness absences, it has proved impossible to initiate a formal performance improvement process with you. It is my belief, based on my realisation of your 'fixed' opinion of your treatment on the part of myself and your local managers, a belief based on my experience of your approach to any management intervention or initiative, that this would not have been entered into in good faith on your part or that a positive improvement would follow. Since your appeal meeting with [Ms Guerno] in December 2020, management have been closely monitoring your work and have seen the level be reduced to basic tasks far below your grade while the amount of your output remains at an unacceptable level. I raised this issue with you in the recent review meeting and gave you the opportunity to respond. It is clear to me that are unwilling to or incapable of delivering to your job description as Product Manager and have evidently failed to deliver even the most basic task-based activities in a timely fashion, due in large part to your entrenched negative views towards myself and your local managers.'

90. He then concluded that:

'… the professional relationship with your substantive line management team (myself and other managers) has broken down irreparably and irretrievably through your unwillingness to move forward and accept your substantive line management team and the decisions of

the TfL processes. This conclusion has been evidenced by the number of complaints processes / appeals / support initiatives initiated (outlined above), by the continued poor standard of your work, through your continuing accusations against your managers and your 'default' assumption of bad faith.

It is therefore my decision that your service with Transport for London be terminated for the substantial reasons that I have outlined above.'

91. The claimant submitted an appeal against dismissal on 13 July 2021. In summary her grounds of appeal were:

    a. Non-application/compliance with respondent's performance policy in respect of any criticisms of the claimant's performance.

    b. Unfair treatment including an extended period spent under interim line management with a consequent impact on team relationships, a failure by the respondent to comply with its own policies and a failure to consider options other than dismissal.

    c. Having been dismissed by post at a time when the OH had advised that she should not be contacted.

92. Ms Sager-Weinstein was appointed by Mr Verma to hear the claimant's appeal. Ms Poole raised concerns with Mr Taylor as to the appropriateness of this as Ms Sager-Weinstein was a peer of Mr Reed. Mr Taylor replied that Mr Verma had given her full authority to overturn or vary the original decision and he was confident that there would be a full, open and unbiased consideration of the appeal. Ms Poole asked for him to look again at getting somebody from outside the Department but Mr Taylor ultimately confirmed that that was not appropriate and that he was satisfied that Ms Sager-Weinstein could deal with the matter impartially. No further objection was taken by the union or the claimant as to Ms Sager-Weinstein's involvement.

93. The appeal meeting took place on 27 July 2021. The claimant was invited to address the meeting in relation to her grounds of appeal which she did. Having done that Ms Sager-Weinstein asked the claimant if she thought the relationship between the respondent and her had irretrievably broken down. The claimant replied 'no'. She said that the breakdown was with Mr Reed, Ms Gupta and, when he was covering, Mr Spence. She said it was not with any of her team or client base and she had no issue with Ms Preston, Mr Olafare, Ms Dixon, Mr Mather or any of the managers from whom she received work. She confirmed that she did not believe 'in the slightest' that her relationship with the respondent had broken down. She wished to be reinstated to the respondent and to undertake her role elsewhere within it.

94. Following the appeal Ms Sager-Weinstein spoke to Mr Reed, Ms Preston and Mr Olafare. Unfortunately no notes were made of these discussions. Her recollection was that Mr Reed genuinely felt the relationship between the claimant and Ms Gupta and himself had irretrievably broken down and he specifically referred to the comments made by the claimant in the SRA. Ms Preston said that she had made substantial efforts to try and encourage the claimant to move away from the grievance process and to work towards

repairing the relationship with her substantive line management but this had failed. Mr Olafare also said that the claimant appeared preoccupied with historic issues with management. Both Ms Preston and Mr Olafare, when asked if there was an option for the claimant to be placed in their team, 'answered with a definite no'. Ms Sager-Weinstein acknowledged that it was hard to disentangle whether this was because of performance issues or because of the claimant's failure to move on from historic complaints but concluded it was both. Ms Sager-Weinstein also spoke to Ms Dixon and Ms Guerno in respect of their findings on the various grievances and reviewed the mediation reports.

95. Ms Sager-Weinstein wrote to the claimant on 3 September 2021 informing her that her appeal had been unsuccessful. On the issue of whether the claimant's relationship had broken down with the respondent as opposed to just her substantive line management she said:

> 'I have considered this issue very carefully. Based upon the paper evidence reviewed - including meeting notes, and your comments on the Stress Risk Assessment - and the feedback of negative and (at best) mixed results from mediations - and on follow-up conversations I have had with your line management team, it is clear to me that despite best efforts and a lengthy series of processes to address your concerns (which could have led to a mending or a normalising of the relationship) that the relationship between yourself and TfL management has indeed irretrievably broken down. Whilst you had requested that you be placed in a new team, on reviewing the evidence that you presented and the case materials, I conclude that given the partially-failed mediation, your tone of bad faith and suspicion in emails (as noted in [Ms] Guernou's January 2021 outcome letter of your grievance raised), I fail to see how simply moving teams would address the central issue which I consider to be about the absence of trust or willingness to 'move on' on your part - critical to any sound basis for the re-establishment of anything approaching a 'usual' working relationship. This is obviously an unfortunate and regrettable situation, but I come to this conclusion mindful that the souring of relations has become entrenched despite an effort to seek resolution over a protracted period. I cannot see any benefit to either party in prolonging this situation.'

96. As far as the claimant's point regarding performance was concerned, Ms Sager-Weinstein said:

> '[Mr] Reed's letter refers to your past and more recent performance in post but does not cite this as a central reason for the termination of your employment. Further, he suggests that your concerns over the management of your performance have led to some of the relationship issues arising, while he also opines that the formal management of your performance (eg. via an Improvement Plan) would not been entered into in good faith on your part and would have otherwise been problematic in working around the various other ongoing complaints processes. It is beyond my remit as appeal chair to comment on this, suffice to say that performance is not presented as a central justification for your service termination.'

## Conclusions

97. Unfair dismissal: the respondent's case is that the reason for the claimant's dismissal was SOSR, namely the irretrievable breakdown in her working relationships with both her own management and the respondent's management in general. The claimant says that it is clear from the circumstances of the dismissal that the real reason was the claimant's performance. In particular we were referred to the failure by Mr Reed to

consult with Ms Gupta about the state of her relationship with the claimant post-mediation and an apparent focus by Mr Reed on performance issues during the dismissal meeting and in his subsequent enquiries. As for the latter point, the respondent says that no performance management was attempted because the claimant's attitude was so poor.

98. We remind ourselves of the need to consider carefully whether SOSR is in fact the real reason for the dismissal or disguises another reason. We are very aware that Mr Reed specified in the dismissal letter that the breakdown of the professional relationship between the claimant and her substantive line management was the reason for the dismissal and it is apparent on the evidence that there was in fact such a breakdown (and at the latest by the time of the appeal meeting, the claimant had admitted this). It would therefore perhaps be surprising for us to find that that was not the true reason.

99. On these facts, however, we are so satisfied. In particular, we note that:

    a. The letter inviting the claimant to the review meeting expressly said that the focus of the meeting would be future working arrangements but it is plain from the minutes of the meeting that that was not its focus. The first hour of the meeting, that lasted in total just under an hour and half, was spent discussing attendance, health, performance and processes (somewhat to the union's surprise). After a brief adjournment Mr Reed turned the focus to 'what happens now' identifying 'work going forward, performance work levels and relationship with team manager' as requiring discussion. In the exchanges that followed, it is clear that the claimant was at least saying that she recognised a need to improve working relationships, made some suggestions in that regard, had taken some steps towards that and believed that relationships were improving. Ms Poole confirmed that the union was encouraging the claimant to move forward and build positive working relationships.

    b. The focus of Mr Reed's enquiries with Ms Gupta before the review meeting had been on the claimant's performance.

    c. Further, after the meeting and notwithstanding him having said that he would be checking if they could move forward in a positive way, Mr Reed did not ask Ms Gupta about her recent relationship with the claimant nor whether there were any signs of progress (as the claimant had suggested) or if she could work with the claimant. Instead, his enquiries with the product managers, Ms Gupta and Mr Olafare were all performance related.

    d. The dismissal letter contained repeated and significant criticism of the claimant's performance. Although Mr Reed sought to justify the lack of any performance process because of the breakdown in the relationship, that is a flawed argument. On his own analysis, poor performance was at the heart of the problem.

This all leads us to conclude that the true reason for the dismissal of the claimant was what Mr Reed considered to be her poor performance.

100. Performance being the reason for the claimant's dismissal, therefore, we turn to whether the respondent followed a reasonable process in then dismissing her for that. It almost inevitably follows that they did not as the process they followed was one (at best) appropriate to an SOSR dismissal rather than for performance. That would likely be the case for any employer but particularly so for an employer, like the respondent, that has an agreed performance management policy.

101. In circumstances where an employee is dismissed for performance but without having been given warnings and a structured opportunity to improve their performance, the dismissal will be procedurally unfair. Even if an employer correctly believes that the process is unlikely to succeed because of the employee's attitude, this is no reason not to follow the process. On these facts this is compounded by the concerns we have regarding Mr Reed's lack of impartiality (explained below) which in themselves make the dismissal procedurally unfair. This fundamental flaw was not clearly not cured by the appeal as it continued the same process as at dismissal stage.

102. As to whether the dismissal was also substantively unfair we find that it was. In particular:

a. Mr Reed had on several occasions expressed opinions about the claimant that made it impossible for him, notwithstanding any conscious efforts on his part otherwise, to deal with the consideration of dismissal meeting impartially (e.g. his email to Ms Dixon of 3 December 2018 and to Ms Preston on 17 April 2019) and there are indications that he inappropriately aligned himself with Ms Gupta against the claimant (e.g. their email exchange on 30 October 2018).
b. There were failures to properly manage the claimant's stress even when it was flagged up to management by OH (as early as April 2018 and again in 2019 and 2020). It must be very likely that this had an adverse impact on the claimant's performance. We also find that Mr Reed's behaviour towards the claimant in May 2018, when he was on notice that she was suffering from stress, was extremely poor. We do not find that the relatively short delay in implementing the SRA was unreasonable by the respondent particularly given the nation-wide circumstances in spring 2020 although the claimant's grievance in this regard should have been at least processed.
c. There was a failure to take up Ms Dixon's recommendations in January 2019 regarding setting and monitoring the claimant's performance which almost certainly impacted upon it.
d. The weaknesses that Mr Mather identified in November 2019 regarding the management of the claimant - confused application of policies and processes and a missed opportunity to address the root cause of the issue - together with a failure to fully implement his recommendations regarding training and monitoring of objectives, are also very likely to have directly adversely impacted on the claimant's performance.

e. Ms Guerno acknowledged in her grievance outcome letter in January 2021 that the temporary line management of the claimant by Ms Preston and then Mr Olafare had had an impact on her being able to fully exploit her potential. Her recommendation of more focused monitoring of the claimant's performance with relevant support again was not implemented.
f. There was a failure to consider whether suitable alternative employment was available across the wider organisation which, in the case of a performance dismissal, should have included consideration of whether the employee could perform satisfactorily at a lower grade. It is apparent that once Mr Reed had been told that medical redeployment was not available he closed his mind to this issue notwithstanding Mr Taylor having specifically told him to raise and consider it.

103. In light of these flaws the decision to dismiss, based on the claimant's performance, was substantively as well as procedurally outside the band of reasonable responses by Mr Reed.

104. The appeal did not remedy these flaws. Ms Sager-Weinstein did not address the problems in the way the claimant had been managed and any impact this had on her performance. Also she did not grapple with the detail of the claimant's point about any relationship breakdown being only with her substantive line management team and, related to that, she did not fully consider whether there was any suitable alternative employment available for the claimant. Although she asked Ms Preston and Mr Olafare if they would have the claimant in their teams, there was no systematic respondent wide review of possible alternatives. This was notwithstanding the very positive things that the claimant said at the appeal meeting about her desire to start again elsewhere in the organisation. For completeness, we are not concerned by the fact that Ms Sager-Weinstein was a peer of Mr Reed.

105. In any event, even if we are wrong about the reason for dismissal, and it was in fact SOSR, we would also find that the dismissal was unfair both procedurally and substantively.

a. Not only do our concerns noted above regarding Mr Reed's impartiality apply but it was also entirely inappropriate for Mr Reed to be conducting the review meeting where the relationship breakdown he was considering included with himself personally.

b. As stated above performance was clearly a major factor in Mr Reed's decision-making (and at appeal stage). We conclude that part of the breakdown in the relationship between the claimant and her line management were these performance issues and the failure of the respondent to manage them appropriately (or at all) - particularly when specific recommendations have been made by more than one reviewing manager in this regard - contributed to that breakdown.

c. Similarly the failure to seek to manage the claimant's stress from an early stage is very likely to have adversely impacted on her relationship with her line management.

d. Again as stated above, the failure to properly consider whether there was suitable alternative employment available for the claimant elsewhere in the respondent was unreasonable.

106. For these reasons therefore, our conclusion is that the reason for the claimant's dismissal was performance and that dismissal was unfair. We invited and received submissions at the hearing as to whether any award of compensation to the claimant should be adjusted due to either any contributory fault or the Polkey principle.

107. Even taking into account that the claimant was suffering from work related stress there were significant aspects of her behaviour that were culpable and contributed to her dismissal. We have no doubt that she was extremely difficult to manage and no health reason was put forward to explain that. Ms Preston's evidence on the claimant's unreasonable defensiveness and default suspicion of her managers' motives was compelling. Ms Guerno's findings regarding the claimant's unwillingness to follow instructions is also indicative of an unreasonable and unhelpful attitude by the claimant which must have exacerbated an already difficult situation. Finally, the extremely inappropriate comments made by the claimant in the final version of the SRA significantly contributed to the breakdown in relationships and understandably had a major adverse impact on Ms Gupta. Consequently even though we have been critical of the claimant's management both substantively and procedurally and it is because of those criticisms that we have found the dismissal to be unfair, we also find that the claimant was to some extent to blame for the dismissal and it is just and equitable to reduce both the basic and compensatory awards by 35% to reflect that contribution.

108. As for a Polkey reduction, we are minded to make one but invite further submissions from both parties as to the amount. This was dealt with, as is often the way, relatively quickly at the conclusion of the hearing and we do not currently have sufficient information from either party in order to make a sound decision. The parties will also have the benefit of taking into account our findings on liability in their submissions. This will therefore be addressed at the remedy hearing which is referred to below.

109. Victimisation: a victimisation claim is predicated upon the existence of protected acts. The respondent has admitted that the alleged protected acts 1 and 3 were indeed protected.

110. As far as alleged protected act two is concerned (the appeal dated 1 February 2019), the claimant's case is that as this was an appeal against the outcome of a grievance which was itself a protected act, it must follow that the appeal is a protected act. We do not agree. Any alleged protected act must contain, in itself, the necessary component parts set out in section 27 of the 2010 Act. The respondent's case is that those are simply not

present on the face of the document. It is not necessary, however, for those component parts to be expressly stated. It is possible, having regard to the entire document and the context, to infer them. Having regard to the contents of this appeal, and its context, we find that references to concerns about the claimant's 'treatment' and a 'hostile environment', are enough to make this appeal a protected act. It is sufficiently clear that these are references to and/or in connection with the earlier complaint about a breach of the 2010 Act. In any event, even if we are wrong about that, the protection afforded to the claimant by the original grievance being a protected act would continue throughout the entirety of the grievance process.

111. Alleged protected act four is the grievance raised by the claimant in June 2020. Again the respondent says there is no express reference in this grievance to a breach of the 2010 Act. This is accurate however the express request for the already agreed reasonable adjustments to be honoured and implemented - inferring they have not been - is clearly sufficient to bring this grievance within the scope of the statutory protection. It is without doubt at the very least in connection with an allegation of a breach of the Act.

112. Alleged protected act five is the claimant's appeal in August/September 2020 regarding her performance rating for 2019/20. Again there is no express reference to a breach of the 2010 Act. There are references to previous allegations as it is, in part, a chronological account of the events over the relevant year. On this occasion however there is insufficient identified to imply a new allegation of breach or concern in connection with the Act. It is true that the claimant used the word 'victimised' on several occasions in this document however our construction of that is she is using it to describe the feeling of being hard done by or picked on rather than in the statutory sense.

113. Then we turn to whether those protected acts were the motivation for the detriments. Even though we have concluded that performance was the true reason for the dismissal it would still be possible for a victimisation claim to succeed if, in addition, we concluded that the protected acts had nonetheless more than a trivial influence over the decisions made that led to the claimed detriments. That is not, however, our conclusion.

114. Even though, as we have said, we believe Mr Reed to be a no-nonsense manager, we do not conclude that he was motivated by the fact that the claimant had raised grievances. We have indicated above examples of what we found to be inappropriate comments/attitude by Mr Reed towards the claimant which pre-dated the first protected act (1 October 2018). As for the period after the protected acts had been done, although we have found that he was irritated - on occasion understandably – by the claimant apparently not accepting the outcome of her grievances, we conclude that the fact of the protected acts having been done was not a motivating factor in the review meeting and subsequent dismissal or failure to look for suitable alternative employment. The motivating factors for those detriments was what Mr Reed saw as her poor performance and her refusal to move on from matters dealt with by earlier grievances. He himself said at the review meeting that eth grievances were 'done and dusted'. As for Ms Sager-

Weinstein there is no evidence to suggest that the protected acts had any influence on her decision making.

**Remedy Hearing**

115. A remedy hearing has been listed for **1** day on **13 November 2013** commencing at **10am** at London South Employment Tribunal, Montague Ct, 101 London Rd, Croydon, CR0 2RF. It is hoped that with the findings above the parties will be able to reach agreement without the need for a further hearing. If so, they shall please inform the Tribunal as soon as possible. Otherwise, the following directions apply.

116. No later than 28 days before the remedy hearing the claimant shall send to the respondent a statement setting out the remedy she seeks and her efforts to mitigate her loss together with copies of any supporting documents and an updated schedule of loss.

117. No later than 14 days after receipt of the claimant's statement, the respondent shall send to the claimant any witness statements and counter schedule of loss upon which they wish to rely in relation to the remedy sought together with copies of any additional documents they say are relevant to the issue.

118. The parties shall seek to agree a bundle of documents for use at the remedy hearing and file one electronic and three hard copies no later than 48 hours before the remedy hearing.

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Employment Judge K Andrews
Date: 13 September 2023