



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Duncan

**Respondent:** London Borough of Ealing

**Heard at:** London Central Employment Tribunal  
**On:** 15<sup>th</sup>- 23<sup>rd</sup> April 2024

**Before:** Employment Judge Singh

**Representation**  
**Claimant:** Ms L Millin (Counsel)  
**Respondent:** Mr B Amunwa (Counsel)

## JUDGMENT

### Unfair Dismissal

1. The complaint of unfair dismissal is not well-founded. The claimant was not unfairly dismissed

## WRITTEN REASONS

### Background

2. The Claimant was employed by the Respondent from October 1988. On the 9<sup>th</sup> September 2021, she pursued claims for age and race discrimination against the Respondent in relation to a MUP process. At that stage the Claimant was still employed.
3. That claim was heard in June 2022 by EJ Joffe and a full tribunal, and the claims were not successful. The Claimant appealed to the EAT but that appeal was dismissed at a Rule 3(10) hearing in May 2023.
4. The Claimant was dismissed in August 2022 and submitted a claim for unfair dismissal and discrimination.
5. There was a Public Preliminary hearing on the 31<sup>st</sup> March 2023 at which EJ Klimov struck out part of the Claimant's claims as follows

*The Claimant's allegations that the Respondent unfairly dismissed the Claimant as follows:*

- ii) ignoring the fact that the Claimant was overworked,*
- iv) commencing the unsatisfactory performance procedure without first appraising the Claimant,*
- v) inadequate assessment of performance,*
- vi) insufficient periods of time for improvement in performance (if required), and*
- vii) no clear indication of what must be done to improve performance*

**and**

*The Claimant's allegations that she was treated less favourably by the Respondent because of her race or age by Mrs Tamara Quinn and by Mrs Yates*

- i) inviting the Claimant to a Performance Review Hearing whilst she was on sick leave, and*
  - ii) disregarding the evidence provided by the Claimant at the hearing*
6. A deposit order was also made by EJ Klimov of the 10<sup>th</sup> April 2023. This was made in relation to the Claimant's claims for direct race and age discrimination and victimisation. The Claimant did not pay any deposit so those claims were struck out on the 25<sup>th</sup> May 2023.
  7. The litigation history to this case was important for me to know. Although the previous case in front of EJ Joffe had not been an Unfair Dismissal case, but a discrimination one, the factual basis for the allegations of discrimination were the same facts that formed the basis for the Unfair Dismissal claim, up to a certain point in time. The Claimant had complained about the MUP (performance management) process, which was what led to her being dismissed.
  8. Therefore, the findings of fact made in that hearing by EJ Joffe on relevant issues to this claim, were binding on the parties. They could not seek to get an alternative finding on those issues at this hearing. The parties accepted this. Although some leeway was given to the representatives when cross examining witness when they asked questions which may have been potentially covered in the EJ Joffe case, I allowed this only on the basis that if a finding on that point had been made EJ Joffe, I would defer to that and not any response given in this hearing.
  9. Further, the strike out and deposit order of EJ Klimov was relevant as this narrowed down the issues that I could consider in this claim.
  10. The only claim that remained for me to determine at this hearing then was the claim for Unfair Dismissal. Both parties agreed that the reason for

dismissal was capability. The Claimant did not seek to argue that there was an alternative reason for dismissal.

11. Taking into account the strike out order by EJ Klimov, there were only 3 allegations regarding the unfairness of the capability dismissal that remained.
12. Firstly, that the Respondent disregarded the Claimant's 33 year work history.
13. Secondly that the Respondent ignored positive appraisals.
14. Thirdly that there was no proper consideration of alternative work.
15. At the start of the hearing, I asked the parties to confirm the issues. They confirmed they were as per the Case Management Order of EJ Akthar, dated 27<sup>th</sup> July 2023.
16. However, it became apparent that these were too general and did not specifically make it clear what grounds the Claimant was arguing that the capability dismissal was unfair.
17. The Respondent raised at the start of the hearing that the Claimant had made a number of new or wider allegations in her witness statement, making it difficult for them to defend the claim.
18. On day two of the hearing I asked the Claimant's representative to set out the issues they considered needed to be determined.
19. The Claimant's representative stated the issues relating to the reasonableness of the dismissal were as follows;
  - a) *Did the Respondent impose an unreasonable amount of work tasks on the Claimant?*
  - b) *Were the instructions given to the Claimant on the work she should be doing clear?*
  - c) *Was the Claimant given sufficient support to carry out her role?*
  - d) *Should the Respondent have given the Claimant a 4-week trial period prior to dismissing her?*
  - e) *Should the Respondent have offered an alternative role?*
20. I was also asked to consider whether the dismissal was procedurally unfair (although the Claimant could not point at that time to a specific defect in

the procedure) and whether the decision to dismiss was within the band of reasonable responses.

21. Apart from the alternative role issue, these issues are not included in the list set out by EJ Klimov as the issues remaining in the case. However, the Respondent did not argue that these issues should not be allowed to be put by the Claimant.
22. The issue regarding whether the Respondent had imposed an unreasonable amount of work tasks had already been struck out by EJ Klimov in my opinion. His judgment looked specifically at the issue of whether or not the Respondent had ignored the fact that the Claimant had been overworked and he determined that the issue of the Claimant's workload had been determined by EJ Joffe.
23. At paras 193-198 of her judgment, EJ Joffe had decided that the Claimant was not overworked. As this issue has been determined by one ET and struck out by EJ Klimov, I did not include it within my reasoning in relation to the claim in front of me.
24. The issue regarding "whether the instructions given to the Claimant on the work she should be doing were clear or not" was similar in my opinion to one of the issues struck out by EJ Klimov; that is issue v), "no clear indication what must be done to improve performance".
25. EJ Klimov decided that this issue had been dealt with by the Joffe ET. He found that at paragraph 98 of EJ Joffe's judgment, the ET "did not find there were unreasonable targets set".
26. I agreed with EJ Klimov that this issue had been dealt with by EJ Joffe. The issue regarding targets is specifically about what the Claimant needs to do to improve to get out of the capability procedure. The issue here is put as "instructions about what work she should be doing" but it was clear to me that this referred to work she should be doing to improve and meet the targets set, and not work she should be doing generally. The Claimant said repeatedly in the hearing that she knew what work she had to do as she was very experienced in her role. It can only be then that this issue relates to targets and what the Claimant needs to do to improve performance. Therefore this issue could not be considered by me again.
27. For the avoidance of doubt, the issues therefore that remained, as agreed on day 2 of the hearing were
  - a. *Did the Respondent disregard the Claimant's 33-year work history and, if so, was this reasonable?*
  - b. *Did the that the Respondent ignore positive appraisals and, if so, was this reasonable?*
  - c. *Was the Claimant given sufficient support to carry out her role?*

- d. *Should the R have given the Claimant a 4-week trial period prior to dismissing?*
- e. *Should the R have offered an alternative role?*

28. And to consider the fairness of the procedure generally and whether the decision to dismiss was within the band of reasonable responses.

## **The Hearing**

- 29. The hearing took place over 7 days starting on Monday 16<sup>th</sup> April 2024. There was a day of reading and then 4 days of evidence. Both parties were represented by Counsel and both representatives made submissions on day 6, orally and in writing.
- 30. I heard evidence from Donna Harrison (DH), the Claimant's line manager prior to the dismissal, Tamara Quinn (TQ), DH's line manager, Jane O Keefe (JK), a HR officer for the Respondent and Councillor Joshua Blacker (JB), who heard the Claimant's appeal. The Claimant called herself and her former line manager, Edward Campbell (EC).
- 31. I did not hear evidence from the dismissing officer, Jackie Yates (JY). There was no witness statement from her and she did not attend the hearing.
- 32. This was unusual in an unfair dismissal case as understanding the reasoning behind the dismissal is key. The Respondent explained that this was because JY was off sick. They produced a sick note for her during the hearing. The Claimant raised an issue about this and said adverse inferences should be drawn. The Claimant's representative said she had been surprised by this but I noted that the Claimant would have been aware JY wasn't going to give evidence when no statement was produced by the Respondent for her at the time of exchange. If they felt JY was a crucial witness, they could have made enquiries with the Respondent prior to the hearing or sought alternative arrangements.
- 33. The Claimant could not explain what inferences they wanted me to draw until the end of the case when they said that I should draw the inference that JY was not confident in her decision and hence had chosen not to attend.
- 34. I saw no basis for drawing such an inference apart from the assertion by the Claimant. There was no evidence that JY was not confident in her decision. She had attended the Claimant's appeal to put forward why her decision was correct.
- 35. In JY's absence, I decided that if there were any factual disputes about incidents that involved only her and the Claimant, I would have difficulty finding against the Claimant's version of events, but there were none in this case.

36. I considered whether a fair hearing was still possible even without the dismissing officer. Neither party suggested we could not go ahead. I noted that I had the notes of the dismissal hearing and dismissal letter which set out JY's decision. More usefully, I had the notes and the outcome of the appeal where JY had defended her decision and explained her reasoning. On that basis I was satisfied that the case could continue, and I could make a decision based on the information I had.
37. There was additional disclosure throughout the hearing by the Respondent. Although it is preferable for this to have been completed prior to the hearing and it did not seem any of the documents could not have been thought about as being relevant before the hearing started, as the Claimant did not challenge the submission of any of the documents, I allowed them and included them in my reading.
38. I was provided with a bundle of 111 pages, which included in it the EJ Joffe judgment, as well as the Klimov judgment. The bundle had been agreed and the Claimant did not raise issue with any of the documents in it.

## **The facts**

39. My findings of the facts are as follows. This was based on the evidence presented to me, but also taking into account any previous findings that were relevant and made by the EJ Joffe ET.
40. The Claimant worked for the Respondent from October 1988. The Respondent is a local authority in London. In April 1991 she was transferred to the transport and travel department. Prior to her dismissal the Claimant was a scale 8 role within the SEND Transport Hub.
41. The Claimant's role revolved around transport arrangements for children with SEN to school. The Claimant worked in a team of Travel Officers.
42. There were various aspects and duties of the role. Duties included, but were not limited to, booking transport providers, overseeing Personal Assistants who travelled with the children, completing risk assessment forms for the children and liaising with stakeholders including parents and schools.
43. In 2017, there was a restructuring of the Transport department. TQ was appointed at that time to oversee the re-organisation of the entire department as it was under-performing as a whole (as accepted by the Claimant in her evidence).
44. The Claimant remained in the SEN Transport team after the restructure and this is when she was upgraded from scale 7 Admin officer to scale 8, senior officer.

45. The Claimant alleged in her evidence that she and TQ had had a personal falling out around 15 years ago. No specific date was recalled. She said that from then, she had only spoken to TQ in a professional capacity. TQ accepted that there had been this incident but stated it had not affected her professionalism when interacting with Claimant at work. The Claimant alleged there were times when TQ did not speak to her or would pass over her to ask someone else a question she needed answering. However, as no specificity could be provided regarding these allegations, I did not find that TQ bore any sort of grudge against Claimant, or that there was any animosity which manifested at work. Indeed, as the R pointed out, if TQ really had an issue with Claimant and wanted to get her out, there was a perfect opportunity during the restructure. Further, it was noted that the Claimant had never raised this during her employment and had not even included it in her witness evidence.
46. In Dec 2018, Mr Edward Campbell was engaged to manage the Claimant's team. He remained the Claimant's line manager only for 7 months until July 2019.
47. Mr Campbell accepted in his evidence that there were problems with the SEN Transport team when he took over. The R's position is that the department had been poorly run due to lack of proper management and standards had slipped. Based on a combination of the evidence provided by Mr Campbell and DH, I agree that there were issues with the standards of work in the department at least from 2018.
48. In July 2019, prior to his departure, EC carried out an appraisal for Claimant in which she was deemed excellent. This is the second highest rating as far as I can see from the form.
49. The Claimant was scored on 5 objectives- GDPR training of PAs, Spot checks of suppliers, PA assessments, updated routes and prices spreadsheet, supervision with PAs. It was clear from this that EC held Claimant in high esteem and vice versa.
50. DH was appointed as the new manager for the SEND transport hub on 29<sup>th</sup> July 2019, so there was a handover period between her and EC.
51. DH gave evidence that there were peaks and troughs of work within the dept. The peak period was around July-Sept each year when the department had to get ready for the new school year and ensure everything was in place for pupils to have proper transport. There was work to do the rest of the year as well, but this was when it was the busiest.
52. Upon taking over the team DH had concerns about the entire team's performance and work not being done. She sent an email on the 19<sup>th</sup> August 2020 to all 3 TOs about risk assessments on PAs. This made it clear to all 3 that if risk assessments were not done then they could be subjected to the Respondent's performance management procedures.

53. It was alleged by the Claimant rep that DH never raised any performance issues with her prior to the first meeting in Sept 2020. The Claimant representative argued that this was in breach of the Respondent's MUP procedure which suggests that issues should be raised informally at first.
54. DH states that she did raise these issues with Claimant when they arose but that at first, due to the peak period of the work and then the turmoil caused by the pandemic, she gave the Claimant the benefit of the doubt. It was only by the summer of 2020 that the issues became too large to ignore.
55. I found DH to be a credible witness and preferred her evidence to the Claimant's about this. Given that DH was so conscientious about the standards in the department and that I can see from the evidence that she was emailing the department about the work they should be doing, I do not accept that she would never raise any issues with the Claimant on an informal basis as and when they arose.
56. However, this issue falls away to some extent with the next event that occurred. On the 19<sup>th</sup> August 2020, DH emailed Claimant to attend an informal meeting about her performance.
57. The Claimant's representative made an issue about the fact DH contacted the Claimant's union rep prior to this meeting. However, I accepted that DH acted as a responsible manager when doing this and was attempting to make sure the Claimant was supported and was not trying to make the meeting a formal one. The union rep did not attend and the meeting in September was an informal one.
58. When asked by me about what format an informal discussion about her work should look like, the Claimant said that DH should have taken her to one side and then told her what she was doing wrong and what she could do to improve. The Claimant agreed that there should be a record of this meeting and that should be sent to her, so she knows what to improve on. It was my finding that this is exactly what happened in the meeting on the 3<sup>rd</sup> September 2020.
59. Both parties agreed that in that meeting, DH spoke to the Claimant about areas she was underperforming in, discussed what she needed to do to improve and then recorded the conversation in writing and sent that to the Claimant.
60. Even if I accept that DH never raised any of the issues prior to the meeting, the meeting was the opportunity for DH to do so and for the Claimant to improve or correct things before any formal process started.
61. The Claimant was given until 3<sup>rd</sup> November 2020 to show improvement. This would have been a period of 2 months which is reasonable in my opinion. The standards set by DH were not difficult or unreasonable (as



found by EJ Joffe) so it should have been clear within 2 months if the Claimant was reaching them. All the Claimant was being asked to do was her normal duties. The Claimant accepted this and did not seek to challenge any of the standards as something she could not achieve.

62. However, after the meeting on the 3<sup>rd</sup> September 2020, a number of complaints were made by transport providers, about work that was not being done by the Claimant.
63. There was a concerning complaint made by a Head on the 16<sup>th</sup> September 2020 about the Claimant not arranging for a 4 year old to have a PA or proper safety equipment when being transported. The Claimant tried to explain the background to this, but I noted that EJ Joffe had already made a finding that she preferred DH's evidence that the Claimant had simply failed to carry out her duties in relation to this.
64. The Claimant alleged that DH had somehow solicited these emails from transport providers. I noted that EJ Joffe had already found that this was not the case. DH explained that when she started in the department and made contact with stakeholders, they began bombarding her with queries or issues. She then made it clear that they should pass any such first instance communications to the TOs, as they had previously, and only come to her with issues they needed to escalate because the TOs were not dealing with them. The Claimant attempted to argue that this was evidence of DH telling the stakeholders they could complain (about the Claimant) so that caused them to make complaints.
65. I find this suggestion ridiculous. I found that it was more reasonable to conclude that the complaints had always been there, but the transport providers had no one to send them to, or they were ignored by TOs. Once DH arrived there was actual visibility of the complaints and problems at a management level. There was no suggestion by the Claimant that the complaints weren't legitimate or made up.
66. In light of the complaints that had been raised in such a short period, I find DH's decision to move forward (to an earlier time) the implementation of the formal MUP to be reasonable. An employer should give an employee a reasonable time to improve. The Claimant has argued that the Claimant's length of service should allow her a longer period than most. However, reasonableness works both ways and in situations where an employee's performance can have serious consequences on members of the public or other stakeholders, it would be fair to speed up the process to correct those issues.
67. In this case, the Claimant's failures had a direct impact on the safety of vulnerable children. There can be fewer situations where it would not be reasonable to tolerate poor performance for an extended period of time.
68. On the 27<sup>th</sup> September 2020, the Claimant was invited to attend a stage 1 performance review meeting

69. DH carried out a stress risk assessment with Claimant on the 28<sup>th</sup> Sept. Although there were issues raised and action points agreed, it was not stated in the document that the Claimant was not coping with her work or that the standards being imposed by DH were excessive.
70. The stage 1 meeting took place on the 6<sup>th</sup> October 2020. The Claimant was set standards to meet, and a review was set for the 8<sup>th</sup> December 2020.
71. Again the standards required do not appear to add additional work to the Claimant or seem anything more than BAU. Again, EJ Joffe had already found the same.
72. In the letter that was sent after the meeting, DH said she will provide all necessary support and said the Claimant could contact her if she wanted any additional support. I note that at no time does the Claimant contact DH to say she needed any additional support.
73. The letter also made it clear the Claimant could be dismissed if she didn't improve.
74. The Claimant did not respond to this letter to challenge it, or the starting of the process. The Claimant's representative alleged that the Claimant was stunned or shocked and alluded to this being the reason she didn't respond, but I note that the Claimant was fully supported by her union throughout and there was no reason why, if she did feel she wanted to challenge anything, she could not have used them to help her do so.
75. The next review did take place on the 8<sup>th</sup> December 2020. The Claimant had had 2 months to show she was meeting the standards required. However, in that period there had been even more complaints about the Claimant not carrying out her duties.
76. This included a complaint by a parent about not being informed about a new route on the 17<sup>th</sup> October 2020, The Claimant not providing a correct transport schedule to the Claimant on the 20<sup>th</sup> October, a complaint by a provider on the 24<sup>th</sup> Nov and the first John Chilton school incident on the 30<sup>th</sup> November. Finally on the 4<sup>th</sup> December is a complaint about failure to communicate that 2 children should have been self-isolating and should not have travelled on a bus with other children.
77. In the 8<sup>th</sup> December 2020 meeting, DH concluded that the Claimant's performance had not improved and highlighted lack of communication with stakeholders. I find that a reasonable employer would have found the same thing in view of the complaints that had been raised in the review period.

78. The Claimant was told that she would move to stage 2 and that there would be a review on the 15<sup>th</sup> January 2021 with TQ. This actually took place on the 26<sup>th</sup> January 2021.
79. Again, we consider that the review period (8<sup>th</sup> Dec to 15<sup>th</sup> Jan) was reasonable. This is in light of the finding that the Claimant is only being asked to carry out her normal duties and to a reasonable standard. The Claimant does not challenge the period or what is being asked of her. Throughout the case the Claimant says that she has been doing her work. In light of that I consider the period was reasonable in order to assess the Claimant.
80. In that stage 2 meeting, DH presented a management case. This had in it a large number of examples of failures to carry out her duties by the Claimant. There had been a further incident with John Chilton school which necessitated an addendum to the report by management as the incident took place on the 21<sup>st</sup> January 2021.
81. The outcome of the meeting was that the Claimant was given a further 4 weeks to show improvement. TQ could have moved to stage 3 if she wanted to, as there was clear evidence of the Claimant's under-performance, but decided to give the Claimant more time to show improvement.
82. During that review period the Claimant was fully supported by DH with regular meetings in the form of 1-2-1s. The Claimant has alleged that these were unreasonable as they were excessive and a form of bullying. EJ Joffe found they were not excessive and actually necessary, given the level of the Claimant's underperformance. I have to agree as I found that I accepted DH's evidence that her intention was to support the Claimant so that she doesn't feel as if she has been left to figure out her underperformance on her own. Further, I accepted DH's evidence that she also wanted to protect the service user children by trying to minimise the Claimant's mistakes by carefully and regularly monitoring her performances. DH's evidence was credible in my opinion and not challenged by the Claimant.
83. The stage 2 review took place on the 15<sup>th</sup> March 2021. We note that further complaints had been made in the prior 4-week period. This included one by a parent on the 4<sup>th</sup> March that she had not been able to get hold of Claimant since Christmas, and one by a school that the Claimant had not followed up an incident about a driver inappropriately touching a child.
84. The outcome of the stage 2 review by TQ was that the Claimant should move to stage 3. Again, I find that they have acted reasonably in light of the Claimant's continued underperformance, failure to demonstrate improvement and the seriousness of the complaints being raised by stakeholders.

85. There was an invite to the stage 3 meeting on the 8<sup>th</sup> April 2021. This meeting did not take place as the Claimant went off sick on the 19<sup>th</sup> April 2021.
86. The 8<sup>th</sup> April date is an important one as the Claimant did not return to work before the eventual stage 3 meeting where she was dismissed. The Respondent therefore based their decision on the Claimant's performance based on the work she had done up to the 8<sup>th</sup> April 2021. I therefore had to determine whether this was a sufficient review period for the Respondent to be able to assess the Claimant's performance and for the Claimant to be able to improve.
87. My finding is that it was. The Claimant had been aware of her performance issue since Sept 2020, so by the 8<sup>th</sup> April 2021 she had had over 7 months to improve, but had not done so. Through the regular reviews and 1-2-1s it was clear that the Claimant's failings were consistent and, in fact, getting worse. The complaints were also accumulating and there was no evidence in front of the Respondent that the Claimant had committed to tackling any of the issues.
88. In fact, the Claimant remained adamant to the Respondent that she was doing her work and that there were no issues. This seems an unreasonable position for the Claimant to take, especially considering the external complaints. The Claimant should have reasonably accepted that what she deemed to be "good performance" was not up to scratch and that there were too many errors to ignore. However, her failure to acknowledge her failings was part of the issue and the most likely reason she didn't improve. She kept working the same way as she saw nothing wrong with it. It is difficult to see how any other reasonable employer would have acted differently to the Respondent faced with this.
89. It is unlikely that a longer period would have yielded different results. Further a longer period would not have been reasonable in light of the impact of the Claimant's failings.
90. I also found that this seems a reasonable enough period for the Respondent to decide about the Claimant's performance. The impact of the Claimant's failings was manifest in the complaints. It would have been clear to the Respondent whether the Claimant was carrying out her duties or not. A further period was therefore not reasonable or necessary.
91. The Claimant's stage 3 meeting took place on the 25<sup>th</sup> April 2022. Prior to the meeting the Respondent sought an OH report about the Claimant's ability to attend. The Claimant did attend with her union rep.
92. The stage 3 meeting was chaired by JY. TQ says that she took herself out of the process as, by that time, the Claimant had raised complaints about her and DH. I find that was a reasonable step to take so as the Claimant did not feel that there was any bias from TQ. Although JY was not from the

same service as Claimant, I was not persuaded that this negatively affected the outcome.

93. JY decided that the Claimant's performance in some areas was below the standard required. JY wrote to say that, during the hearing there had been no arguments or evidence substantiated to show that the Claimant's performance had met the standard or improved over the review period. She found however that the Claimant had had extensive management support and intervention.
94. JY found that 5 concerns persisted and were significant in nature. She also took note of the impact on the child passengers. She noted that the Claimant struggled to undertake her main duties on a consistent basis
95. JY in her dismissal letter set out the options for a manager considering a stage 3, including to take no further action, giving a final opportunity to improve, demotion or transfer, or dismissal.
96. JY Concluded that Claimant's performance did not meet the required standards to ensure the Respondent met its obligations to service users or other stakeholders. She stated that her conclusion meant that she could not apply a lesser sanction to dismissal.
97. The Claimant was told her employment would end with effect on the 4<sup>th</sup> August 2022, unless she secured another role within the local authority by that date.
98. That may seem unusual step to take, given the Respondent is dismissing the Claimant for poor performance, but TQ explained that any current employee can apply for another role and if they are appointed on merit, this would negate the termination of employment.
99. The Claimant was signposted by JY to other vacancies. We note that during the process, TQ made it clear (before the decision to dismiss) that the Claimant could consider alternative roles as well and that HR sent out emails to all staff each week setting out the vacancies available. However, the Claimant did not take any steps to apply or enquire about any of these.
100. The Claimant was dismissed but appealed. The appeal was heard by Josh Blacker. JY attended to present the management case, effectively explaining her reasoning and justifying her decision to dismiss. JY response to the Claimant's appeal was a very detailed document responding to each of the grounds raised by the Claimant and providing examples to support her decision.
101. The Claimant submitted some new grounds and evidence after that report was prepared. Although the normal procedure was for employees to submit such documents before the report was prepared, JB made an exception for the Claimant and allowed her to submit this.

102. In the hearing, JY summarised the reasoning for her decision. She cited examples of the impact on stakeholders of the Claimant's failings. She explained she had decided not to offer a final opportunity to improve as the Claimant had not accepted her performance was unsatisfactory, and she had continued to fail to comply with the requirements set out by DH.
103. She had excluded the options of demotion or transfer as there was, in her opinion, no evidence that the Claimant's performance would improve to an acceptable level. The Claimant had not complied with some of the basics of her role, such as acknowledging emails within 24 hours, which she felt confirmed that the Claimant could not even carry out a lower grade post.
104. She decided dismissal was appropriate as Claimant had been given sufficient warning about the impact of failing to improve and had provided no evidence to refute the examples of unsatisfactory performance. The Claimant did not seek to argue in this hearing that such examples had been provided but had been ignored by JY or JB.
105. JY accepted that the Claimant had worked for the council for 30 years with no previous issues but said that whilst she may have had a previously unblemished record, the fact remained that the Claimant's performance is not satisfactory now. I found that this was a reasonable position for an employer to take. Whilst previous good service should be taken into account, that does not mean that it absolves completely and later poor performance.
106. Considering the arguments put forward by JY, JB decided to uphold the dismissal. Again, I find his decision to be reasonable, in light of the evidence presented to him. I find that a reasonable employer would have acted the same way.
107. The Claimant's challenge to the fairness of the appeal was that she felt JB didn't listen to the points she had made and only listened to the Respondent's case. Looking at the outcome letter and listening to JB's evidence I do not agree this was the case at all. It was clear to me that JB considered each of the points raised by the Claimant and responded to them in a way which demonstrates that the Claimant's grounds were listened to.

## **The law**

108. Section 98 of the Employment Rights Act 1996 states that a dismissal will only be fair if it is for a potentially fair reason. Capability is a potentially fair reason, and the Claimant did not seek to challenge this as the reason for her dismissal.
109. In determining whether the decision to dismiss for capability is fair, it is not for me to substitute my own decision for the employers. I do not

need to decide whether I think the Claimant had underperformed, but whether the Respondent had acted reasonably in deciding to dismiss based on the evidence presented to it.

110. The Respondent must show that it honestly believes that the Claimant is incapable and incompetent. The key phrase here is “honestly believe”. The Respondent did not need to prove to me that the Claimant was incompetent, just that they had honest belief in her underperformance.
111. In **Alidair Ltd v Taylor 1978 ICR 445, CA** Lord Justice Geoffrey Lane said the test for a fair capability dismissal has 2 elements
  - does the employer honestly believe this employee is incompetent or unsuitable for the job?
  - are the grounds for that belief reasonable?
112. The tribunal therefore also has to decide whether there was material in front of the employer that satisfied it of the employee’s failure to perform and on which it was reasonable to dismiss.
113. In considering whether or not the employer honestly believed the employee was underperforming, we need to look at the standards being set that were not met. It is for the employer to set the standards asked of employees; tribunals cannot substitute their own view of an employee’s competence.
114. As set out in **Fletcher v St Leonard’s School EAT 25/87**, Employers can insist on levels of performance that are higher than those at comparable institutions.
115. Those standards could be set out in a variety of places such as the contract (express or implied terms), non-contractual policies and procedures or even industry and local practice.
116. Further, as in the case of **Burns v Turboflex Ltd EAT 377/96**, some standards are so basic or obvious that they do not need to be spelled out anywhere to apply to the employee.
117. If there are specific performance targets, the tribunal needs to be satisfied that the employee knew about them or could reasonably have been expected to know about them.
118. In relation to the “grounds” part of the test, we need to consider the evidence that was presented to the employer upon which they based their decision.
119. If it is accepted that it was right for the employer to find that the employee was incompetent or unsuitable for their role, we then need to

consider whether it was reasonable for the employer to dismiss for that reason.

120. In relation to the reasonableness test, the tribunal will consider not only what steps a reasonable employer would have taken when faced with an employee who does not come up to scratch, but also what steps the employer should have taken at the very start to minimise the risk of poor performance and to create the conditions that allow an employee to carry out his or her duties satisfactorily.
121. As in the case of ***Fowler v Hertfordshire County Council ET Case No.1501047/06***, proper training, supervision and encouragement are essential. If the employer fails to provide clear instructions or proper support or sets unrealistic standards (bearing in mind the right for employers to set their own standards which may be different to the tribunal's), then a subsequent dismissal is likely to be unfair.
122. There must also be examination of the performance management process. Was the employee given adequate warnings, regular meetings and adequate time to improve?
123. Consideration should also be given to whether it was reasonable to redeploy the employee to another role. The size and resources of the employer is relevant here, but so is the nature and scale of the incompetence.

## **Decision**

124. In order to make my decision, I considered the factors set out above, but also factored in the issues the parties had agreed.
125. As a reminder, they were
- a. *Did the Respondent disregard the Claimant's 33 year work history and, if so, was this reasonable?*
  - b. *Did the Respondent ignore positive appraisals and, if so, was this reasonable?*
  - c. *Was the Claimant given sufficient support to carry out her role?*
  - d. *Should the Respondent have given the Claimant a 4-week trial period prior to dismissing?*
  - e. *Should the Respondent have offered an alternative role?*
126. The first two issues relate to the test of whether the Respondent had an honest belief the Claimant was underperforming. If the Respondent has unreasonably ignored evidence such as an unblemished work record and previous positive appraisals, then it is likely that they would not have sufficient evidence to hold an honest belief.
127. The third issue relates to the issue of reasonableness. As part of that test, I must consider whether or not the decision that the Claimant had



been underperforming was reasonable, taking into consideration the performance management process and the support that was given during it.

128. The latter two issues relate to the reasonableness of the dismissal, where I must consider whether alternative options should have been offered to the Claimant rather than dismissing her. The 4-week trial may also factor into the decision as to whether the Claimant had been given adequate time to demonstrate improvement.

Did the Respondent have an honest belief that the Claimant was incompetent or unsuitable for the job?

129. Based on my findings of fact, I find that the Respondent did have this honest belief.
130. I found the witnesses DH, TQ and JY to all be credible in relation to this. It was clear to me that they all believed the Claimant was not performing her duties to the required standard.
131. The Claimant suggested in the hearing that TQ had a bias against her due to a previous personal altercation that they had had some time before the incidents in this claim.
132. I did not agree with this argument. TQ's evidence on this was that she did not let it interfere with her professional relationship with the Claimant. Aside from the Claimant's assertion in the hearing, I was presented with no credible evidence which showed that TQ had acted in a biased or unprofessional manner against the Claimant.
133. I also took into account that DH was the person who first highlighted the Claimant's poor performance. TQ only became involved at a later date and even she was not the one who made the decision to dismiss the Claimant.
134. In fact, when TQ was presented with evidence of the Claimant's poor performance she took the step to offer another review period, rather than proceed to a stage 3 hearing as she could have done.
135. Further, TQ took herself out of the decision making when the Claimant raised complaints about TQ and DH. If there was any bias, TQ did not give herself the opportunity to exercise this or influence the dismissal.
136. JY, the dismissing officer, makes it clear in her letter to the Claimant and her statement in the appeal the grounds she took into account to decide the Claimant had been underperforming.
137. There were clear records of the Claimant being set standards for work and not meeting these. As per the finding of EJ Joffe, this was only

the basic duties that formed the Claimant's role, nothing extra. However, even basic things such as Risk Assessments were not being done.

138. There was also a litany of complaints about the Claimant's performance from 3<sup>rd</sup> parties such as parents and transport operators. In light of such evidence, I find that it would be reasonable for any employer to have an honest belief that the Claimant was not performing in her role.

Are the grounds for that belief reasonable?

*Did the Respondent disregard the Claimant's 33 year work history and was this reasonable?*

139. My finding was that this was not correct. It is clear from JY's summing up that she did take into account the Claimant's previous work history and her explanation as to why that did not alter her decision appears reasonable.

140. The Respondent concluded that, although the Claimant may have had good service previously, the evidence about her current service indicated that she was now clearly underperforming and that underperformance was having serious consequences.

141. I find that no reasonable employer would have acted differently when presented with such evidence, particularly the complaints from stakeholders which were established to be legitimate. Even though the Claimant had no previous complaints, it would not be reasonable for an employer to ignore such serious complaints and evidence of failings which had serious impact on vulnerable children because of the Claimant's past work record.

*Did the Respondent ignore previous positive appraisals and was this reasonable?*

142. I accepted that the Claimant had had a previous positive appraisal from her former manager, EC. I did not find that this was fabricated or in any way false.

143. However, I found that it was reasonable for the Respondent to discount this in light of the performance issues raised by DH and the complaints by service users.

144. I do not see how it would be reasonable for any employer to find that the appraisal by EC outweighed the evidence presented to them at the Stage 3 hearing about the Claimant's level of underperformance.

145. No reasonable employer would have looked at an appraisal from July 2019, by a manager who was only in-post for less than a year (and is no longer there to explain his decision) and decide that that should

absolve the Claimant from being responsible for her current underperformance which was evidenced in so many more ways.

146. As such, I find that the Respondent did have an honest belief that the Claimant was incompetent or unsuitable for her role and there were reasonable grounds for that belief.

Was the decision to dismiss reasonable?

*Was the Claimant given sufficient support to carry out her role?*

147. I find that she was given sufficient support. Although Claimant's representative tried to argue the 1-2-1s were not reasonable, I turn to EJ Joffe's finding that they were supportive and necessary. I agreed that this is a reasonable step to help an employee who is failing and also to protect the service users.
148. The Claimant had regular opportunity to speak to her manager DH to ask what she needed to be doing, to ask for help and training if needed, or even ask for work to be taken off her. I note that the Claimant did not do any of these things, despite having the opportunity.
149. I also find that DH provided support by bringing in additional people in the team to help out. The Claimant's representative suggested that this wasn't enough and, when asked, what would have been required to help the Claimant, she said "another Claimant" should have been brought in to help.
150. I find this an unreasonable suggestion. No reasonable employer would engage 2 people to do 1 person's job because the first person is underperforming, particularly when the underperformance is related the basic tasks of their role and there is no evidence of that person being over-worked.
151. I noted that during the process the Claimant did not raise that she needed any support or training. In fact, she maintained she was doing her job well and, in light of this, I cannot find that Claimant wasn't given sufficient support.

*Should the Respondent have given the Claimant a 4-week trial period prior to dismissing?*

152. I do not consider that this was reasonable or necessary. As stated, by the time the Stage 3 invite was sent in April 2021, the Respondent had, in my opinion, sufficient information to determine whether the Claimant had met the performance standards and whether she had shown improvement in the period from Sept 2020.

153. Even though the Claimant had been off for a year by the time of the dismissal meeting, it does not appear that they needed further time to see if the Claimant was performing and it is doubtful that a 4-week trial would have allowed them to do this. The Claimant would have had to come back off sick first and very likely had a phased return. During such periods work is often reduced and the Claimant would have needed time to reacclimatise. It is almost certain her performance would not have been to normal standards so a 4-week trial would not have shown the Respondent any useful information about the Claimant's work.

*Should the Respondent have offered an alternative role?*

154. I found that the opportunity to apply for alternative roles was offered at regular stages throughout the process. The Claimant was sent details of vacancies but never applied. The Claimant was also told by TQ to consider whether she wanted to find an alternative position in the Council.

155. I agree that at the dismissal stage JY said that she could not offer an alternative role as a lower sanction as she did not feel that Claimant was meeting even a basic standard. I find her conclusion to be reasonable based on the evidence presented to her in the dismissal process.

156. However, the Claimant was given the opportunity to apply for other roles prior to her notice period expiring but didn't. I therefore find that the Respondent has acted reasonably in relation to alternative roles.

157. Therefore, I find that the Respondent has acted reasonably in treating the reason for dismissal as sufficient reason.

Was the dismissal procedurally unfair

158. Turning to the remaining issues- firstly I find that the dismissal was procedurally fair. The Claimant could not point to any specific breaches of procedure by the Respondent in the process.

159. The Claimant did raise in the hearing that she thought that she should have been allowed a legal advisor in the dismissal and appeal meeting as the Respondent had one. However, I note that that is not part of any procedure of the Respondent. Further, this is not normal practice in any capability or dismissal process. I find that this did not therefore render the procedure to be unfair.

160. I note that the Claimant had union rep throughout and therefore was not completely unrepresented.

161. The Claimant also alleged a breach of ACAS guidelines. She was asked what specific part of the ACAS code had been breached, but the only specific point she could make was that the Respondent should have considered alternatives to dismissal, which I have dealt with above.

Was the dismissal within the range of reasonable responses.

162. I find that it was. Whilst the Claimant may argue that a different employer may have imposed a less sanction such as an alt role, that is not what I have to consider. I need to consider whether or not a reasonable employer would have acted this way and I find that they would have. It is perfectly reasonable, in my opinion, for an employer to dismiss an employee where this level of underperformance has been demonstrated and evidenced, where the employee fails to acknowledge their underperformance, has shown no signs of improvement and where the impact of underperformance has serious consequences on the safety of vulnerable service users.

163. For these reasons, I find the dismissal to be fair. The Claimant's claim is not well founded and is dismissed.

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Employment Judge **Singh**

\_\_\_\_\_ 31<sup>st</sup> July 2024 \_\_\_\_\_  
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

7 August 2024

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FOR THE TRIBUNAL OFFICE