



EMPLOYMENT TRIBUNALS

Claimant: Mrs N Rashid

Respondents: (1) Lloyds Banking Group

Heard at: Leeds

On: 15-18 and 22 May 2023 and 10-13, 17, 18 and (deliberations only) 20 December 2024

Before: Employment Judge Maidment

Members: Mr T Downes

Mr C Lannaman

Representation

Claimant: In person

Respondent: Miss A Stroud, Counsel

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and direct race discrimination fail and are dismissed.

REASONS

Issues

1. The claimant brings a claim of ordinary unfair dismissal where the respondent maintains that the reason for dismissal was one related to capability i.e. poor performance. There has been an issue as to the correct identity of the claimant's employer, but the tribunal understands that this has been agreed to be HBOS Plc. This certainly reflects the claimant's contract of employment within the bundle of documents before the tribunal.
2. The claimant also brings complaints of direct race discrimination. The race of the claimant is defined by national/ethnic origin and colour. She is British, but of Pakistani origin. She complains that her dismissal was an act of less favourable treatment because of her race. In addition, she alleges, as

detrimental treatment because of race, the institution and implementation of the performance improvement plan ("PIP"), which led to her dismissal, and the respondent's handling of her grievance, including the grievance outcome and appeal. Finally, she complains of a failure to afford her access to training as less favourable treatment because of race.

3. Whilst no freestanding complaint of discrimination is brought in respect of it, the claimant relies, as material from which, she says, the tribunal ought to draw inferences, on an incident at a meal in November 2019. In the case summary arising out of a preliminary hearing on 13 December 2023, it is said that the claimant maintains that she arrived late and as she walked past her colleagues to her seat, one of them said that she looked pretty. The claimant says that the manager, Ms Garbutt, commented: "For her kind." At the time, the claimant was wearing traditional dress.
4. The tribunal discussed the issues with the parties which were agreed to be accurately reflected in the case summary following the preliminary hearing on 13 December 2023. An issue was raised by the claimant regarding the bundle of documents before the tribunal. This numbered 1201 pages, but the claimant said that the bundle she had been provided with earlier was 6 pages short of that. The 6 additional pages were emails sent to the claimant by Mr Marples during the PIP.

Evidence and applications

5. The claimant also raised that there had not been a simultaneous exchange of witness statements. The claimant had waited until the evening of 5 April 2023, but, in circumstances of no response received from the respondent, had then sent her own statement to the respondent. The respondent's representatives had sent their statements only on 11 April. The claimant had by the start of this hearing had an opportunity to read the respondent's statements and prepare questions for their witnesses. If she believed any advantage had been taken by the respondent of the earlier sending of her own witness statement, that was a matter she could cross-examine relevant witnesses on.
6. Finally, the claimant raised that there was a difference in agendas which had been prepared for a previous preliminary hearing maintaining that the respondent had been attempting to hide something. Again, witnesses could be asked questions, if necessary, though it was not obvious how this issue had a wider impact on the substantive hearing of the issues.
7. The tribunal adjourned until just after 14:00 and in the interim period read into the witness statements relied upon by the parties and relevant documentation referred to.
8. On reconvening, the issue of the additional 6 pages of documents, at pages 1195-1201 of the bundle, was revisited. Miss Stroud said that she had attempted to provide copies of these to the claimant. She said that they had been sent to her on 5 April. The respondent's solicitors had referred to them specifically and offered to send the claimant hard copies. The documents were said to be highly material, relating to the second stage of the PIP, including detailed feedback. The claimant's position was that she was sent a link to the documents but had not been able to access them. The claimant

maintained that she was now being given less than 24 hours to review those documents.

9. On a separate issue, a document was included at page 1115 of the bundle which the claimant said was a list of opinion papers given and their authors. The respondent wished to rely on a different document and said that the claimant's was not accurate.
10. Following an adjournment, the tribunal ordered that the additional pages 1195-1201 should be admitted as evidence. The claimant had been sent a link to these documents on 5 April 2023, but had not asked for hard copies. Importantly the emails were in fact communications sent by Mr Marples to the claimant in January 2020. They were clearly relevant documents. Mr Marples was not giving his evidence on the first day of the hearing and the claimant had time to prepare any additional relevant questions.
11. The document at page 1115 was an extract from a contemporaneous document in circumstances where the respondent says that there is a newer and different version in existence. The new document the respondent wishes to rely on relating to that at page 1115 appears to be relevant to the issues. The claimant and tribunal ought to have that document at the earliest opportunity and, again, in circumstances where the claimant would have a chance to consider it and understand its implications. In any event, the respondent would have been able to put questions to the claimant to show any suggested differences/inaccuracies in the document at page 1115.
12. At 14:30 the tribunal heard evidence from Ms Emma Garbutt, head of financial well-being, customer financial assistance & home in the conduct compliance & operational risk ("CCOR") team. The tribunal broke for the day at 16:00 before her evidence could be completed.
13. Ms Garbutt's evidence continued from 10:03 on day 2 (16 May 2023). Her evidence was concluded at 14:42.
14. The tribunal then heard from Mr Philip Marples, senior manager in the customer financial assistance advisory team after a brief break. The tribunal broke for the day at 16:00 before his evidence could be completed, in circumstances where the claimant was unwell due to a headache.
15. At the start of day 3 some additional documents provided by the claimant for insertion at pages 1203-1211 were accepted with no objection from the respondent.
16. The claimant then raised an issue from the previous afternoon. She said that, before the parties left, there was a need for some documents to be copied by the tribunal staff for the parties. The claimant and the respondent's representatives were in their respective separate waiting rooms. The copied documents arrived. Miss Stroud had then come into the claimant's room. Apparently, documents had been provided to her by Miss Stroud, who then left the room. The claimant had noted some documents which she did not think were meant to be there and told the tribunal clerk. The clerk had told Miss Stroud, who had then come into the room and had allegedly "grabbed" documents away from the claimant. As the claimant left the tribunal premises, she said she had looked at the tribunal's clerk, but said nothing.

There had been a red dot on the claimant's fingertip as Miss Stroud had scratched her. She needed a tissue to stop it bleeding. When the claimant arrived back home her children had queried what was on her finger. Initially, when asked by the tribunal what the claimant wanted the tribunal to do with this information, she said she simply wanted it to be noted.

17. The claimant then, however, indicated that she wished to make an application that the respondent's response be struck out on the basis, firstly of Miss Stroud's alleged conduct and secondly on the basis that Mr Marples was now saying, she asserted, that he had tailored his witness statement evidence arising out of his awareness as to what the claimant was saying in her evidence. This arose out of a question put to Mr Marples asking him to reflect on his comments about the claimant's performance in a previous role. Mr Marples, when the claimant had asked him if he had changed his evidence after reading her own statement, had said that might well be the case. Miss Stroud submitted that Mr Marples was confused when he said that.
18. Miss Stroud wished to make an application to include 2 emails, the first of which attached Mr Marples final amendments to a draft witness statement on 4 April, the day before the claimant sent her own witness statement to the respondent. The draft witness statement contained on 4 April the change Mr Marples had referred to already. The second she wished to submit was from the respondent's solicitors to all the respondent's witnesses on 11 April (when the respondent provided it statements to the claimant) attaching the claimant's own statement. It showed, she said, that the claimant's statement had been retained by the respondent's solicitors until 11 April and that Mr Marples did not receive it until then.
19. Miss Stroud explained to the tribunal that documents to be given to the claimant had been put in a folder which already contained privileged correspondence and her own notes of questions to be put to the claimant in cross-examination. This had been handed to the tribunal's clerk in error, who subsequently came back to the respondent's waiting room to say that she needed to go to speak to the claimant about the documents. There were some documents placed on a table. The issue of the documents containing some privileged correspondence was raised. Without asking the claimant, Miss Stroud had reached over to pick up the documents. She accepted that it would have been courteous if she had asked the claimant for the return of the documents. She, however, refuted the allegation that she had behaved aggressively.
20. The claimant then raised the issue of a breach of earlier directions regarding the timing of exchange of witness statement evidence. The tribunal was clear to the claimant that any breach which had occurred and delay in exchanging witness statements was not an issue which could give rise to a striking out of the response at this stage.
21. Having adjourned, the tribunal gave its decision to the parties on the applications at 11:47. The tribunal refused the claimant's application to strike out the respondent's response. The issue of Mr Marples changing his statement, even if he did so in response to the claimant's own statement, was not of such a nature to prevent a fair trial from proceeding. The tribunal noted the nature of the change alleged and its lack of material relevance to

the determinations the tribunal was required to make. It would not render the entirety of Mr Marples' evidence unreliable. In any event, the tribunal can only determine with confidence whether Mr Marples did in fact make the change if it understands the sequencing process by which the statement was prepared. The tribunal will be assisted in this if the respondent was allowed to refer to the additional evidence it wished to submit. There is no prejudice to the claimant given the lack of materiality of the alleged change - it is not going to materially influence the tribunal's final decision. On the other hand, an adverse finding would have consequences for the respondent and its representatives in terms of professional conduct obligations.

22. The tribunal had an understanding of what happened the previous afternoon regarding the claimant being given privileged documents in error. It could confidently conclude that that was a degree of inappropriateness in Miss Stroud's behaviour. She accepts that she could and should have asked the claimant for the documents, rather than having just taken them back off her. It cannot make a finding, however, that she was rude, aggressive or guilty of any form of assault.
23. The context was of an understandable degree of panic by Miss Stroud at having handed over privileged documents. The tribunal accepts the claimant's genuine feeling of upset and intimidation as a result of these events. However, again that is not such as to render a fair trial impossible or to cause the tribunal to debar the respondent from defending very serious claims against it with consequences also for its own managers and their own professional futures. The tribunal considers that the claimant does require an element of protection and reassurance and therefore any further matters of preparation and conduct of the case Miss Stroud wants to address with the claimant, must be addressed publicly before the tribunal, not privately.
24. The claimant was not then in a position to continue with the hearing and cross-examine the respondent's witnesses with, in her words, her head pounding. She hoped to be fit to continue the following day. The claimant described herself as having gone around the block but couldn't calm herself down. The tribunal determined to adjourn from 12:00 to 14:00 to see if the claimant might then be fit to continue in circumstances where Mr Blott was only available to give evidence that day. The tribunal reconvened at 14:09 to be informed by the claimant that her headache had increased. The tribunal, therefore, adjourned for the day.
25. On day 4, the claimant had telephoned, then emailed the tribunal to say that she was not fit to attend that day. There was an inevitability then of the tribunal going part heard in circumstances where Ms Shepherd was not available to give evidence beyond the day. The tribunal determined, in the light of the claimant's correspondence, to adjourn until 10:00 on Monday 22 May 2023. On that day the tribunal had received communication from the claimant that she was not fit to attend. The claimant had been asked to provide some medical evidence regarding her state of health.
26. The tribunal then struggled to find alternative dates for the resumption of the hearing until Wednesday 10 December 2024 due to availability issues affecting both parties and the tribunal itself.

27. Mr Marples' evidence continued and was completed on 11 December 2024. The tribunal then heard on Thursday 12 December from Ms Rozanne Shepherd, director of IT supplier management and who heard the claimant's grievance. Having broken for lunch, the tribunal then heard from Mr Blott, an HR director from 13:00 until 14:18. No other witness for the respondent was available to be heard that day. The tribunal therefore heard from Mr Pete Owen, head of integrated financial risk on Friday 13 December. The tribunal was then able to hear from the claimant from 12:00 on that day after a delay during which it was ascertained that the statement of the claimant before the tribunal was identical in content to that which she had disclosed to the respondent. The respondent had placed a header at the beginning of such statement which had then been, to some extent, reformatted. The claimant's evidence could not be completed on that day. The following Monday was a non-sitting day. The claimant's evidence resumed on Tuesday 17 December and was completed by 14:50 on 18 December.
28. The parties had been made aware by the tribunal that it would proceed to hear submissions at the conclusion of the claimant's evidence. Miss Stroud provided written submissions which were considered by the tribunal prior to reconvening to hear oral submissions at 15:48. The claimant had been granted additional time to read the submissions. Miss Stroud's oral submissions were limited to 15 minutes and the claimant's to 30 minutes. The claimant concluded her oral submissions before the imposition of any guillotine.
29. Having considered all relevant evidence, the tribunal makes the factual findings set out below.

Facts

30. The claimant had been employed by the respondent for almost 30 years. Due to a restructure, it was determined that a position she held as a band E manager in the conduct, compliance and operational risk team ("CCOR") team was no longer required. At this time, the claimant was absent from work due to long-term sickness. After an occupational health appointment on 9 November 2018, the respondent was advised that the claimant was fit to return to work with no health issue likely to affect her performance. Discussion of a return to work plan was recommended. Such meeting took place on 10 December, at which the claimant confirmed that she did not need any adjustments to support her return to work. Her then line manager, Mr Bruce Hodgson, updated the claimant of the organisational changes, the nature of her new role (continuous risk management and deep dive reviews) and that he did not anticipate any issues with her performing that role. The claimant confirmed that she had no concerns herself and believed that she had the knowledge skills and experience. There was discussion regarding the claimant having disputed her 2017 performance rating. The claimant's new role was described as an opportunity for a fresh start. The claimant was redeployed, as a band E manager, into a team in Halifax in January 2019, still within COCR, reporting to Emma Garbutt, who was based in Chester. Mr Marples, at the time, held a similar role to Ms Garbutt, who has been described internally by the director, Mr Rankin, as "firm but fair" in terms of her management. Mr Rankin also recognised a history of tension between the claimant and previous line management. Mr Marples described

Ms Garbutt (also during the claimant's grievance process) as having had a particular reputation in a previous role, but that he had no complaints himself about her management. There is no evidence that there was an engineering of the claimant being placed with Ms Garbutt on the basis that she would manage her any more aggressively than anyone else. Ms Garbutt reported to Mr Exeter as head of department, who sat beneath Mr Rankin as the service director.

31. Ms Garbutt understood that the claimant's previous role had centred on quality assessing calls with customers. The claimant says that that was only part of her role and other aspects of it were relevant to her new role, including assessing risk. Ms Garbutt when cross-examined expressed surprise that this was the case given the claimant had said that she was new to many of the tasks in her new role. She was surprised that the claimant was now saying that she was well versed in risk management.
32. The claimant, in her new role, had responsibility for providing risk management oversight for the area of the respondent which handled customers in financial difficulty. This included oversight of risk management processes and governance. Those within CCOR were expected to challenge other parts of the business to help them improve their risk profile. The management of risk is known as continuous risk management ("CRM"). The claimant's team also provided "risk opinions" which were akin to an audit of specific areas of potential risk to the business. CRM is a consideration to be taken into account in providing any risk opinion. The claimant's area of work was focused on ensuring fair outcomes for customers in financial difficulty – an area heavily scrutinised by the respondent's external regulator given the vulnerable nature of many of the customers involved.
33. Ms Garbutt spoke to Mr Bruce Hodgson, as the claimant's previous line manager, at the time the claimant joined her team. He told her about the claimant's history of sickness absences and her having been managed under a formal attendance plan. In circumstances where the claimant had been absent during the previous year, there was no discussion regarding her performance. Ms Garbutt did not review the previous performance ratings the claimant had been given.
34. The claimant joined the team at the same time and in similar roles as Paul Walsham and Ceri Jenkins, who had no prior experience of working in a risk oversight role in CCOR. Ms Garbutt expected the claimant to have something of an advantage over them in the new role. In cross-examination, Ms Garbutt recognised that Mr Walsham had been employed in a leadership role, but said that, whilst he might have been aware of some systems, his role had never been to oversee risk. Ms Jenkins had certainly not undertaken any "after the event" risk testing. Ms Garbutt thought that this was in contrast to the claimant who had worked in a "second line" risk role for 6 years, was a competent outcome tester and had used the respondent's risk frameworks. There was some dispute between the claimant and Ms Garbutt as to whether her responsibilities involved outcome testing. Ms Garbutt told the tribunal that that is what the team did in which the claimant had previously worked and that the quality assurance of calls amounted to outcome testing - the clue, she said, was in the title.

The tribunal accepts Ms Garbutt's evidence and the reasonable expectations she had of those joining the department.

35. The claimant was initially given operational risk management work and this continued as there was felt to be a need to build up the claimant's competencies in areas she struggled with. Whilst Mr Walsham and Ms Jenkins were moved onto more complex tasks, no one could do those tasks without understanding the risks, what was recorded on the systems and what the controls looked like. Mr Walsham and Ms Jenkins were viewed during their induction periods as performing better than the claimant on operational risk management. They were deemed able therefore to move onto writing risk opinions. This resulted from the feedback Nikki Higgins gave after their initial training. The claimant said that she had wanted to work on risk opinions also, but Ms Garbutt said that no one could pick and choose their work - they needed to develop skills outside their comfort zone. She said that the claimant was certainly not being set up to fail. The evidence does not suggest that she was.
36. Ms Higgins sent Ms Garbutt notes on all of the new team members, so that she could understand whether people were getting the right training and support. Ms Garbutt denied that from the outset the claimant had to justify everything she was doing. More formal notes on the claimant's performance were kept after the Q1 check-in, when Ms Garbutt could see that the claimant was really struggling – this accorded with the respondent's performance management procedure.
37. The claimant was provided with some training by Eileen Mensah, who emailed Ms Garbutt on 22 January 2019 with information on the tasks and systems they had been through. The claimant considered this to be largely refresher training with an explanation of system changes during her period of absence. The claimant said at the time that she found it helpful. Julie Struthers gave the claimant some training on the preparation of consolidated risk reports which were to be provided to the group risk committee. Nikki Higgins trained the claimant and her other new team member colleagues in CRM. She provided feedback to Ms Garbutt on the areas covered on 21 January and 26 March 2019. By later in the year, Ms Garbutt accepted that Ms Higgins had expressed some frustration at training the claimant, she said, because of a need to repeat the same things.
38. Ms Garbutt asked her (and her colleagues) to complete a training assessment to identify any gaps where further training or development was required. On reviewing the claimant's updated skills matrix, Ms Garbutt emailed her on 24 January. Out of 28 listed competencies, the claimant rated herself as competent in only 3 areas and suggested that improvements were required in 23 areas. Ms Garbutt was surprised by the claimant's assessment of herself which appeared to her to be indicative of someone who should not be in the role. A number of the matters the claimant had assessed as requiring improvement were competencies Ms Garbutt expected the claimant to have been exhibiting within the respondent for some years. The claimant told the tribunal that she had been told by her previous manager to "go low and build yourself up" and that if she oversold her own abilities she would get no training. Given the lack of trust the claimant has expressed in that manager, the tribunal struggles to accept that she was taking his advice in the way described.

39. Ms Garbutt met with the claimant and concluded in fact that the claimant's deficit in any competencies was less stark than indicated by the claimant and that there were some areas where only a quick refresh was required. Ms Garbutt, by an email of 24 January 2019, included some future goals for the claimant and some guidance on matters which she would need to familiarise herself with. Some advice was given on report writing. The claimant told the tribunal that this related to CRM reports rather than the deeper dive opinions in which she subsequently became involved. Complimentary skills were, however, involved in both.
40. Ms Higgins emailed the claimant on 29 January after a morning session with the claimant. She praised the claimant's walk-through of a completed spreadsheet and then gave the claimant some pointers to remember going forward. A comment was included that the detail she had written in the comments was perhaps "too low level. She invited the claimant to review her own analysis as an example of the level of output expected of her. The claimant's view was that Ms Higgins method of training was not an example of best practice. She expected Ms Higgins to walk through a task rather than set her a task, the results of which they would then review together. There is no evidence that she asked for any alternative forms of training at this point in time. When interviewed as part of the claimant's subsequent grievance appeal, Ms Garbutt described Ms Higgins as an expert in her field, who had trained all new colleagues, including Mr Walsham and Ms Jenkins. All colleagues trained by her had been complimentary about the training and had become competent very quickly, she said.
41. Ms Higgins followed up some training on data validation in an email to the claimant on 30 January. Again, some reminders and pointers were set out. These included the need to have a robust rationale for any observations and to know how she arrived at her decision. The claimant was recorded in the email as finding worthwhile a session on data validation the previous day with a colleague, Fatima. The claimant told the tribunal that her session with Fatima did not add any value, but there is no evidence of her raising a concern at the time.
42. Ms Garbutt held an attendance review meeting with the claimant on 4 February - health issues arising out of the impact of the loss of her mother were noted. Ms Garbutt wanted to check on how the claimant was after being back in work for a full month. The claimant said that she was feeling positive with everything going well apart from systems issues. Ms Garbutt confirmed that it had been frustrating getting setback up on all the systems, but that the claimant was almost there and was learning the job well. The claimant said that she was in a good place, wanting to come into work each morning and had a good manager and nice team. She said that she was enjoying work. Ms Garbutt asked the claimant if there was any further support needed but the claimant confirmed that one was required. The claimant did not refer to any concerns with the training Ms Higgins or anyone else was giving her. She told the tribunal that the meeting was about her attendance, not her work. Also, she felt that she was doing well. She had no major concerns. Despite this, the claimant's evidence was that she was constantly raising with Ms Garbutt and Ms Higgins that the style of training was not the most effective for her. On the balance of evidence, the tribunal cannot accept that she was at this time.

43. On 11 February, a colleague, Ms Struthers, emailed the claimant with a training pack for her to practice on the preparation of consolidated risk reports. The claimant told the tribunal that this was after Ms Struthers had walked her through such a task. She advised the claimant to book time for a discussion in Mr Exeter's diary at an early stage to enable him to review her work up to that point – prior to its finalisation.
44. Ms Garbutt, thereafter, observed that, whilst Mr Walsham and Ms Jenkins appeared capable of undertaking the work tasks effectively, the claimant appeared to be unable to work independently to provide a robust analysis of risks and insightful risk opinions based on that analysis – the opinions were required to provide practical recommendations as to steps the business could take, but she felt that this was lacking.
45. The head of team, Jason Exeter, fed back to the claimant (forwarded to Ms Garbutt) on 15 Feb that a risk opinion she had produced was not at a level suitable for a MD to receive and that the claimant had not within it made any proposals of her own. Contrary to the claimant's evidence, there was clearly an expectation that she would come up with proposals rather than this being a task for Mr Exeter to complete himself. There is no evidence that the claimant told Mr Exeter that this was not expected of anyone else in her role as she suggested in cross-examination. The evidence is of the claimant simply continuing with the report, thanking Mr Exeter for his support.
46. Ms Struthers provided further advice to the claimant and the consolidated risk report by email of 1 March suggesting she updated as much as she could before reaching out to Mr Exeter for more information.
47. A further attendance review meeting took place on 13 March 2019. It was noted that there had been no further absences since the claimant's return to work in November. Ms Garbutt congratulated her on maintaining full attendance and said that this meant that they could now close down the formal attendance action plan. The claimant confirmed that she was still enjoying work and, whilst some of the tasks were outside of her comfort zone, she was enjoying learning and thriving on a new challenge. The claimant again said she was satisfied with the level of support she was receiving. Ms Garbutt advised the claimant to speak up if anything changed in her circumstances. The claimant told the tribunal that she noted to Ms Garbutt that the style of training was not the best for her, but this is not reflected in the meeting note and again is unlikely to have been said in circumstances where the claimant also told the tribunal that she had no concerns at that time.
48. Ms Higgins emailed the claimant on 15 March following a call that morning. She gave some advice regarding the preparation of a pack for a meeting with Mr Exeter, including having the pack ready to go two days before its presentation. In an email of 26 March Ms Higgins set out a timetable for the preparation of CRM proposals. On 5 April, Ms Higgins provided confirmation of further advice given that day including trying to use the knowledge which the claimant had gleaned to enable her to show insight. She asked the claimant to diarise 3 further sessions to discuss respectively, risk details report, controls testing and action plans.

49. The claimant described to the tribunal a telephone call on 2 April attended by Mr Exeter, Ms Garbutt, Mr Marples and Ms Higgins which the claimant chaired. She said that she felt exposed, as the call highlighted gaps in her knowledge. Up until then she said that she was confident that the training she was receiving on CRM was effective and that she was learning. After the call, she rang Ms Higgins for feedback as to how she would have approached the call. Ms Higgins said that she had not jumped in as she had not wanted to embarrass the claimant. The claimant said that she started to question her own ability.
50. The claimant agreed in cross-examination that she had no issues with the training she received until this call which corroborates a lack of the claimant raising concerns at an earlier stage regarding her training. Even at this stage the claimant did not identify to Ms Higgins or anyone else any specific aspect of her training which she felt to be deficient. There is no evidence of the claimant saying she would benefit from being able to shadow another more experienced colleague.
51. The claimant described to the tribunal that the call was a “massive moment” and that everything went downhill after that. She said that she realised that she had no idea what she was doing.
52. Ms Garbutt conducted a first quarterly check-in with the claimant on 9 April at which she congratulated her on areas of success. The check-in also identified areas for improvement including the need to come up with proposals and provide insight. She asked the claimant to consider all the feedback given by Mr Exeter in February regarding bringing a proposal to him rather than a document with blanks for him to complete. She described the same thing as having happened in March. Ms Garbutt considered that the claimant’s previous experience with the respondent might have involved more of a process driven review of a customer’s experience, assessing whether policy and regulatory requirements had been met. That might not have involved as much independent thinking and analysis as was now required of the claimant. Her view at the time was that the claimant appeared to accept the feedback and was keen to address any shortcomings.
53. The claimant’s evidence was that she was requesting assistance by way of shadowing someone other than Ms Higgins. That is not reflected in Ms Garbutt’s summary email sent to the claimant on 9 April. The tribunal does not find that the claimant identified to her any purported gaps in training.
54. The tribunal notes that the check-in and all other meetings with Ms Garbutt until September were conducted remotely. As already referred to, Ms Garbutt was based some distance away. In evidence, Ms Garbutt said that she had tried to get across to Halifax in Q1, but had had to turn back because of a road traffic incident. She said that it was not unusual to interact with others, to the same extent, remotely. Whilst Ms Garbutt agreed that she had seen Mr Walsham more than the claimant, as he was based in Chester like her, she had spent more time with the claimant.
55. Ms Higgins emailed the claimant on 15 May on tasks to complete and further pointers to assist the claimant. As regards the monthly CRM deep dive, she referred to having redone the previous piece which the claimant had

completed for May, but that the claimant should have a stab at the next one for Mr Exeter and walk her through it. Ms Higgins subsequently provided comments marked up on the claimant's draft review.

56. On 11 June, Mr Exeter emailed the claimant asking where the pack he needed was, as there was a meeting later that day. He also referred to a piece of work on data validation where he wished to review the overall opinion the claimant had shown him and consider how to make it "more high-level".
57. Ms Garbutt conducted weekly one-to-one reviews with the claimant where areas for development were identified. One such review on 17 June 2019, which the tribunal has been referred to, was, on the tribunal's findings, detailed, balanced and constructive. As regards the risk deep dive, Ms Garbutt said: "... for this exercise, think about the "so what" question. What valuable insight are you providing to the business? Then consider how you can articulate the findings in a clear and simple way, preparation is absolutely key for when you come to present your findings... Insight and judgement are the key skills that we need to continue to work on. Let's talk further this week to see how you found the exercises, what you've learnt and if your development plan is working for you."
58. Nevertheless, Ms Garbutt became increasingly concerned about a lack of responsiveness and productivity from the claimant. She considered that the claimant had failed to reply to a number of her emails and her thinly populated outlook calendar was an indicator of a lack of output. When Ms Garbutt raised this with the claimant, the claimant said that she had IT issues preventing her from having access to the system, but was unable to demonstrate what the specific issues were or that she had escalated the matter to IT. Separately, the claimant had acknowledged to Ms Garbutt that some things were taking her longer than she expected. Ms Garbutt summarised her concerns in an email to the claimant of 24 June 2019, referring to her having been unable to reach the claimant, advising her to obtain an IT issue reference number and log any faults. Ms Garbutt thought that the claimant was raising IT issues in circumstances where she was failing to report and resolve them. When Ms Garbutt asked the claimant to demonstrate some of her difficulties, the claimant advised that she was unable to even move her cursor as the system had now frozen, but Ms Garbutt had noted that the claimant was in fact able to move the cursor. In cross-examination the claimant initially accused Ms Garbutt of lying, but retracted such accusation on being shown her response to Ms Garbutt's email at the time where she agreed that her cursor attempted to move, but said that this was short lived. Further information was requested and that the claimant document how long tasks (which the claimant herself thought were taking longer than expected) were taking in anticipation of a discussion the following day to see how the claimant's issues might be addressed.
59. The claimant has raised IT issues such as a failure to increase the size of her mailbox in early June 2019. There is no evidence that this prevented her from working. In late June, a memory upgrade was installed which the claimant said caused her screen to freeze. Ms Garbutt's view was that these were routine issues and she would expect someone of the claimant's experience to know how to get them resolved. Ms Garbutt was adamant

that systems issues were not at the root of the claimant's performance, for which she criticised her.

60. The claimant told the tribunal that there were occasions when she was connected to the network, but was being shown as off-line. Ms Garbutt said that she was unaware of such an issue occurring with anyone else.
61. During a call with the claimant the following day, the claimant advised Ms Garbutt that she didn't believe she had the skill set required for the role, with particular reference to analysing data and providing an insight/opinion. The claimant referenced a forthcoming restructure and said that if there was an opportunity to move to another role her preference would be to work on outcome testing. She acknowledged the training and support that Ms Garbutt and others had provided. She did not criticise Ms Higgins' style of training. Nor did she ask to shadow another colleague. She said that, when she first agreed to accept the role, she believed that she would be primarily undertaking outcome testing rather than needing to provide an analysis. Ms Garbutt found this difficult to understand as the respondent was doing away with the need for stand-alone outcome testing roles, hence the reorganisation which had resulted in the claimant joining her team. Ms Garbutt explained that outcome testing was only part of the role and it was important to be able to complete the analytical duties. Ms Garbutt said that band E colleagues had to independently lead on risk opinions including engaging senior business stakeholders and that was the expectation of a band E in CCOR. She discussed with the claimant the possibility of her exploring vacancies on Workday, the respondent's HR management tool, although the claimant would be responsible for finding any alternative roles.
62. When the claimant and Ms Garbutt spoke on 25 June, Ms Garbutt indicated that there would be a further session to agree an informal performance improvement plan. Within the respondent's performance management policy, there was an opportunity for performance concerns to be managed through regular meetings with improvement objectives to be achieved within a typical period of 1 to 3 months. Only if progress was not made, would the formal process be invoked which consisted of a maximum of 3 formal review meetings and up to 2 formal action plans. The claimant told the tribunal that her preference would have been to look for another role.
63. The claimant had also emailed Ms Garbutt on 25 June, saying that the training had not helped her to the degree she was expecting and had led to her being overstretched affecting her work/life balance.
64. Their discussions were summarised in an email from Ms Garbutt to the claimant on 26 June. The claimant was noted as also saying that she was keen to stay in the current team as she loved the people, but could not remain undertaking an analyst role.
65. Ms Garbutt had a further discussion with the claimant on 27 June, which she followed up with an email summarising what had been discussed. The claimant had commented that her role did not suit her skill set. The claimant was recorded as being happy with the support and training, but that the operational risk work didn't suit her skill set and she felt there should be more opportunity to complete other tasks within the team, which perhaps suited her skill set better. The claimant wanted to work on risk opinions. She

felt that Mr Walsham and Ms Jenkins had been allowed to undertake this work from a much earlier stage. Ms Garbutt stated that Ops risk was a fundamental part of all CCOR risk opinions, hence why a large section of the CCOR capability matrix was dedicated to ensuring colleagues were confident in this area. In cross-examination, the claimant agreed that CRM impacted everything they did and there was a need to understand CRM in order to be able to write risk opinions.

66. Ms Garbutt followed up a call and the morning of 2 July with an email. She noted a discussion on how CRM impacted risk opinions and how this knowledge was used to make judgements and provide insights. Looking at the operational risk analysis completed in May, it was noted that the claimant was able to walk through what she thought the task was and summarise the data “but the insight was missing.” Ms Garbutt described some teaching and coaching undertaken during the session and their working through action plans to look at how risks were being managed. The claimant was reminded to present her findings in a clear and simple way so that “you land your insight with impact”.
67. The claimant emailed Ms Garbutt later on 2 July praising Ms Garbutt and the other managers and expressing her trust in them. She described her team as “truly the best team in CCOR with 3 incredible managers (that’s you, Phil & Jason). I also made it clear that I want to remain in this team within CCOR where I trust my management & especially you as my LM”. She recognised that she had development areas to address, but considered that she would overcome them as she had their support. She had no interest in moving teams and was not looking for other vacancies. The claimant told the tribunal that she was wanting to start afresh and realised that she was trapped in terms of the informal PIP, but had to make the best of it.
68. On the claimant’s questioning of her, Ms Garbutt accepted that an issue had arisen around June with a colleague of the claimant, Eileen Mensah. The claimant had been asked to do a task, but said that she could not access the SharePoint area. Eileen was based in Halifax with the claimant and Ms Garbutt asked Eileen to have a look. The claimant would not, however, allow Eileen to show her anything on the screen and she wouldn’t show Eileen the access problems she was experiencing. Ultimately, Eileen contacted Ms Garbutt to say that the claimant could access the systems now and had asked Eileen to pretend/misrepresent that there had been system problems. She was aggrieved that the claimant had asked her, as she saw it, to lie. She said that there had been a previous occasion when she had been asked to pretend that the claimant had not arrived late for work. Ms Garbutt had spoken to HR. They were worried that, because the claimant was, by the time Ms Garbutt became aware of it, being managed on a PIP (see below), the issues could become intertwined and could be related to the claimant’s struggles. The advice was to document a discussion with the claimant, but not take it any further. Ms Garbutt raised the matter with the claimant on 9 September, but the claimant denied everything. No action was taken as a result.
69. The issue arose subsequently when the claimant took part in some mediation with Ms Garbutt. Ms Garbutt disagreed when it was put to her that she ever refused to investigate the matter further or said that it was not

in the claimant's best interests for her to do so. There is no evidence of any form of threat as alluded to by the claimant.

70. Ms Garbutt was of the view that the respondent had exhausted all that it could do to assist the claimant in terms of training. There had been many (around 30) training and coaching sessions. The claimant had been given everything that she had asked for.
71. Ms Garbutt conducted a Q2 check with the claimant on 8 July. Her email of that day confirmed that discussion recorded a continued need of the claimant to provide insight not just analysis and to demonstrate the ability to work independently. The claimant described receiving support from Ms Higgins and Ms Garbutt and being comfortable with the support provided.
72. In a separate email of the day, Ms Garbutt provided details of the informal PIP. She described the overarching aim as to give the claimant the opportunity to demonstrate that she could work independently to provide robust analysis of risks and controls, insightful risk opinion and practical recommendations. A number of tasks were set for her to complete. The claimant said in cross-examination that she was very clear as to what was required, but reiterated that she thought the training was lacking. She believed that the performance management policies required training to be provided as part of the PIP. She did not raise that, however, with Ms Garbutt.
73. The informal PIP was set to run from 8 July to 5 August. Ms Garbutt considered that against the background of the aforementioned support, the PIP was all about the claimant "executing" the level of performance required. It was not about the claimant receiving any more structured training, as was put to her in cross-examination. The claimant needed to show that she could deliver. Nevertheless, when the claimant asked to go on an external course. Tasks to be completed were set, together with the respondent's expectations. Regular check-in meetings took place. Ms Garbutt went through the work the claimant had completed, giving examples of the type of report/analysis which was expected of her. Additional training sessions took place with Ms Higgins on analysis and CRM.
74. On 10 July the claimant provided Mr Exeter with a table showing CFA risks. He responded noting that she had raised questions but that he was looking for insight from her analysis and an opinion could share with others. Examples were given of where further work was required. Ms Garbutt followed this up with a discussion with the claimant which he confirmed in an email of 11 July. This reaffirms the need for insight and a discussion of examples which the claimant was following up with Mr Exeter. On 12 July Mr Exeter emailed the claimant saying that he had not received papers from the claimant he needed for a meeting that day which was therefore being rescheduled.
75. In a catch-up meeting on 14 July, the claimant acknowledged that the support she was receiving was good, but said that HR had told her that more training ought to be added to the PIP. Whilst the types of training the respondent could offer internally have been exhausted, the claimant identified an external course, which the respondent agreed to fund and was to take place in October.

76. On 15 July, Ms Garbutt emailed the claimant with key learning points from the RRC pack review call that day. It emphasised the claimant's need to show her own and fresh insight – not just a repeat of opinions from previous quarters.
77. Ms Garbutt also emailed the claimant on 15 July, following up on an earlier conversation, saying that she had spoken to HR and they were comfortable with the approach she was taking. She said: "Interestingly, they did say that they don't provide an advice service to colleagues so I'm not sure who told you that we need to add more training to the PIP". She recorded that she had committed that she would support the claimant in finding an appropriate person to spend some more time with her in operational risk work. On balance, this is likely to be the first time the claimant raised sitting with someone other than Ms Higgins - it was then put in place by 26 July. She also referred to the claimant's attendance on the aforementioned external course which was not available until 14 October. Ms Garbutt said: "I think we agreed that as you have now had all of the other training available at least twice over, there is not much benefit in revisiting again but do shout if you think there is something that will help?"
78. Ms Garbutt met with the claimant again on 16 July regarding the RRC opinion. The claimant felt that she had provided fresh insight. Ms Garbutt suggested that she compare the Q1 opinion with the Q2 draft discussed the previous day. She said that she would follow-up the request of sitting with someone else to complete CRM activity when Mr Exeter was back in the next day, saying that they needed to ensure that they found the right person for the claimant to shadow.
79. Ms Garbutt emailed on 18 July confirming a chat that morning with the claimant. She said that she was in the process arranging for the claimant to sit with someone else. The claimant confirmed that she had not yet done the Q1 and Q2 comparison of the RRC opinion.
80. Ms Garbutt emailed on 23 July following a discussion that morning on weekly progress. Ms Garbutt commented that the session on CRM was lacking insightful risk opinion and recommendations.
81. The claimant and Ms Garbutt had a further discussion on 31 July. The claimant had sat with a colleague, Sally, the previous week and the claimant commented that she had got to see a different style. The claimant told the tribunal that the session with Sally had been really good and had helped her to realise the gaps there had been in her previous training. On balance, this was not said by the claimant. It is not reflected in the email of Ms Garbutt on 31 July reflecting their discussion or the claimant's witness statement evidence. Ms Garbutt did praise the claimant for pulling out relevant points in the risk deep dive.
82. Ms Garbutt provided the claimant with feedback on 6 August regarding a QC intervention for a contact strategy being prepared for Mr Exeter. She commented that her outputs were framed as questions rather than opinions. She sent over Mr Exeter's opinion on this so that she could compare and contrast as a learning exercise for the future. The claimant told the tribunal that while she had not recognised this at the time, the piece of work she had

been given was for someone 2 levels above her own. The tribunal has no evidence from which it could reach such conclusion. Ms Garbutt's evidence was that this was the sort of task which could go to anyone in the team – it was not only appropriate to be done at a level higher than the claimant. Ms Garbutt commented that it was not clear whether the claimant was supporting the proposal and said that her outputs were framed as questions rather than as opinions. The claimant put to Ms Garbutt that she had not received the training necessary for her to be expected to produce opinions. Ms Garbutt did not agree and noted that the claimant had been asking all along to do opinions. She was also then subsequently assisted by Mr Marples as her manager, who provided coaching support.

83. Ms Garbutt and the claimant met on 6 August to review the informal PIP. The claimant highlighted how grateful she was for all of the additional support and training she had, in particular from Ms Higgins. Ms Garbutt confirmed that improvements had been seen in her planning more effectively and sending out findings in advance of calls. However, development was still required on the required level of analysis and its communication. She confirmed that sufficient improvement had not been seen to allow the claimant to come off the PIP. The claimant said she was surprised by this, which in itself surprised Ms Garbutt.
84. The claimant was then absent for a few weeks of annual leave. The claimant emailed Ms Garbutt on 6 September. She agreed that she had learned a lot in July/August and felt less confused. There had however been earlier confusion she said. She expressed gratitude for the training she had received from Ms Higgins and others. She said that she had previously delivered when placed outside of her comfort zone. She said that this was the first time she had not digested the training as she would have expected. She was trying to understand how this was the case and to eliminate the possibility of it being due to her having been predominantly trained by Ms Higgins alone. She referred to being able on 26 July to sit with Sally saying that she found that to be invaluable. She said that opinions were subjective and could differ from one individual to another. She referred to having requested to work on different tasks. She said that she voiced her concern about going to a formal PIP when improvement had been seen although she agreed that further training was still required.
85. Ms Garbutt had discussed the options with HR. She felt there was little benefit in extending the informal process, given the amount of support given to the claimant and how little improvement that had resulted in. It was decided to move to the formal stages of the policy. The claimant provided to HR and the claimant a lengthy a detailed factual summary/timeline of the claimant's performance management. The claimant noted points of disagreement on the document and expressed the view, when returning it, that the criticisms of her were harsh. She said that some of her comments were to provide more balance.
86. Ms Garbutt met with the claimant on 11 September 2019 to tell her that she would shortly be inviting her to a formal meeting to discuss the performance plan. That invitation went out by letter of 12 September. The claimant was given a right to be accompanied.

87. On 11 September, the claimant was made aware of the concerns which Eileen had raised around June. Eileen left the respondent on a voluntary severance arrangement that month.
88. The claimant says that, in contrast to how Ms Higgins' work anniversary was treated, after 29 years' service her own was not celebrated as it typically would be on an all team call. The claimant emailed Ms Ferda Mehmet, an executive office manager within CCOR, on 19 September 2019 saying that her anniversary was not recognised whereas others were. The claimant described herself as proud and privileged to be working for an organisation "which is simply amazing". Ms Mehmet replied, apologising that she was missed off and saying that they were reliant on line manager feedback with the HR electronic systems being so new and still having teething issues. She said that it sounded as though the claimant might have been one of the few who had slipped through the net. The claimant thanked her for her "kind" response. Ms Garbutt told the tribunal that it was not her responsibility to inform anyone of a work anniversary. That responsibility lay with the PA of a director (John Rankin) 2 levels above her. Ms Mehmet was the PA of a group director who seemed to assume that the information came from line managers, which was not the case. Ms Garbutt said she had never submitted any information for anyone. Ms Garbutt could not recall whether she had had an opportunity to sign an anniversary card for the claimant, the claimant noting that Mr Marples had signed a card for her, yet she did not (yet) report to him. Ms Garbutt did not accept that she had not signed a card for the claimant because of any dislike of her.
89. The first formal review meeting took place on 26 September. The claimant was accompanied by her union representative, Chris Rimmel. Phil Marples, senior manager, attended to take notes. There is a consensus that the meeting became very heated. Ms Garbutt considered that the claimant had been angry. Ms Garbutt recognised that she herself had been frustrated - she said because of the claimant talking over her. The claimant's evidence is that she accused Ms Garbutt of lying, though Ms Garbutt had no recollection of that.
90. Ms Garbutt summarised the support provided to the claimant and outlined the key development areas where more work was required. The focus was on analytical and communication skills. The claimant said that she was confused as to what was expected of her, specifically regarding CRM. Ms Garbutt expressed the view that this had been made clear on a number of occasions, that the claimant had previously been happy with the level of support and had previously conceded that she did not believe she had the skills to undertake the role.
91. Mr Marples' recollection of the meeting was that the claimant highlighted that she did not feel that CRM activity was suited to her skillset and Ms Garbutt advised that her work going forwards would include more opinions/analysis. Ms Garbutt made it clear that the respondent would need to see a detailed rationale of how the claimant reached risk opinions and a demonstrated ability to work independently.
92. The tribunal notes that following a challenge by the claimant's union representative, Ms Garbutt confirmed that the claimant had had the required training. She referred to Ms Jenkins and Mr Walsham having started at the

same time and with the same induction. Ms Garbutt said that it was only when a formal plan was suggested that the claimant raised training concerns. The claimant's union representative said that he did not feel that the claimant had had sufficient time on the informal action plan. Ms Garbutt disagreed and said that she had spent a disproportionate amount of time supporting the claimant with evidence of 37 interactions of support since January. For this reason, an informal plan of one month's duration was felt to be appropriate. Ms Garbutt said that the claimant had always fed back to her that she felt thoroughly supported. When asked if there was any more training that the claimant needed, the claimant said that she couldn't immediately think of anything. Ms Garbutt asked her to go away and think about it.

93. Ms Garbutt had been asked to act up into Mr Exeter's head of team role and it was explained that, as a result, Mr Marples would be the claimant's new line manager and would oversee the PIP. A formal PIP was put in place for a period of 5 months with a review at the halfway point. A template action plan was provided to the claimant together with information about 2 pieces of work which the claimant would be leading on in the next quarter as part of which she would have the opportunity to prove her ability to work independently and to deliver the level of analysis required. Ms Garbutt's understanding was that the claimant agreed this action plan.
94. Ms Garbutt wrote to the claimant on 3 October confirming the decision to put in place a formal action plan. There would be an interim review meeting on 10 December. The claimant was given a right to appeal the decision which she did not exercise. The formal action plan was enclosed which referred to a final review date of 26 March 2020. The first two opinion tasks for the claimant to work and were stated to be being the CFA lead on a review of operational resilience and then for the claimant to lead a CAT review.
95. During the meeting, Mr Rimmel had suggested a breakdown in trust between the claimant and Ms Garbutt and mediation as an appropriate way of addressing this. The mediation subsequent took place in October and November 2019. Ms Garbutt's view was that the claimant would not accept what she regarded as constructive feedback and talked over her.
96. Mr Marples had previously worked in the same team as the claimant for a couple of years, when she had been an assistant manager. In a subsequent appeal the claimant raised against the outcome of her grievance (described below), Mr Marples said that the claimant was in the "bottom 3 ability/skills wise" in that other team. Before the tribunal he said that that was not fair and maybe a bit harsh. He was talking about a period 10 years ago. He would now say that she was a "fairly average performer". Mr Marples had nominated the claimant for an award in recognition of an aspect of good performance in December 2014, when she was at band D. That was not inconsistent with his view of the claimant. Prior to taking over as her line manager, Mr Marples was a senior manager colleague of Ms Garbutt. He told the tribunal that he had seen first-hand the work that the claimant was producing and believed himself that the analysis of the data in her reports was poor and often required some fundamental rewriting.

97. Mr Marples undertook weekly check-ins with the claimant and followed up by sending her notes of their discussions. Feedback was given on work she had completed. Mr Marples asked the claimant to let him know if she required any particular support, but she always confirmed that she was getting the help and training she needed.
98. The first took place on 4 and 11 October. On 18 October he emailed her about the need to plan effectively and provide feedback to senior stakeholders at an early stage. He referred to a telephone call with Emma Garbutt as having been “very poor” and that phrases such as “fingers crossed” did not instill confidence. The claimant was encouraged to seek help on the CAT review. On 25 October, Mr Marples gave further advice and congratulated the claimant on some positive feedback from Becky Nicholson who was managing the first opinion on which the claimant was working. He noted however that as there had been no material findings in this review “we won’t be able to tick that off against your plan”. This was not a criticism of her in any way and he expected that there would be findings in the next CAT review, which would give the claimant the requisite opportunity to provide an opinion and show insight.
99. By 5 November the claimant had successfully signed up for an external course.
100. On 6 November, Mr Marples summarised their discussion the previous day. He noted that her stakeholder call went well and the first Ops Resilience opinion which Ms Nicholson managed had been a positive experience for her. On another matter, he had challenged her and her insight saying that being able to review papers and come up with sensible challenges was a vital part of the role. The claimant was encouraged to be inquisitive. He described the session as being good overall and that he was pleased with progress over the last week. He said that now was a critical time to deliver on the CAT report.
101. On 8 November Ms Nicholson provided written feedback on the operational review. She noted that whilst the claimant had worked as part of a team, she had worked independently to deliver the testing in CFA. There had been one meeting with the claimant and the stakeholders and she was comfortable with the summary which the claimant provided and the minor gaps identified. As the claimant wasn’t required to write up any risk issues or findings or discuss observations with stakeholders she couldn’t provide any feedback on those topics. On checking the review, she had identified an omission testing point which had been missed by everyone in the team. The tribunal concludes that this was a genuine communication sent from Ms Nicholson, with no evidence of any changes made by the respondent to create a negative impression. It is noted that the claimant provided at the appeal against her ultimate dismissal a different version of this email which omitted reference to the omission identified and the limitations on the requirements of the claimant to come up with opinions.
102. The claimant worked as part of a team on the review submitted to Ms Nicholson. She was the lead for her particular area of work, but other teams fed into the review.

103. Mr Marples emailed the claimant and 22 November summarising their discussions regarding the second opinion she was working on (the CAT opinion). He recorded that their relationship was good and she was getting the support she needed. The claimant told the tribunal that she trusted Mr Marples “wholly” at this point. He congratulated her on a presentation she had made to the team based on what she had learned from the Operations Resilience review. The claimant was told of the need for her to summarise her thoughts succinctly in opinions and on stakeholder calls. He said that they saw that in the work of other band E employees in the team, “but you are not displaying that currently and this needs to change quickly. CAT will give you an opportunity.”
104. A team meeting was arranged to take place in London on 21 November 2019. A meal out was arranged on the night before the meeting. The claimant arrived a little late at the restaurant saying that she had had travel difficulties on the tube. The claimant had to walk past Ms Garbutt to get to her seat. The claimant says in her pleaded case that one of her colleagues commented that she looked pretty and that Ms Garbutt added “for her kind”. The claimant said that she was wearing traditional dress related to her ethnicity. Ms Garbutt told the tribunal that that never happened, describing herself as “completely anti-racist” and, her being supportive of all inclusion and diversity activities, that was not something she would have said. Ms Garbutt said that her treatment of the claimant was “never a question of race” and that she found it hurtful that the claimant raised such “false allegation”. She considered that this incident was being brought up for the first time two and a half years after the event.
105. Mr Marples did see some improvement in the claimant’s performance, but this was in her core skills, such as planning, with no notable improvement in terms of fundamental elements of the opinion/analysis role including in her insight and report writing. He raised with the claimant on numerous occasions a lack of analysis and that it was critical to improve those skills to the level the respondent would expect for someone in her role. He provided specific examples of what was required. Mr Marples considered that producing opinions might be more challenging than CRM work, but it was work expected of someone in the claimant’s role and she had expressed a preference for it.
106. On 2 December, the claimant provided Mr Marples with her list of what had gone well against the action plan and what could be better. In the latter category she said that she wanted to improve her report writing. In terms of what had gone well, she referred to feedback that her summary of an external training course had been confused. She said that Mr Marples had been a positive influence. Whilst she appreciated feedback, she had found it to be overly harsh and critical compared to other band E’s. She said that her working relationship with Ms Garbutt had broken down in September and there was no longer the trust they once both had. She referred to the ongoing mediation process with Ms Garbutt.
107. Mr Marples responded with a number of comments. He said that she had effectively worked independently on the CAT review and had received positive feedback on the Operations Resilience review. However, his main concern was around providing robust insight in the draft CAT report. The structure and wording needed a lot of work. He said: “In summary, the level

of insight and articulation is not at the same level your peers produced for their first opinions, and you are not at the level required of band E team members. For next week, can you be clear on what it is that you have found in the CAT review without my help and what it is you are saying needs to be done about it.” He said that there had been no updates to senior stakeholders as promised and emphasised the need to manage expectations. The claimant needed to provide the risk opinions in a timely manner.

108. The claimant responded on 3 December expressing disappointment with the comments. She said that she had not agreed with the formal plan as the informal plan had been in place for only one month and she had demonstrated improvements. She was hoping she could rely on him to help her and not allow her to feel as though she was being set up to fail. The claimant agreed that she did not raise any specific challenge on the points Mr Marples had raised.

109. A second formal review meeting took place on 10 December 2019 which the claimant attended together with Mr Rimmel, her union representative. Mr Marples explained that the purpose was to review her progress against the action plan and to consider whether they should continue with the formal plan or whether any changes were required. He accepted that there had been progress in her ability to work independently and plan. He noted a lack of improvement, however, in stakeholder management and providing insightful risk opinions along with practical recommendations. The claimant accepted that she had struggled with insight in her opinions. Mr Marples referred to a failure to update stakeholders. The claimant said that she accepted that when working on the report “stakeholders went out of my head”. At one point the claimant referred to having been let down by people. Towards the end of the meeting, Mr Marples referred to the claimant having made progress on three quarters of the plan and said: “We are getting there. But where is your insight? It needs to come out.” These notes were never challenged by the claimant and the tribunal cannot accept that Mr Marples in fact said that she had successfully completed three quarters of the PIP. The claimant said she felt she was being overly criticised. Mr Marples said that she had received some positive feedback.

110. Mr Marples confirmed that they would be moving to the second phase of the action plan and would continue to review her performance. The claimant would be working on a new Proof of Concept opinion. He discussed whether the claimant had thought about whether the role was the right one for her as had been raised previously. He advised that, if she was unable to successfully complete the plan, then a potential consequence at the final meeting could be the termination of her employment. The claimant confirmed that she was getting all of the support and training she required and she felt she was in the right role. The claimant said at the meeting that, in terms of support, she had everything she needed.

111. The claimant said that she was enjoying working on opinions rather than CRM which she had found challenging.

112. An outcome letter was sent to the claimant on 16 December 2019 with an updated action plan. A lack of improvement in the 2 key areas of

stakeholder management and providing an insightful opinion with practical recommendations was highlighted. The review of her development would continue pending a final review meeting on 26 February 2020, at which point they might move to the final stage. Dismissal was then said to be a potential outcome.

113. Mr Marples continued to meet with the claimant regularly including undertaking 4 on site visits and 10 one-to-one sessions from the review meeting up to early February 2020. He undertook 3 reviews of a draft report and sourced documents to assist her with the background information needed. Mr Marples described this as a greater level of support than would normally be provided. In the later stages of the action plan, he took other responsibilities away from the claimant so that she could focus on the delivery of the objectives. In his view, however, her reports continued to be of an unacceptable standard. Risks were not being identified and there remained a lack of insight.
114. The claimant was referred to an email from Mr Marples of 3 January with some pointers on the POC opinion describing the Tuesday as being an important day. The claimant accepted in cross-examination that Mr Marples wanted that to go well for her. The claimant had said that she had no new training requirements, but Mr Marples was checking whether another external course might be available for her.
115. On 24 January Mr Marples emailed confirming their discussion that day noting that she seemed more confident. He identified “risk insights” as continuing to be the key area to focus on. He noted that to date she did not have any key findings in the POC work. He said that it was critical that she was able to articulate what she had reviewed and why there was nothing material if that was where she ended up. He referred to them now having daily calls to monitor progress which the claimant told the tribunal was too much and causing her immense pressure. Again, the claimant said that she had no new training requirements and did not need anything else from Mr Marples.
116. The claimant referred Mr Marples to an email she sent to a stakeholder on 3 February which she said evidenced insight. In fact, as described by Mr Marples, it simply raised questions for discussion.
117. On 4 February 2020, Mr Marples noted that the claimant said she was pleased with the draft POC opinion. He however rated the content and style of the report as “bad” and said that it needed a fundamental rewrite. He believed there was a lack of insight in a lot of the elements, the findings currently were not material and he was struggling to understand one of them. He said he had a real concern that she would be able to fulfil the requirements of her action plan by the end of the month. He provided some detailed feedback.
118. On 12 February Mr Marples emailed the claimant saying that the draft report fell well below the standard expected of band Es in the team. What insight the report contained was not well explained or was deemed non-material. He said that Ms Garbutt wanted him to take over completing the report. The claimant in cross-examination did not accept the criticisms,

pointing to Ms Garbutt having her own criticisms of work which Mr Marples had inputted on.

119. A formal review meeting took place on 2 March 2020 which the claimant again attended with Mr Rimmel. Mr Marples explained that this was the final stage in the performance process and he would be considering whether she had met the requirements of the formal plan. He confirmed that the work produced in the period since the second review meeting was not of the expected standard. He said that he ultimately had to completely redraft a particular opinion/report she had produced. He gave specific examples of where she had fallen short of his expectations. The claimant requested a 2 month extension to look for and secure potential redeployment. This coincided with the coronavirus pandemic and, as a result, Mr Marples agreed to delay any decision until 1 May 2020. The claimant was not required to undertake a day-to-day role during this time so that she could focus all of her efforts on securing a new position. An outcome letter was sent to the claimant on 26 March 2020. The claimant had access to all available roles advertised internally within the respondent and at all grades.
120. By email of 5 May 2020, Mr Marples invited the claimant to a remote meeting on 11 May to discuss the plan outcome and whether she had secured an alternative role. He explained that the reason for the meeting was to provide an outcome to the action plan. Mr Rimmel said that the claimant wasn't prepared for that conversation and requested a further delay as the claimant wished to submit a grievance. The claimant did say that she had applied for a number of alternative roles, but there had been a pause on non-critical recruitment as a result of the pandemic.
121. Having taken HR advice, Mr Marples explained to the claimant that, if it had not been for the coronavirus pandemic, the respondent would be terminating her employment on the grounds of capability that day. However, he was conscious of the impact of the recruitment freeze on her opportunities to obtain an alternative role and agreed to hold off on dismissal and review on a monthly basis. A summary of the discussion was sent to the claimant on 2 June 2020. He confirmed that the claimant had the right under the performance management policy to appeal against his decision within 14 days of receiving the letter.
122. Mr Marples periodically sent the claimant details of potential alternative roles when he became aware of them. Those included a position as manager in customer service testing which he felt matched some of her skills.
123. By email of 12 May 2020, the claimant raised a formal grievance alleging unfair treatment in relation to the performance improvement process. This was investigated by Rozanne Shepherd, head of IT sourcing. Mr Marples had confirmed receipt of the grievance and that this would be heard before any final decision was taken in respect of her ongoing employment. Mr Rimmel emailed Mr Marples on 19 May 2020 to say that the claimant would attend no further meetings in relation to performance improvement until there was a grievance decision.

124. The claimant accepted that within her grievance she raised for the first time that Mr Marples had been influenced in his management of her performance by Ms Garbutt. She said however that she had raised at the September 2019 meeting that the process might not be fair, as Ms Garbutt was herself responsible for Mr Marples' performance. The claimant also stated that in July 2019 (not, it is noted, from April) she had asked that she be allowed to shadow another colleague. The claimant also noted that Ms Garbutt had been willing to postpone logging the PIP until job preferences had been expressed as part of the forthcoming restructure.
125. Ms Shepherd met with the claimant to discuss her grievance on 21 September 2020. As part of the complaint, the claimant alleged that Mr Marples had been influenced in his opinion by Ms Garbutt and had treated her unfairly during the process. Ms Shepherd interviewed Mr Marples on 23 September 2020 and also Ms Garbutt on 29 September. She obtained relevant documentation from them both.
126. Ms Shepherd found, as confirmed in an outcome letter of 15 October 2020, that there was no substance to the allegations and concluded that Ms Garbutt had provided the claimant with appropriate support and had not treated her differently to other colleagues – whose performance was viewed differently to the claimant's. Ms Shepherd concluded that Mr Marples had invested a lot of time and had evidenced supporting the claimant through the formal process.
127. The claimant appealed that outcome which was considered by Mr Blott, future of work and business design director. The claimant expanded on her allegations. She said that Ms Garbutt had used the claimant's vulnerability to manipulate her onto the informal plan for a month. Mr Blott met with the claimant and Mr Rimell on 5 May 2021.
128. At one point the claimant mentioned that her skin colour is quite fair and at an evening meal in November 2019, when she sat down, one of the team had said that she looked pretty and Ms Garbutt had said: "Yes, for her kind". The claimant said that at the time she didn't care, but now recognised that this wasn't right. Later in the meeting Mr Rimmel said that there had been an over analysis of some of the PIP points, "not the racism and micro-aggression points". He referred to an ulterior motive and this having something to do with her race. Situations like the November meal played into this. There might have been something else going on rather than just managing her performance. He later referred to a potential racially motivated reason behind the PIP. The claimant told the tribunal that she would not have raised the issue of race if the November meal incident had not happened.
129. Mr Blott was not expecting allegations of race discrimination in circumstances where there was no reference to the claimant's race or the restaurant incident in her appeal letter.
130. The claimant was provided with a copy of her meeting notes. She reviewed these and provided a significant number of amendments/additions which the respondent was unwilling to include in amended notes as they did not always reflect what had actually been said at the meeting itself.

Effectively, two versions of the meeting notes were retained on file. Neither the claimant nor her representative took any notes at the meeting itself.

131. Mr Blott interviewed Mr Rankin on 6 June, Mr Exeter and Mr Marples on 1 July 2021, Mr Walsham on 9 July and Ms Jenkins on 21 July. He purposely asked open questions about the November 2019 meal and whether anything untoward had happened which had made them feel uncomfortable. None of those at the meal recalled anything. There were also no concerns raised about Ms Garbutt's management style and no one interviewed raised any concern about her treating people differently. He interviewed Ms Garbutt on 9 August 2021. He asked her about a number of instances where the claimant alleged that she had been treated differently by colleagues and about the work meal and whether Ms Garbutt had made a racist remark to the claimant saying that she looked nice "for her kind". Ms Garbutt denied ever making such comment.
132. Mr Blott issued an appeal outcome on 21 October 2021 rejecting the claimant's appeal.
133. Mr Marples emailed the claimant on 12 November 2021 inviting her to a meeting on 23 November to re-review the outcome of the formal action plan and discuss her redeployment attempts. He advised that, should it become clear that her performance fell short of expectations of the formal action plan and she had not managed to secure another role, a potential outcome could be the termination of her employment.
134. The claimant emailed Mr Charlie Nunn, the respondent's CEO, on 17 November 2021 complaining about unfair treatment which she indicated was on the basis of race. The claimant forwarded to Mr Marples the response she received from the CEO's office on 19 November 2021 to say that her complaint was being looked into. She asked if Mr Marples would postpone the meeting.
135. Mr Marples met with Mr Blott on 17 December 2021 who advised him that the appeal had not been reopened, but that some additional points needed to be addressed in the light of the claimant's complaint to the CEO. Mr Blott asked him again about the London meal specifying this time the comment the claimant said was made by Ms Garbutt. Mr Marples said that he had heard nothing of that nature and it would have been something he would definitely have remembered. He had never observed any racist comments or seen any micro-aggression towards the claimant by Ms Garbutt. He confirmed that he had the autonomy to manage the claimant's performance shortcomings without any pressure on him from Ms Garbutt. Mr Blott reinterviewed Ms Garbutt on 17 December. She said that the claimant was making allegations because she knew how personally Ms Garbutt would take them, given how important equality and diversity was to her. Ms Garbutt was one of the respondent's diversity and inclusion leads. Mr Blott reinterviewed Ms Jenkins and Mr Walsham on 17 December. When told of the alleged words used by Ms Garbutt, both appeared shocked by the allegation and categorically denied hearing such comment or seeing anything which could be considered as racism. Mr Walsham commented that, if that language had been used, the whole atmosphere at the meal would have changed. He recalled the claimant and Ms Garbutt being involved that evening in a friendly conversation. Mr Blott also spoke to Ms

Shepherd to seek her view on the allegations of race discrimination. She appeared surprised, given that race had not been raised as an issue or potentially motivating factor as part of the grievance she had considered. The claimant told the tribunal that she had found the issue of the London meal too painful to raise at the earlier grievance stage.

136. Mr Blott provided to the claimant a further outcome letter dated 24 December 2021 outlining his further investigations and enclosing further witness interviews. He confirmed his rejection of the claimant's grievance appeal. He said, that whilst the accusations of racism were rejected, he was conscious that her feeling that her treatment had been in some way racially motivated might remain her lived experience. He was sorry if this was how she felt. He expressed gratitude to her for being brave and open in sharing her experience. He said that the respondent continued to learn from and listen to all colleagues.
137. Mr Marples met with the claimant for a final performance management review on 10 March 2022. The claimant mentioned the London meal, saying that at the time she did not believe the alleged comment to be racist, but had since reassessed this opinion in the light of global events such as Black Lives Matter. The claimant told him that she had been isolated from the team and treated differently from when she joined in January 2019 as part of a conspiracy to make sure she failed. Mr Marples checked with HR that the grievance decision was final at that point. The claimant said that she had attended a number of interviews for alternative roles, but had lost confidence which meant there was nothing in terms of potential redeployment. It is noted that Mr Marples had highlighted to the claimant on 29 October 2021 an opportunity for an outcome testing role. The claimant told the tribunal that her being on a PIP impacted upon her opportunities for future employment. Mr Marples accepted in evidence that this was a legitimate concern of the claimant, as being on a PIP might detract from an application. Mr Marples confirmed to the claimant that he would be terminating her employment on notice.
138. Mr Marples wrote to the claimant on 15 March 2022 confirming that decision and giving her a right of appeal. The claimant emailed him the following day asking how she could appeal. She then submitted an appeal (and substantial supporting documentation) which was heard by Pete Owen on 25 April 2022. Mr Marples was interviewed as part of that process. The claimant was recorded as saying during the appeal meeting that it did not matter whether a risk opinion contained all of the identified risks. She said that racism was involved in her treatment but did not give any specific information.
139. Mr Owen issued an outcome rejecting the claimant's appeal on 12 May 2022.
140. In terms of the respondent's motivation for her treatment, the claimant said that the desire to remove her from the respondent stemmed from Mr Bruce Hodgson's reaction to her challenging his performance rating of her. Her being exited, was an act of revenge. Mr Hodgson had been the relevant head of service and Mr Osmond the senior manager involved. Mr Hodgson was at the same level as Mr Exeter and Mr Osmond at the same level as Mr Marples. Mr Hodgson also had an established relationship with

Mr Rankin, who sat in the director position, above Mr Exeter, Mr Marples and Ms Garbutt. Mr Hodgson had exerted undue influence via Mr Rankin.

141. The second motivation contained an element of discrimination which she had identified from the events at the London dinner in November 2019. Ms Garbutt was the only manager in respect of whom she said that she had evidence of a discriminatory attitude. She however stood by the allegations of discrimination in respect of the management of the PIP, dismissal and the respondent's handling of her grievance and grievance appeal. On questions from the tribunal, the claimant said that Ms Garbutt and Mr Marples had been influenced by her race to manage her out, with there being the coincidental and simultaneous pressure from Mr Rankin to manage her out because of the disputed appraisal rating in 2017 which had upset Mr Hodgson.
142. The tribunal noted during the cross-examination of Ms Shepherd that the claimant did not seem to be pursuing a case that the conduct or outcome of the grievance had been influenced by the claimant's race. Ultimately, the claimant did put it to Ms Shepherd that she did not uphold the grievance because of the claimant's race. Ms Shepherd denied that to be the case and said there had been no bias in her decision-making. The claimant then, however, told the tribunal that she was raising an allegation of race discrimination solely against Ms Garbutt - that was because she had made the alleged comment at the London meal. The issue of her race, she said, had nothing to do with her treatment by Mr Blott, Ms Shepherd, Mr Owen or Mr Marples. In contrast, Ms Garbutt had said what she had at the meal and was instrumental in putting her on the PIP and setting her up to fail. She went further and said that there had never been an allegation against Mr Blott, Ms Shepherd and Mr Owen of discrimination. The allegation was just against Ms Garbutt. When referred by the tribunal to her original grounds of complaint and a reference to discriminatory treatment from line managers in the plural, the claimant said she was referring there to Mr Hodgson.
143. Miss Stroud raised at this point that her understanding of what the claimant was saying was that the complaints of race discrimination at paragraph 2.2.2 of the note of the preliminary hearing in respect of the handling of the grievance and grievance appeal were withdrawn as well as allegation 2.2.1 in respect of any actions on the part of Mr Marples. The claimant intimated that she was withdrawing any allegations of racism regarding the handling of the grievance and grievance appeal, saying that she did not want to allege that either Ms Shepherd or Mr Blott were racist. The tribunal ultimately was not satisfied that there was any unequivocal decision to withdraw and asked the claimant to reflect on what she had said and to inform the tribunal the following day if there was any withdrawal of any of her complaints. The claimant did not subsequently notify the tribunal of any withdrawal and later in the hearing suggested that she had been confused about what she had said at this earlier stage during the evidence of Ms Shepherd.

Applicable law

144. In a claim of ordinary unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to capability pursuant to Section 98(2)(a). This is the reason relied upon by the respondent. The tribunal refers to **Alidair Ltd v Taylor 1978 ICR 445** – it is sufficient that the employer honestly believes on reasonable grounds that the employee is incapable. If the respondent shows a potentially fair reason for dismissal, the tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the Employment Rights Act 1996 (“ERA”), which provides:-

“ [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – depends upon whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case”.

145. Classically, in cases of performance related capability, a tribunal will consider whether an employee was aware of the risk of dismissal and was given a reasonable opportunity to show and improvement and with reasonable support. Were any alternative employment opportunities or changes to the employee’s role reasonably considered? The tribunal has to determine whether the employer’s decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

146. A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. The tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

147. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

148. The tribunal has been referred to the case of **Bevan Harris Ltd v Gair 1981 IRLR 520**, where the EAT held that there is not necessarily an obligation upon every employer who dismisses an employee on the grounds of capability to offer employment in a subsidiary or another position. Every case must depend upon its own circumstances. Where the reason for dismissal is shown to relate to the employee's capability and it is shown that the employee received adequate warnings as to his shortcomings and an adequate opportunity to improve, but failed to do so, there is not the same obligation to attempt to fit him in in a subordinate capacity as there may be, for example, where an employee is dismissed because he is redundant. Even where there is such an obligation in a capability case, it must be influenced to a great extent by the size and administrative resources of the undertaking. The tribunal obviously appreciates the size of the respondent in this case. The tribunal was further referred to the case of **Awojobi v Lewisham LBC EAT/0243/16** where it was not accepted that there was any principle that an employer will be acting unreasonably if he does not give the employee an opportunity of alternative employment in a less demanding role, even if it was the employer who placed the employee in the more demanding role. Again, the test which the tribunal must apply is whether the dismissal fell within the range of options open to a reasonable employer in the circumstances.

149. The claimant complains of direct discrimination based on race. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."* In terms of a relevant comparator for the purpose of Section 13, *"there must be no material difference between the circumstances relating to each case"*.

150. The Act deals with the burden of proof at Section 136(2) as follows:-

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".

151. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

152. It is permissible for the Tribunal to consider the explanations of the respondent at the stage of deciding whether a prima facie case is made out (see **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At the second stage the employer must show on the balance of probabilities that the treatment of the claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

153. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

154. Applying those principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

155. The tribunal has referred in its factual findings to inconsistencies in the claimant's position. The claimant's witness evidence was at times problematical. If an answer did not advance her case, the claimant often prayed in aid a lack of recollection which was not always credible. In some instances, she had a perfect recollection despite a lack of any note taken at the time. Notes were said not to be accurate, but contemporaneously had never been challenged by the claimant. At times, the claimant's interpretation was at odds with the ordinary meaning of words. Some assertions were inherently difficult to accept – for instance, that a subject matter expert had stolen her work. Given her overarching lack of trust in the respondent, the claimant showed a difficulty in viewing past events objectively. She had also shown an element of manipulation in the occasional praise given to individuals.

156. As regards the initiation of the performance improvement plan and its continuance up to the point of her dismissal, the claimant's allegations of race discrimination focus on Ms Garbutt. She initiated the informal performance improvement plan and, the claimant maintains, put pressure on Mr Marples to achieve her aim of removing the claimant from the

business. Whilst the claimant was inconsistent in how she expressed her case, the tribunal has proceeded on the basis that she is also alleging that Mr Marples himself was influenced by considerations of the claimant's race. Nevertheless, the claimant accepts that the only "evidence" she has to suggest a racial motivation is the alleged comment made by Ms Garbutt at the London meal in November 2019.

157. The claimant is not here saying that anything which happened during that meal is the reason for Ms Garbutt's less favourable treatment of her - indeed, by the time of the meal the claimant had already been progressed through the informal performance improvement plan initiated by Ms Garbutt and was now subject to the formal stage of the plan managed by Mr Marples. Instead, she maintains that Ms Garbutt's alleged comment illuminates the reason why the respondent performance managed her in the first place.

158. The tribunal does not, however, make any finding that Ms Garbutt said "for your kind" when another colleague at the meal said that the claimant looked pretty.

159. The respondent points to the claimant raising that she was wearing traditional dress only at the preliminary hearing, not having mentioned this when she pursued her complaint about Ms Garbutt's alleged comment internally or indeed in her witness statement evidence before this tribunal. The tribunal accepts that the claimant was wearing traditional dress - the claimant described exactly what she was wearing during the course of the hearing. She did not ordinarily wear traditional dress at work and a number of those attending the meal would only occasionally have seen the claimant in person, given that they worked at multiple sites throughout the country with most of their interactions being by telephone call or video in circumstances where the claimant had a preference not to switch her camera on.

160. The claimant wearing traditional dress at the meal makes it more likely that someone in attendance would have passed comment on how she looked and the tribunal can conclude that one of her colleagues said that she looked pretty, as the claimant maintains.

161. The alleged comment then made by Ms Garbutt was, if made, overtly discriminatory and offensive. Ms Garbutt has at all times been adamant in her denial that this was ever said. Given her senior position, the presence of more senior managers, the respondent seeking, as a matter of policy, to address issues of inclusivity and diversity and Ms Garbutt's lead role in that area, it would have been incredibly stupid/career threatening for Ms Garbutt to have made the comment, which was

allegedly made at the start (rather than the end after the potential for a greater consumption of alcohol) of a social evening event. The tribunal ultimately accepts Ms Garbutt's evidence.

162. The tribunal is assisted by the interviews carried out by Mr Blott where it was clear that no such comment had been heard by others in attendance and, had it been heard, it would have been extremely memorable and shocking to all those in attendance. The claimant's evidence is that the comment was heard by those in attendance as they all looked down at the table (avoiding eye contact) when it was said. On her account, in denying it was said, they are lying. The tribunal cannot accept that to be the case, not least in circumstances where those lying are said to include Mr Rankin and Mr Exeter, who would have had no fear in tackling Ms Garbutt had the comment been heard. A disparity in evidence as to the reason why the claimant was a little late in attending the meal attributed to Ms Jenkins does not undermine her reaction of, the tribunal finds, genuine shock at learning of the allegation the claimant was making.

163. The tribunal also notes that at the final review meeting with Mr Marples on 10 March 2022, the claimant said that she did not believe the comment to have been racist at the time and she had only since found the courage to raise the issue. If the comment was made, it was clearly racist and offensive. The claimant would have been significantly and instantly upset by it.

164. The tribunal can understand an employee's reluctance to make allegations of discriminatory treatment, but it is nevertheless noteworthy that the claimant made no reference to the alleged comment during the internal grievance or in her appeal letter against the grievance outcome. The accusation is not clearly made until the grievance appeal hearing on 5 May 2021, around 18 months after the social event in issue. It does not appear that the claimant told anyone about the comment, including her union representative, until this point. The claimant is not an individual reluctant to challenge those in authority. This does undermine the claimant's evidence.

165. The tribunal can only conclude that the claimant has reconstructed conversations during the November 2019 meal sometime after the event which are unfortunately wholly inaccurate.

166. Otherwise, in terms of less favourable treatment, the claimant suggests that she was singled out for adverse treatment regarding her performance in contrast to her white colleagues, Mr Walsham and Ms Jenkins, who commenced a role identical to the claimant at the same time

as her. The tribunal, however, has no evidence that either of those two colleagues struggled to get to grips with CRM tasks so as to hinder their progression and ability to take on other types of work such as the writing of risk opinions. The contemporaneous evidence is of the respondent considering that they were more effective performers than the claimant and had got up to speed, with what was a new area of work for them, more quickly than the claimant. There is substantial evidence that the claimant struggled. Once the claimant was on a performance improvement plan, she was, for that very reason, managed in a different manner to anyone who was not considered to be struggling and requiring additional training and support at work and in order to be able to progress to tasks where a solid grounding in the basics of CRM was required. Mr Walsham and Ms Jenkins are not true comparators.

167. Whilst it is obviously quite possible for there to be dual motivations for any adverse treatment of the claimant, the claimant's case appears to be that she was placed under Ms Garbutt's management quite deliberately as part of a wide-ranging conspiracy driven by Mr Rankin to exact revenge for her questioning her 2017 appraisal rating given to her by a previous manager, Mr Hodgson.

168. The tribunal considers that perhaps the more obvious area where there might have been scope to draw an adverse inference, lay in the respondent's assessment of the claimant's performance in her role as being so poor. This is in the context of the claimant having worked for the respondent for almost 30 years at the time and having progressed to the relatively senior level of a band E manager. It is indeed surprising that someone with the claimant's experience genuinely struggled to the degree put forward by the respondent.

169. It would be speculative for the tribunal to conclude that the claimant had suffered a significant loss of confidence as a result of issues affecting her mental health, but, as a matter of fact, the claimant had been absent from work due to sickness for a protracted period prior to her commencing her new role in CCOR.

170. Fundamentally, the tribunal has heard substantial and wholly convincing evidence from the respondent's witnesses that the claimant was not able to grasp what her role required and demonstrate an ability to work to the standard required for someone in her position. The claimant in fact almost identified herself as incapable of performing the role in the early self-assessment she made of her own skills.

171. The tribunal accepts that there were a number of elements to the claimant's role and, in particular, the distinct tasks of CRM and the drafting of risk opinions. It accepts nevertheless that coming up with substantive opinions required an underlying knowledge of CRM. As the claimant acknowledged, effective risk opinions involved a requirement for analysis, insight, practical recommendations and clear communication. These were fundamentally the areas where the claimant fell short together with issues of time management and communication with stakeholders.
172. Such shortcomings are evidenced from early on in the claimant's employment in her CCOR role and from a variety of sources. Such matters were raised in feedback on 15 February 2019 where it was noted that the claimant had not made any proposals, from Ms Garbutt's Q1 check-in on 2 April 2019 and from the early feedback of Ms Higgins who was primarily responsible for the early training of the claimant.
173. The tribunal's factual findings include many instances where the claimant was confused about what was required of her and was asking herself why she was struggling and failing to grasp fundamental concepts. The tribunal has recited extensive feedback given to the claimant on her performance, including by Ms Garbutt, Mr Marples and Ms Higgins. They highlighted many areas where her work could be improved with pointers given to the claimant as to how she approached tasks and where she could go to see examples of what was regarded as an acceptable level of output.
174. During the management of her performance, the claimant did not suggest that the respondent was wrong in its assessment of her other than in quite general terms where she at times comments on the criticism being harsh or over-the-top and unfair when compared to the treatment of her colleagues.
175. There is some evidence of the claimant seeking to blame others and the lack of robust IT systems for her performance failings, but in circumstances where they provided no explanation at all for the more fundamental failings identified by the respondent.
176. The tribunal can only conclude that the initiation of the performance improvement plan and its progress through to the claimant's ultimate dismissal was because of the respondent's genuine concerns about the claimant's performance. Whilst there are no facts from which the tribunal could reasonably conclude the process up to and including the claimant's dismissal to have been because of her race, the tribunal is able to make a positive conclusion that the performance management process and the

claimant's dismissal was because of the respondent's view of her performance untainted by any consideration of her race.

177. The claimant's complaint of less favourable treatment in being given access to training has not been articulated by her. The tribunal is unclear where there has been a failure to provide access to training. As is clear from the tribunal's factual summary, there are very many examples of where the claimant was given training, coaching and support. She has specifically complained about not being allowed to shadow someone other than Ms Higgins until 26 July 2019, but the tribunal's findings are that this had not been an ongoing request since sometime in April, but had only been raised much more recently and indeed was relatively swiftly arranged for the claimant. Again, the claimant has shown no facts from which the tribunal could reasonably conclude that any provision or lack of provision of training to her had been influenced by considerations of her race. The tribunal accepted Ms Garbutt and Mr Marples' evidence that they spent more time in providing training to the claimant than they did to anyone else and that the amount of time taken up by them in her training was indeed exceptional.

178. As regards the grievance and grievance appeal processes and outcomes, the tribunal is required to consider what was in the minds of Ms Shepherd and Mr Blott. The claimant has not sought to advance any positive argument or factual basis from which an inference of discrimination might reasonably be drawn. The claimant's grievance and grievance appeal were thoroughly investigated with detailed outcomes produced and a willingness at the grievance appeal stage to reopen and re-investigate. There was additional oversight at CEO level. The tribunal considers there to have been a reasoned and reasonable basis for the conclusions reached by both Ms Shepherd and Mr Blott. Certainly, no facts have been shown from which the tribunal could reasonably conclude any of the steps they took or conclusions they reached to have been influenced to any extent whatsoever by the claimant's race. Nor is there any evidence that they were influenced by Ms Garbutt or any wider attempt to manipulate the situation to effect the claimant's removal from the respondent.

179. The claimant's complaints of direct race discrimination must all fail and are dismissed.

180. Turning to the claimant's complaint of unfair dismissal, the tribunal has concluded above that the claimant was dismissed for reasons relating to her capabilities. There is no evidence of a conspiracy to ensure her removal from the respondent because of her challenge to an appraisal rating in 2017. The claimant was not placed under the management of Ms Garbutt to engineer her dismissal. An engineered dismissal would not

likely have taken so long to effect or provided to the claimant so many opportunities to remain within the respondent.

181. Again, there are consistent themes in the respondent's view of the claimant's performance particularly as regards her inability to provide insight and practical recommendations. The respondent genuinely considered that the claimant was not producing work of a level to be expected of a band E manager.

182. There were reasonable grounds for the respondent to come to a conclusion that the claimant was unable to perform to the standard required of her. The claimant herself at her early self-assessment did not believe she had the knowledge, skills and experience to do the role to an extent which was hard to comprehend given her experience previously within the business - she considered herself that she required improvement in 23 out of 28 competencies. Ms Higgins assessed the claimant's analysis on data validation work on 30 January 2019 as too low level. Mr Exeter on 15 February commented that the claimant's work did not contain proposals and the risk opinion was not a suitable level. Ms Higgins was again urging the claimant on 5 April 2019 to show insight. At a check-in on 9 April 2019, Ms Garbutt had identified the need for the claimant to come up with proposals and show insight. On 11 June Mr Exeter was again highlighting the need to make opinions more high-level. A one-to-one meeting with Ms Garbutt was focused on helping the claimant show insight and judgement, which were described as the key skills. On 25 June the claimant was saying that she did not think that she had the skills for the role, including analysing data and giving opinions. On 2 June 2019 Ms Garbutt was noting that insight was missing from the claimant's work. Such omissions continued to be highlighted to the claimant on 8 and 15 July. On 23 July the claimant's CRM work was still regarded as lacking insightful risk opinions and recommendations. In the QC intervention, the claimant was noted to be raising questions rather than giving opinions. A stated development area in the review of the informal PIP was the claimant's level of analysis. Mr Marples highlighted repeatedly these issues during the formal PIP during which the claimant was made absolutely clear as to what was expected of someone at her level in terms of added value and expert insight.

183. The respondent fully appreciated that, whilst the claimant had significant relevant experience, training would be required for the claimant to get up to speed with a new type of work. In the period from January to early July 2019, the claimant was given extensive training and advice from Ms Garbutt, Ms Higgins and others. The tribunal has noted the involvement of Ms Mensah, Ms Struthers and a colleague called Fatima. Ms Garbutt and Ms Higgins certainly met with the claimant regularly and discussed goals and pointers to help her improve. These were of a balanced nature with praise given where appropriate. Only on 26 June 2019 was it determined that it was necessary to agree an informal performance

improvement plan. The reason for that step was evidenced in Ms Garbutt's timeline prepared for the first formal review on 26 September 2019 which showed the regular and extensive nature of support provided to the claimant. In excess of 30 examples of training and coaching sessions were detailed. Indeed, an exceptional amount of management time was taken up in seeking to support the claimant. Ms Higgins was frustrated at the lack of progress but reasonably so in the circumstances and where the claimant's experience with the respondent and the type of work she had already done ought to have given her somewhat of a head start when compared to someone unfamiliar with the respondent's processes. Ms Higgins was the subject expert in CRM and had coached all of the claimant's colleagues who were new to the role and who had progressed satisfactorily.

184. Contemporaneously, the claimant was praising the level of support she received as well as the attitude of her managers. She was not criticising Ms Higgins' training of her. Her desire to shadow another person was raised only in July 2019 and actioned quite quickly. The claimant was inconsistent in her evidence but did at one point say that it was only on 2 April that she realised for herself that the training had not been sufficient to allow her to understand what was required. Her attribution of blame to the type of training appears, however, to be a view reached in hindsight. 25 June was perhaps the first time the claimant said that the training was insufficient, but in the sense that it had not helped her to the degree expected and where she was keen to stay and move on to writing opinions. The claimant has never clearly articulated what was wrong with the training she received. In cross-examination she seemed to concentrate on Ms Higgins asking her to complete a task which they would then talk through, rather than Ms Higgins walking her through a task. Again, the difference any alternative method of training would have made to the claimant's performance is unclear in circumstances where there is significant evidence of the respondent's managers, including Ms Higgins, working very closely with her through each individual element of her job.

185. The claimant predominantly throughout the whole of the performance management process said that she was getting all the support she needed and that she could not think of anything else which could be provided. The claimant was continually asked by Ms Garbutt if there was any training in particular which was required. The claimant was instructed to say if she was unclear on any issue or required more training. There is in fact no evidence of the claimant expressing clear dissatisfaction with her training until September 2019 when she was notified that there would be consideration of placing her on the formal PIP.

186. The claimant was at all stages aware of the possible outcomes of an informal and then a formal PIP. Once on the formal PIP, the respondent advised the claimant that, if she was unable to demonstrate the necessary

improvement, her employment might be terminated on the grounds of capability. This was reaffirmed at the end of the formal PIP period when the final decision to terminate employment was held in abeyance pending the claimant's grievance and in the light of the coronavirus pandemic.

187. The claimant maintains that the one-month duration of the informal PIP was unreasonably short. However, the period of one month was within the range recommended in the respondent's performance management policy. Further, it was not unreasonable against a background of significant training and support provided over the preceding 6 months. The respondent reasonably concluded that all available training had been exhausted and even repeated at least once over. This was in the context of the claimant having extensive experience with the respondent. Ms Garbutt reasonably concluded that the claimant needed now to show that she could deliver on the training provided. The respondent's procedures provided that any formal PIP would typically last for up to 6 months. The period of five months put in place by the respondent was again, in all the circumstances, reasonable. The claimant had significant support from Mr Marples and multiple opportunities to demonstrate an improvement.

188. The tribunal has already referred to Ms Jenkins and Mr Walsham as potential comparators in the complaint of discrimination. The evidence suggests that the claimant ought to have been more familiar with what was required in her new job than either of them. Whilst both of them were allowed to start opinion writing work in early 2019, the tribunal has accepted Ms Garbutt's evidence that the building blocks of CRM needed to be understood before moving on to more complex work writing risk opinions. There is evidence of Mr Walsham and Ms Jenkins completing risk opinions together with a more senior manager, before working more independently. CRM work did involve reviews as part of a constant cycle of risk management and ought to have been easier for the claimant to become proficient in than opinion writing. The evidence is that the claimant was struggling with this stage and could not be confidently progressed to work on risk opinions. That was in contrast to Mr Walsham and Ms Jenkins who had grasped CRM more quickly than the claimant. The claimant herself an early stage had highlighted significant perceived deficiencies in her own skills which inevitably required to be significantly built up. The tribunal does not consider that the claimant was deliberately underselling herself on the advice of her previous manager Mr Hodgson – a person whose advice the claimant would be suspicious of given the accusations levelled against him elsewhere. Working on opinions earlier would not have been likely, on the facts, to have allowed the claimant to show an improvement in her performance. Indeed, the opposite was more likely.

189. The claimant maintains that she was hampered by IT issues, but these appear to have been raised by the claimant as somewhat of a smokescreen in circumstances where she clearly did not proactively

escalate the IT issues to obtain a resolution. In any event, they did not explain the deficiencies observed by the claimant's managers in terms of inadequate report writing and lack of insight.

190. The claimant was not subjected to an unreasonable level of scrutiny. She was given feedback regularly and in a reasonable manner on her work. The claimant identified for herself early on that she needed upskilling in a significant number of areas and effectively invited the respondent to provide her with additional support. Inevitably, when subject to a PIP, the claimant felt under more scrutiny, but this was not unreasonable in all of the circumstances. The claimant points to weekly reviews with Mr Marples turning into daily reviews. These were, however, in circumstances where she acknowledged the positive input he was providing at the time and where it is clear that he was trying to help her succeed. It is fair to say in this case that the respondent applied all of the management tools it believed reasonably to be at its disposal in managing the claimant to effect an improvement in her performance.

191. The respondent further acted reasonably in delaying the claimant's dismissal to give her an opportunity to look for alternative employment within the business and further delaying in circumstances where this was problematical because of the coronavirus pandemic. Indeed, the respondent showed unusual patience and forbearance in the time given to the claimant before dismissal was actioned. Effectively, the claimant had a two-year period (on pay) to seek other roles through the respondent's internally advertised roles to which the claimant had continual access. After the formal PIP had concluded, Mr Marples had ensured that the claimant could concentrate on retaining her employment in an alternative role. He pointed the claimant in the right direction in terms of her job search and also referred possible roles to her himself. It was open to the claimant to have looked for roles at a level lower than currently enjoyed by her and which might have provided a realistic opportunity for the claimant to remain with the respondent in circumstances where her PIP would have been of less obvious direct relevance. The context was of a senior employee with years of experience at her employer. The claimant has not, in the questions put to the respondent's witnesses, sought to expose any failings in the opportunities given to her to remain within the respondent. Nor has she suggested to the tribunal what other steps might reasonably have been taken.

192. The claimant's dismissal was within the band of reasonable responses in all the circumstances and after a fair process had been followed. The claimant was not unfairly dismissed, and her claim of unfair dismissal must therefore fail.

Employment Judge Maidment

Date 7 January 2025