EMPLOYMENT TRIBUNALS

Claimant: **Ms M Patel**

Respondent: **Vita Health Group Limited**

Heard at: Midlands East Tribunal

On: 14, 15 and 16 October 2026

Before: Employment Judge Brewer

Representation
Claimant: Mr D Fletcher, Trade Union representative
Respondent: Mr M Rudd, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim for unfair dismissal fails and is dismissed.

REASONS

Introduction

1. This case came before me for a final hearing over 3 days. The claimant was represented by Mr Fletcher and the respondent by Mr Rudd.

2. I had a bundle of documents running to 452 pages and I was helpfully provided with a chronology, cast list and list of abbreviations. Mr Fletcher also provided written representations and updated those which formed his submissions. Mr Rudd made oral submissions.

3. I had witness statements, and heard evidence from the claimant, and, on behalf of the respondent, from Mr Irving and Ms Wood. Mr Irving was the dismissing manager and Ms Wood was the HR business partner who advised at the appeal.

4. The evidence concluded just before lunch on the second day of the hearing. I dealt with submissions in the afternoon of day two, and I gave an oral judgement in the afternoon on the third day. Having had time to prepare full written reasons, I set those out below, which I hope the parties find useful.

Issues

5. The claim is for unfair dismissal and the issues are,

   5.1. what was the reason for dismissal and was it a potentially fair reason within the meaning of s.92 Employment Rights Act 1996,

   5.2. was dismissal within the band of reasonable responses,

   5.3. was the procedure followed by the respondent within the band of reasonable responses.

6. I remind myself at this stage that it is not for me to step into the shoes of the employer and decide what I would have done, the question is whether what the respondent did was, in all the circumstances, reasonable.

Law

7. The respondent says that the reason for dismissal was capability, and I set out here in brief the relevant legal principles.

Employment Rights Act 1996

8. Section 98(1)(b) and (2) of the Employment Rights Act 1996 (ERA) sets out the potentially fair reasons for dismissing an employee. One such reason is where the dismissal 'relates to the capability or qualifications of the employee for performing work of the kind which he was employed… to do' — S.98(2)(a).

Definition of capability

9. Capability is defined in S.98(3)(a) ERA as 'capability assessed by reference to skill, aptitude, health or any other physical or mental quality'. Examples of employees who have been held to be lacking in capability include,

   9.1. an inflexible and unadaptable worker — **Abernethy v Mott, Hay and Anderson** 1974 ICR 323, CA,

   9.2. an employee who failed to reach the employer's standards, even if those standards were higher than those of similar employers — **Fletcher v St Leonard's School** EAT 25/87,

   9.3. an employee who, although efficient, was difficult and abrasive and so affected the quality of the staff's work generally — **Bristow v Inner London Education Authority** EAT 602/79.

Procedure - general

10. If the employer chooses to go down the capability route, part of a fair dismissal procedure will entail providing an opportunity to improve. In the absence of specific timescales set out in a formal capability procedure, the quality and length of the employee's past service, as well as the extent of the underperformance, may be relevant factors in assessing the overall fairness of any subsequent decision to dismiss (see for example **Siburn v Modern Telephones Ltd** 1976 IRLR 81, ET).

Reason for dismissal – The Alidair test

11. Where an employer seeks to rely on incapability as the ground for dismissal, the onus is on it to show that this was the actual reason or principal reason for dismissal. But this should not be mistaken as meaning that an employer must objectively establish that a dismissed employee lacked capability. As Lord Denning MR put it in **Alidair Ltd v Taylor** 1978 ICR 445, CA,

> *'Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.'*

12. This was put another way by Lord Justice Geoffrey Lane in the same case; the Court of Appeal's test of a fair capability dismissal (aside from procedure) has two elements,

    12.1. does the employer honestly believe this employee is incompetent or unsuitable for the job,

    12.2. are the grounds for that belief reasonable?

13. What the tribunal has to decide is whether there was material in front of the employer that satisfied the employer of the employee's inadequacy or unsuitability and on which it was reasonable to dismiss. In **Smith v Glasgow City District Council** 1987 ICR 796, HL, the House of Lords confirmed that, if the employer fails to show a clear reason or principal reason for dismissal — in that particular case, the reasons relied on were a combination of alleged misconduct and capability — it will not be able to demonstrate reasonable reliance on the reason asserted and the dismissal will accordingly be unfair.

Standards of performance

14. Standards of performance are not static and the appropriate performance standard must be judged according to the employee's current contractual requirements and role.

15. Some requirements of the job are, however, so obvious that the employee's attention does not need to be drawn to them. For example, as observed by His Honour Judge Pugsley in **Burns v Turboflex Ltd** EAT 377/96:

> *'[A] van driver… does not need to be warned that he should not drink before he drives; the personnel director of a large company does not need to be told that he should not make racist or sexist comments about or to members of his staff; a pilot does not need to be warned that he should not crash the plane.'*

16. But aside from the most obvious requirements of the job, it is important for the employer to have drawn the employee's attention to the required standard, usually at the outset of employment and then, should it become necessary, for the purposes of a capability procedure. If performance targets apply, for example, an employment tribunal will need to be satisfied that the employee could reasonably be expected to have known about them. The employer will be expected to be able to show that the targets had been brought to the employee's attention and that he or she was made aware of the possible consequences of not meeting them

17. The test set down in **Alidair Ltd v Taylor** (above) (i.e. does the employer honestly believe the employee is incompetent or unsuitable for the job and are the grounds for that belief reasonable?) means that an employer has to produce evidence of poor performance and show that this was its real reason for dismissing the employee.

Reasonableness of dismissal

18. Once the reason for dismissal has been established, the question of whether the dismissal was fair or unfair in the particular circumstances of the case will be judged according to the 'reasonableness' test set out in S.98(4) of the Employment Rights Act 1996 (ERA). This stipulates that, having regard to the reason shown by the employer, the determination of the question whether the dismissal is fair or unfair depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

19. This means that, in general, an employer should be slow to dismiss an employee for incapability *'without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance',* see **James v Waltham Holy Cross UDC** 1973 ICR 398, NIRC. This can be broken down into the following basic steps:

    19.1. proper investigation/appraisal of the employee's performance and identification of the problem

    19.2. warning of the consequences of failing to improve

    19.3. reasonable chance to improve.

20. In **Burns v Turboflex Ltd** EAT 377/96 the EAT emphasised that employers should allow employees to answer allegations of poor performance.

21. The aim of the capability hearing (or meeting) will be to achieve the following:

    21.1. enable both employer and employee to explain their cases fully

21.2. give the employee ample opportunity during the interview to respond and give his or her explanation regarding the employer's performance concerns

21.3. explore and, if possible, identify the cause of the underperformance

21.4. determine what, if any, remedial action can be taken

21.5. obtain the employee's commitment to reaching the required standard

21.6. set a reasonable period for the employee to reach that standard

21.7. agree on a monitoring system during that period, and

21.8. inform the employee what will happen if that standard is not met.

22. In **Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL, Lord Bridge observed that in the great majority of cases employers will not be considered to have acted reasonably in dismissing for incapability unless they have given the employee fair warning and a chance to improve.

23. Warnings are especially important in this context where it is in the employee's power to improve his or her performance. They have the purpose of affording incompetent employees the opportunity to improve their performance and management a chance to pinpoint the reason for poor performance, be it insufficient training, weak support from colleagues, personality problems, lack of effort or a genuine inability to perform the job competently.

24. Employers should make it clear to employees that they are warning them and the consequences of a failure to improve performance should be set out in clear terms — for instance, that it 'may result in dismissal or some other contractual penalty such as demotion or loss of seniority'

25. What is considered to be a reasonable improvement period will differ greatly from case to case and will depend on the circumstances of each case.

26. The employer should monitor the employee's progress during the improvement period.

27. Denying an employee a right of appeal against a decision to dismiss on the ground of capability or lack of qualifications is likely to lead to the conclusion that the dismissal is unfair, particularly if the right of appeal was contractual — see **West Midlands Co-operative Society Ltd v Tipton** 1986 ICR 192, HL.

Findings of fact

28. I make the following findings of fact (references are to pages in the bundle).

29. The claimant commenced employment as a trainee Psychological Wellbeing Practitioner (PWP) with Nottinghamshire Healthcare NHS Foundation Trust on 27

April 2015. The basic role of a PWP is to assess and treat adults with mild to moderate common mental health problems, such as anxiety disorders and depression. The work is done through telephone triage assessments and one to one sessions via telephone, video or face to face.

30. The claimant transferred to the respondent under TUPE on 1 April 2021.

31. The respondent is a private UK healthcare provider, providing integrated physical and mental health services to employers, insurers, the NHS and private patients. The Respondent employs approximately 1,400 therapists and healthcare workers.

32. Until January 2025, the claimant was managed by Jessica Parkins, Senior PWP, but after she left the respondent's employment Stephen Irving became the claimant's line manager.

33. Mr Irving joined the respondent in October 2022. He is employed as an Operational Team Manager and, in that role, line manages a team of up to 18 clinicians. This role includes performance management, supporting professional development, and upholding clinical best practice. He is responsible for meeting objectives set by local commissioners. This includes discharges (completed treatments) and ensuring staff have sufficient clinical hours available each week, while also supporting staff in their wellbeing and professional development. Prior to becoming the Operational Team Leader, Mr Irving was employed as a Psychological Wellbeing Practitioner from October 2015.

34. The respondent operates a detailed Performance Improvement Policy [78 *et seq*].

35. The formal procedure set out in the policy consists of 4 stages,

    35.1. stage 1 applies where performance issues first arise, in which case they will generally be dealt with informally between the employee and their line manager as part of day-to-day management,

    35.2. stage 2 applies where problems persist following a period set for improvement. An employee may be given a first written warning at this stage,

    35.3. stage 3 applies if performance has not improved (either at all or sufficiently). At this stage an employee may be given a final written warning,

    35.4. stage 4 applies if performance has not improved (either at all or sufficiently). At this stage an employee may be dismissed, or the respondent may extend a final written warning and setting a further review period (although this applies only in exceptional cases where the respondent considers that a substantial improvement is likely within the extended review period).

36. Employees have the right to appeal against any 'formal decision' made by the respondent under this procedure. This must therefore include the right to appeal a first and final written warning and, of course a dismissal.

37. In her role, the claimant was clinically supervised by Parisa Toutounchi, Clinical Management Supervisor.

38. On 15 May 2024 Jessica Parkins invited the claimant to attend a Stage 1 formal performance meeting scheduled for 22 May 2024 [98/99]. The reason for the meeting was set out in detail as follows,

> *"You previously had an informal performance improvement plan put in place on 02/11/2023. Within this plan you were informed that if the same issues with your performance were to arise in the future, then we would progress to the formal stage. The reason for this is because over the last 2 years you have been placed on a formal performance review once and informal performance review (as stated above) once and similar issues have continued to reoccur. You will have every opportunity to state your case at the meeting and this is an opportunity for you to raise any additional support you may need.*
>
> *The areas where improvement's required are:*
>
> *• Interpersonal skills (e.g., a reduction in complaints made my clients, or clients requesting a new therapist due to interpersonal skills, such as feeling rushed or not listened to).*
>
> *• For processes and procedures to be correctly followed consistently (e.g., for therapy notes to be properly completed, for cases to be regularly discussed within supervision, for cases to be properly managed within policies set out in the PWP Manual).*
>
> *• To begin working within or be working towards working within a face-to-face clinic as per your hybrid contract.*
>
> *• Improvement in diary management (e.g., for the correct number of clinical hours to be made available without prompting, to be open to making changes to the management of your diary)…"*

39. The Stage 1 performance meeting took place as scheduled on 22 May 2024, and a Performance Improvement Plan (PIP) was agreed. Five areas for improvement were set out which were,

    39.1. interpersonal skills,

    39.2. to follow correct procedures at all times,

    39.3. to be open and to actively participate in working towards having face to face clinics,

    39.4. improvement in diary management, and

    39.5. to catch up with Long Term Conditions Top-up training.

40. The Stage 1 outcome letter listed a Stage 2 meeting for 19 June 2024, giving the claimant a month to show improvement.

41. The outcome letter also noted that to support the claimant the respondent reduced the claimant's clinical work by two hours per week and the claimant confirmed that this would be helpful [104]. There would also continue to be weekly meetings between the claimant and Ms Parkins.

42. Finally, the outcome letter stated as follows,

> *"Please be aware that if the required level of improvement is not reached by the Formal Stage 2 Hearing, the outcome of the hearing could be that you are issued a First Written Warning and a further review period set."*

43. Following the monitoring period set out in the First Stage outcome, on 12 June 2024 the respondent invited the claimant to a Stage 2 meeting scheduled for 19 June 2024 [106/107]. The letter confirmed that,

> *"The purpose of this meeting is to review the formal performance improvement plan that was put in place on 22nd May 2024. You will have every opportunity to state your case at the meeting and this is an opportunity for you to raise any additional support you may need."*

44. The letter also confirmed that a possible outcome of the meeting could be a First Written Warning, details of which were in the Performance Improvement Policy, a copy of which was sent with the letter.

45. The Stage 2 meeting was held as planned on 19 June 2024, the Stage 2 Performance Improvement Plan was updated, and a Stage 3 Performance Improvement Plan document was issued with targets running to 20 September 2024 [111/112]. The clamant was issued with a First Written Warning. The reasons for the warning were set out in the letter as follows,

> *"- Interpersonal Skills – you did not pass the enhanced assessment audit carried out as part of your PIP, and the reasons for this related to interpersonal skills (interjecting patients while they were talking, audible sighing, reading notes in the third person and asking leading questions during the risk assessment).*
>
> *- Following correct policies and procedures – two caseload checks during the 4-week period demonstrated that caseload management requires ongoing work, caseload checks highlighted several patients who have been on your caseload for long periods of time.*
>
> *- To catch up on your Long-Term Conditions top-up training – you completed 1 module out of 4 within the 4-week period and therefore have another 3 modules in need of completion.*

> *- Professional boundaries – it has been highlighted that an area where improvement is required relates to the way in which you communicate with colleagues, this objective has therefore been added to your PIP."*

46. The claimant's diary management had improved sufficiently, and that was removed from the list of required improvements, and the requirement to be open to and actively participate in working towards a face-to-face clinic was 'paused' due to service needs [115].

47. On 24 July 2024 the respondent invited the claimant to a Stage 3 meeting scheduled for 7 August 2024 [120/121]. The purpose of the meeting was,

> *"to review the formal performance improvement plan that was put in place originally put in place on 22nd May and was updated after your Stage 2 hearing on 19th June 2024. You will have every opportunity to state your case at the meeting and this is an opportunity for you to raise any additional support you may need."*

48. The claimant was reminded that the Employee Assistance Programme was available for independent advice and support.

49. The claimant went on sick leave in August 2024, returning on 26 November 2024. The respondent agreed a phased return to work, details of which were sent to the claimant on 20 November 2024 [134]. The phasing was,

> *"Week 1 – Tuesday and Thursday 9am – 2pm – Hayley Armstrong will schedule a time to meet with you on Tuesday as Jessica will be on a day off.*
>
> *Week 2 - Tuesday, Wednesday and Thursday 9am – 2pm*
>
> *Week 3 onwards – working days/hours to be arranged with line manager. From week 3 onwards we would like to see some clinical work introduced to your week and this to gradually increase during the remainder of your phased return and for you to be close to full capacity towards the end of the phased return"*

50. In the meantime, the claimant had appealed the First Written Warning she had received at the Stage 2 meeting as she objected to the inclusion of the concern about 'professional boundaries'.

51. The clamant had another short period of sick leave for the week commencing on 9 December 2024, as a result of which her phased return to work plan was adjusted.

52. In January 2025 the claimant was offered clinical session shadowing following her long-term sickness absence.

53. On 13. February 2025 Stephen Irving commenced his role as Operational Team Manager.

54. The claimant's appeal in respect of the Stage 2 outcome was successful. This meant that Stage 2 had to be revisited with the "professional boundaries" issue removed. Given that the concerns about the claimant's performance remained, on 26 February 2025 she was invited to a revised Stage 2 meeting [143/144]. The purpose of the meeting was,

> *"to review the formal performance improvement plan that was initially implemented on May 22 2024."*

55. On 4 March 2025 a treatment audit of the claimant's practise was conducted.

56. On 5 March 2025 an assessment audit and a webinar audit were conducted. The claimant passed the webinar audit but failed the others.

57. The Stage 2 (revisited) review meeting took place as scheduled on 5 March 2025, and on 10 March 2025 a Stage 2 (revisited) outcome letter was issued [149 – 151].

58. The outcome letter set out the background to date and confirmed that the following objectives had been met,

> *"Completion of Long-Term Conditions E-learning. You completed this in January 2025.*
>
> *Ensuring effective diary management including advertising full clinical hours (20 hours a week) by end of week prior. Since returning from your sickness absence you have shown consistency with regard this."*

59. However, the following concern remained,

> *"To evidence appropriate interpersonal skills with patients including evidence of empathy, active listening, maintaining a warm and compassionate tone, adopting a non-judgmental approach, and providing encouragement and positive reinforcement."*

60. The conclusion of the meeting was that,

> *"Your set targets will continue to be monitored for a further period of 4-6 weeks and at the end of the monitoring and review period your progress against the performance improvement plan will be reviewed. The next meeting (Stage 3 hearing) will be held on Wednesday 16th April 2025 at 12pm Via Teams."*

61. On 10 April 2025 a treatment audit was conducted and on 11 April 2025 an assessment audit was conducted. Both were failed.

62. A Stage 3 review meeting was conducted on 16 April 2025 as planned, and a Final Written Warning was issued. Mr Irving set out in detail his reasons for issuing the warning as follows,

"As you know, having carefully considered your performance I feel that there has not been improvement in some aspects of the plan. As outlined in the meeting, you have not demonstrated enough improvement in the following areas:

To consistently demonstrate adequate interpersonal skills, including warmth and empathy, in both treatment and assessment sessions. A total of three audits have been completed (2 treatment and 1 assessment) and all three of these have failed. On two, the original treatment audit and assessment audit, a lack of warmth and empathy was identified. However, in the second treatment audit it was noted that you showed an improvement in more consistently offering warmth and empathy. Additionally, the session was better structured and likely benefited from changes I know you have made to your own notes template.

As mentioned, although you did demonstrate warmth and empathy in the second treatment audit this was not seen as consistently in the assessment audit. Additionally, in the second treatment audit you did not follow supervision advice and continued with using exposure with a client presenting with possible health anxiety symptoms and IBS symptoms. It was discussed with you previously in treatment, by Parisa (your CMS supervisor) that any exposure work needs to be done at Step 3 per NICE and service guidance. In the assessment audit it was identified that while a risk assessment did take place a full written safety plan was not completed despite the patient having a history of risk to themselves. It is service policy that any patient presenting with historic risk needs a full written safety plan which they can agree to. It was decided that both of these issues can potentially put patients at risk."

63. In terms of support, ongoing support in the form of supervision, the phased return to work, regular meetings and shadowing had been in place for some time and after each failed audit extensive feedback was provided which included specific advice on how the claimant could improve. In fact, when the claimant was asked at the Stage 3 meeting whether she needed any further support or adjustments to meet the targets she said "*don't need anything*" [156].

64. At the weekly meeting between the claimant and Mr Irving on 14 May 2025, after Mr Irving asked the claimant if she required any further support, the claimant initially said that no further support was required. However Mr Irving suggested a have a three-way meeting with the claimant's supervisor, Parisa Toutounchi. The intended purpose of this meeting was to clarify audit feedback, any changes in process, and to give support and guidance in offering empathy and improving interpersonal skills. The claimant agreed to attend this, and a meeting was arranged.

65. That meeting took place, and the claimant was offered some role play sessions on 20 May 2025, giving her an opportunity to practice offering empathic statements and the interpersonal skills assessed as lacking in previous audits.

66. Following the role play Ms Toutounchi provided a resource sheet around empathic statements which was emailed to the claimant on 30 May 2025.

67. As part of the context to what was happening in the service at this time, the time taken for assessments, which had been scheduled for one hour each, was planned to be reduced with effect from 19 May 2025. It was noted that within the hour-long assessments only 30 to 45 minutes included clinical work with the remaining time being taken up with admin. It was decided therefore to reduce the assessment time to 45 minutes of patient facing time leaving a structured 15 minutes for admin. There was also to be an increase in the number of assessments to be done by each PWP.

68. As Mr Irving stated in his evidence, concerns were raised with him about workload following the introduction of the 45-minute assessments. His unchallenged evidence was that the service ensured that the transition to the increase in assessments was gradual and that staff were supported in this. That of course included the claimant who did not a reach full caseload until shortly before her dismissal.

69. A Stage 4 hearing was scheduled for 25 June 2025 giving the claimant around 9 weeks to show sufficient improvement.

70. Following the Stage 3 meeting, the claimant's performance continued to be monitored. On 10 June 2025 a treatment audit was conducted and on 12 June 2025 an assessment audit was conducted. Both were failed, and the respondent concluded that the claimant had not shown the required improvement. The invitation letter to the Stage 4 meeting, dated 18 June 2925 says [160/161],

> *"The areas that require further improvement are:*
>
> *To consistently demonstrate adequate interpersonal skills, including warmth and empathy, in both treatment and assessment sessions.*
>
> *You should be aware that should the meeting conclude that performance remains unsatisfactory, a possible outcome of this meeting and review period could be that your employment is terminated, details of which are in the Performance Improvement Policy available on Radar."*

71. The Stage 4 meeting took place as scheduled. The outcome letter is at [194 – 198]. The letter sets out the support that had been given to the claimant to help her meet her improvement objectives as follows,

> *"The expectation was for you to successfully pass one assessment and one treatment session, as set out in your PIP. To support you in achieving this, you were provided the opportunity to reflect on feedback from Parisa, your Clinical Supervisor. A three-way meeting was arranged with you, Parisa, and myself to review audit findings, clarify findings, expectations, and determine what further support might assist you in meeting required standards. A role-play exercise with Parisa was arranged, followed by the provision of an "empathy skills sheet."*

I confirmed with you on 11th May that you had read this material, and you stated you had begun incorporating it into your client sessions. You did not identify any additional clinical support needs following these interventions. Since early 2024, a total of six audits have been completed under Parisa's supervision. Of these, only one – a webinar audit – met the required standard. The remaining audits unfortunately fell short. After each audit, Parisa provided you with clear and detailed feedback, identifying both strengths and areas requiring improvement. You were given opportunities to reflect on this feedback during CMS sessions and to raise any additional support or training needs. In parallel, we held weekly meetings to monitor your wellbeing and offer appropriate support, which included:

Granting short-notice annual leave.
Providing schedule flexibility for house viewings.
Encouraging breaks, journaling, and walks.
Referring you to Kent Talking Therapies after the WeCare referral proved unsuccessful, which resulted in you commencing therapy.

Despite these additional support measures, the final audit outcomes for both treatment and assessment sessions did not meet the required standard. The sessions demonstrated continued concerns, including:

Interrupting clients during sessions.
A tone that was at times perceived as abrupt.
Missed opportunities to validate emotional distress.
Use of language considered invalidating and inappropriate.
A general lack of warmth and empathy.
Rushed pacing, particularly during risk assessments, with repeated interruptions."

72. Mr Irving dealt in detail with the matters raised by the claimant including time pressures, and communication issues but concluded that,

"Despite the support provided throughout the Performance Improvement Plan (PIP), you have unfortunately not met the required standard of performance, particularly in relation to the sustained objective of demonstrating empathy and effective interpersonal skills.

As outlined in writing in the Stage 3 outcome letter dated 16th April 2025, you were advised that failure to achieve the necessary improvements could result in the termination of your employment.

Regrettably, as your performance has not reached the expected standard, and in line with our Performance Improvement Policy, we have made the decision to bring your employment to an end."

73. Therefore, the claimant was dismissed with immediate effect and was paid in lieu of notice.

74. The claimant appealed against the decision to dismiss her. The appeal hearing took place on 21 August 2025.

75. Ms Wood's evidence dealt with the form of the appeal and the outcome.

76. The appeal was not a rehearing, it focussed on the grounds of appeal. In her appeal email the claimant identified two grounds of appeal – not releasing evidence and what she referred to as subjective assessment [220/221]. At the appeal itself those grounds were added to.

77. The appeal took place on 15 August 2025 and was heard by Cathy Smith, Regional Service Director, supported by Ms Wood.

78. Following the appeal hearing a detailed response was sent to the claimant on 26 August 2025 [234 – 236]. On the two grounds of appeal set out by the claimant the appeal found as follows,

> *"1. Evidence Not Released*
>
> *You raised concerns that key evidence, such as audit recordings, was withheld. After review, it was confirmed that:*
>
> *• All audit outcomes and feedback were shared with you verbally and in writing.*
> *• There is no policy requirement to share raw recordings; the structured feedback provided was sufficient to understand the concerns.*
> *• At least one recording was selected by yourself for audit purposes*
> *• You were provided access to the internal call recording system*
> *• No new evidence was introduced at Stage 4.*
>
> *Finding: The process was correctly followed, and you had access to the information necessary to*
> *understand the performance concerns.*
>
> *2. Over-Reliance on Subjective Feedback*
>
> *You argued that your dismissal relied on subjective judgments rather than objective data, such as your recovery rates and lack of patient complaints. The panel found that:*
>
> *• Structured clinical audits with objective scoring and double-marking were used to minimise subjectivity.*
> *• Five out of six audits since 2024 were failed, demonstrating consistent performance issues.*
> *• While your recovery statistics were acknowledged, these did not mitigate the identified concerns around empathy and interpersonal skills, which are essential for the PWP role.*

Finding: The evidence base was objective and consistent; dismissal was not based on subjective opinions."

79. Those findings were not effectively challenged under cross-examination.

80. The further grounds of appeal raised at the appeal were,

    80.1. that the reduction of assessment slots from 60 to 45 minutes negatively affected the claimant's ability to perform,

    80.2. harsh or inconsistent feedback, and

    80.3. unfair process / lack of support.

81. Each of these were responded to and none succeeded.

82. The appeal failed.

83. The claimant commenced ACAS Early Conciliation on 18 September 2025.

84. The ACAS Early Conciliation certificate was issued on 7 October 2025.

85. The ET1 was presented on 29 October 2025.

Discussion and conclusions

86. This case concerns what the respondent says was a capability dismissal, and to reiterate, the matters I must determine are whether capability was the reason or principal reason for dismissal and if so, whether the dismissal was fair. The fairness issue can be broken down to a number of more specific questions,

    86.1. did the respondent honestly believe the claimant was incompetent or unsuitable for her job,

    86.2. were the grounds for that belief reasonable,

    86.3. was there a proper investigation and appraisal of the claimant's performance and identification of the performance problem,

    86.4. was the claimant made aware of the performance problems

    86.5. was the claimant warned of the consequences of failing to improve,

    86.6. was the claimant given a reasonable chance to improve.

Reason for dismissal

87. I shall deal first with the reason for dismissal.

88. In her claim form the claimant alleges that the real reason for her dismissal was to save costs and not genuinely for capability. She was asked about this in cross examination and, although somewhat hesitantly, she confirmed that that was still her view.

89. However, at no point during the cross examination of Mr Irving was it put to him that he, or his predecessor Ms Parkins, had a cost saving agenda, nor was it suggested that he did not genuinely believe the claimant was underperforming in the ways set out in the various stages of the performance improvement process, and no evidence was led, and there is no evidence in the large bundle of documents to suggest, that there was any reason for the claimant being taken through the performance improvement process other than the fact that the respondent genuinely believed that her performance was lacking.

90. In the circumstances I am entirely satisfied that the respondent honestly believed that the claimant was failing in an important part of her role.

Reasonable belief

91. Of course, the question of an honest belief is only the starting point. The second question is whether that honest belief was held on reasonable grounds.

92. Again, Mr Irving was not challenged on the reasonableness of his belief. It was part of the claimant's case that the audits of the claimant's interpersonal skills, particularly in relation to empathy, was subjective. Inevitably there is subjectivity in any assessment of what might be described as soft skills, but that does not make the assessment invalid. Each audit of the claimant's performance was undertaken by her supervisor and the Deputy Clinical Lead, Radika Kotak-Patel. No evidence was led, and indeed no suggestion was put to Mr Irving, that either of the assessors were biased against the claimant, inappropriately trained or not sufficiently experienced to be able to assess her, or that either of them did anything wrong in the methods they applied in their audits of the claimant's performance and the conclusions they reached.

93. Each audit was detailed, each audit was scored, and the feedback included both positive comments and learning points with sufficient detail so that the issues were clear to the claimant at every stage of the process.

94. A period of around 13 months elapsed from the commencement of the formal performance improvement process to the claimant's dismissal. At each stage of the process there was detailed information provided about what specifically the performance issues were, targets for the claimant to achieve and the period she had to improve.

95. The audits were undertaken by skilled and experienced assessors, and it was not credibly asserted by the claimant either during cross examination of Mr Irving or in submissions that he was not acting reasonably in relying on those assessments.

96. In my judgment, given the detailed processes followed over the 13 months given to the claimant to improve, given that in some respects her performance did improve,

I am satisfied that the respondent had a reasonable belief that the claimant failed to improve in relation to her interpersonal skills which the respondent believes, a belief not challenged by the claimant, are a very important part of the role of a PWP.

Investigation and appraisal

97. The method used by the respondent in monitoring, investigating and appraising or assessing the claimant's performance involved direct observation of her performance. The audits of her assessment and treatment sessions were detailed and examples of the scoring matrices which included positive comments and learning points are in the bundle. At no point was it suggested the respondent was not properly or adequately monitoring or appraising the claimant's performance.

98. I am satisfied in that the respondent properly investigated and appraised the claimant's performance, identified the concerns and shared those with the claimant.

Was the claimant aware of the problems

99. There can be no doubt that throughout the time that the performance improvement plan was undertaken by the claimant, a period of around 13 months, the claimant was fully aware of all the concerns that the respondent had about her performance. There has been no serious challenge to this and given the amount of documentation provided to the claimant about the concerns, whether through provision of the audits, supervision sessions, meetings with Mr Irving, there can be no serious challenge. The claimant was always aware the concerns the respondent had about her performance in her role.

Warning of consequences of failing to improve

100. The claimant had a copy of the Performance Improvement Policy.

101. At every stage of the process the claimant was written to in clear and unambiguous terms setting out,

    101.1. why each stage was being implemented,

    101.2. the concerns to be discussed at each stage,

    101.3. what improvements were needed,

    101.4. the period for improvement, and

    101.5. the consequences of failing to improve.

102. The claimant could have been in no doubt, and indeed it was not suggested that she was in any doubt about the consequences of failing to improve.

A reasonable chance to improve?

103. The last specific question is whether the claimant was given a reasonable chance to improve.

104. It is of course always possible for an employer to give a failing employee a longer time to improve and there is some authority for the proposition that the longer someone has been employed the longer the opportunity to improve should be, but that is not a rule of law. The fact is that it is not difficult to think of examples where immediate improvement is required. For example, a bus driver who is assessed as an unsafe driver is unlikely to be put in charge of driving a bus on the road in the hope he or she will improve.

105. The claimant was aware of the issues with her performance even before the formal performance improvement process commenced. In total she had over a year to improve her interpersonal skills once the formal process began. It must be remembered that at the date of dismissal she had been in practise for around 10 years and it was reasonable for the res[pendent to conclude that to be failing in showing warmth and empathy at this point suggests that no amount of time beyond that which had already been given to her to improve those skills, would have made any difference, particularly in light of the amount of support that had been made available throughout the formal process.

106. I am satisfied that the claimant did have a reasonable chance to improve.

Was the procedure reasonable?

107. The general test I have to apply is whether the procedure followed by the respondent was within a band of reasonable responses. I am satisfied that it was.

108. There had clearly been informal discussions prior to the implementation of the formal process.

109. The formal process followed a recurring pattern of assessment (audits), support, formal meetings at which the issues were discussed, the setting of reasonable targets to be met over a reasonable period.

110. At no point during the hearing has the claimant credibly challenged the reasonableness of the procedure followed by the respondent in this case save in one respect which I shall deal with below.

Was dismissal reasonable?

111. That leads to the final question which is whether dismissal was reasonable, that is to say whether the decision to dismiss was within the band of reasonable responses.

112. As I have found above, it seems to me that given the process followed by the respondent at the point at which dismissal was being considered, it was reasonable for Mr Irving to conclude that no amount of time or further support was going to

make any difference. The claimant had improved those aspects of her performance which she was capable of improving but she entirely failed to improve the key aspect or interpersonal skills despite a prolonged period of assessment, support, target setting and clear warnings leading to consideration of dismissal.

113. In fact, it is perhaps a surprising feature of this case that the only material challenge to the process followed by the respondent is a complaint that the claimant was not given access to the recordings of her sessions with the patients which had been audited.

114. This was a somewhat disingenuous complaint.

115. All of the recordings were stored in a system called Redbox. Until 16 June 2025 the claimant had unfettered access to all of the recordings of all of her sessions with her patients and there is no evidence that she took advantage of that either to learn from or to challenge the audit scoring set out in the written documentation.

116. It is true that the claimant did not know, prior to the Stage 4 meeting, that the last two audits were undertaken of her 10 and 12 June sessions. Redbox was decommissioned on 16 June 2025 and the recordings were no longer available after that date. The effect of that was that the claimant was unable to listen to the June recordings and take issue with the audits based on those recordings.

117. But had the claimant had such access, and even had she taken issue with the audits, the question is whether that could have made any difference.

118. The reality is that on the question of interpersonal skills, the claimant had never previously disagreed with the audit outcomes. It was only when faced with dismissal that the question of accessing the recordings arose. Furthermore, it was not the claimant who sought access to the recordings, it was her trade union representative. This strongly suggests to me that the claimant did not in fact take issue with the audits, the request was simply her representative trying to see if there was any way of challenging the respondent.

119. The fact is that given that this performance issue had persisted for over a year, and given that there had been no improvements in the claimant's interpersonal skills throughout the formal process, it was very unlikely that the respondent would have accepted that the June 2025 audits were somehow faulty and should be ignored. In my view the unavailability of the recordings did not adversely affect the reasonableness of the decision to dismiss. To quote the response given in the appeal outcome on this point,

> *"• All audit outcomes and feedback were shared with you verbally and in writing.*
> *• There is no policy requirement to share raw recordings; the structured feedback provided was sufficient to understand the concerns.*
> *• At least one recording was selected by yourself for audit purposes*
> *• You were provided access to the internal call recording system*
> *• No new evidence was introduced at Stage 4.*

Finding: The process was correctly followed, and you had access to the information necessary to understand the performance concerns."

120. On the question therefore of whether dismissal was within the band of reasonable responses, I am satisfied that a reasonable employer acting reasonably on the information available at the relevant time could have dismissed the claimant, and therefore dismissal was within the band of reasonable responses.

121. In the circumstances the claimant's claim for unfair dismissal fails and is dismissed

Approved by:

Employment Judge Brewer

Dated: 16 October 2026

Sent to the parties on

....29/10/2026.....

For the Employment Tribunal

.....Hakeem Nuama.....

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/