



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Duncan

Respondent: London Borough of Ealing

Heard at: London Central
(by Cloud Video Platform)

**On: 6, 7, 8, 9, 10, 13 and 14 June
2022**

Before: Employment Judge Joffe
Ms H Craik
Mr P Madelin

Appearances

For the claimant: Ms L Millin, counsel

For the respondent: Mr B Amunwa, counsel

JUDGMENT

1. The claimant's claim of unfair dismissal is dismissed on withdrawal by the claimant.
2. The claimant's claim for 'other payments' is dismissed on withdrawal by the claimant.
3. The claimant's claims of direct age discrimination are not upheld and are dismissed.
4. The claimant's claims of direct race discrimination are not upheld and are dismissed.

REASONS

Claims and issues

1. The issues were as agreed at a case management hearing in front of Employment Judge Spencer on 14 December 2021. The claimant withdrew claims for unfair dismissal and 'other payments' and it was agreed that those claims should be dismissed.

Issues

The Claimant describes herself as of an African-Caribbean background. For the purposes of her direct race discrimination complaint she compares herself to individuals who are white. In relation to her complaint of age discrimination the Claimant's age group is over 60 and she compares herself with people who are younger than 60.

1. Did the Respondent (Ms Harrison and/or Ms Quinn) do any of the following?
 - a. Require her to attend a formal performance management meeting in September 2020
 - b. Set unreasonable targets/objectives thereafter
 - c. Subject her to excessive supervision
 - d. Require her to attend a stage 2 meeting
 - e. Subject her to continued unnecessary supervision after the stage 2 meeting
 - f. Require her to attend a stage 3 meeting the outcome of which would be that she would be demoted or dismissed
 - g. Fail to respond to her DSAR request within 30 days

(Note - although the Claimant referred in her claim to not being entitled to have a union representative at the meeting, she does not complain that this was an act of direct race discrimination, but this is information provided by way of background. She is also considering whether or not 5g above is to be pursued as a complaint of race and age discrimination).

2. If so, has the Respondent (Ms Harrison and Ms Quinn) treated the Claimant less favourably than they would have treated a white comparator in materially comparable circumstances?
3. In respect of the complaint of race discrimination did the Respondent treat the Claimant less favourably than it treated Mr French and Ms Jaszczolt. (In comparing the Claimant's treatment with Mr French and Ms Jaszczolt there must be no material difference between their circumstances and the Claimant's.)
4. If so, was that treatment because of the Claimants race?

5. Equally, has the Respondent treated the Claimant less favourably than it would have treated an individual who was under 60 in materially comparable circumstances?

6. If so, was that treatment because of the Claimant's age?

7. If such treatment was because of the Claimant's age, was that treatment a proportionate means of achieving a legitimate aim?

8. In relation to the complaint of age discrimination the Claimant relies on the fact that Ms Harrison said to her "you have had a big birthday recently" and recommended that she attend a retirement course.

Jurisdiction

9. Are any of the Claimant's complaints out of time?

10. If any matters are out of time, would it be just and equitable to extend time? Or was there conduct extending over a period which would bring those matters within time?

Findings of fact

The hearing

2. We had a bundle of some 561 pages. Some further documents were produced in the course of the hearing amounting to a further 27 pages. We read documents to which we were directed and which were referred to in witness statements.
3. The claimant gave evidence on her own behalf and also called Mr E Campbell who was formerly interim transport manager at the respondent. She also produced statements from Ms S El-Safi, Ms A John and Ms J Thomas, who did not attend to give evidence. For the respondent we heard from Mrs D Harrison, transport and travel manager, and Mrs T Quinn, assistant director - planning, resources and service development in the Children, Adults and Public Health Directorate.
4. An oral judgment and reasons were given and these written Reason are provided pursuant to a request made by the claimant at the hearing.

Relevant procedures

5. We were referred to the respondent's Managing Unsatisfactory Performance procedure ('MUP').
6. Some relevant features of this procedure were that:

- It conferred a right to representation during the formal stages but not the informal stage;
- A grievance about the procedure could not be pursued unless there was an allegation of discrimination or an ulterior motive for bringing the procedure/

6. The MUP had the following stages:

Informal stage:

Where improvement in performance is required, the employee should be told what standards are expected, how this will be reviewed and over what time period. Any informal performance discussions should be noted, with a copy given to the employee concerned. Employees should also be made aware of what action could be taken if they fail to improve. Where the performance does not improve, or has not met the required standard, the manager should consider taking formal action.

Formal stages:

Stage 1:

10.2.1 Where early intervention and good management practice does not achieve the performance or standard required, or where the problem is more serious, the manager will arrange a Performance Review Meeting. This will normally involve the manager, a HR representative, the employee and their representative. The manager will inform their Head of Service and a Human Resources representative that they are arranging the meeting. This will be the first stage of formal action.

10.2.3 Managers should take into account the following principles and apply those which are appropriate at any meeting, or review at which performance is discussed:

- *Bring to the attention of the employee problems with their work performance;*
- *Explain how it fails to meet the required standards;*
- *Provide an opportunity for the employee to give an explanation as to the causes;*
- *Clarify standards of performance required;*
- *Develop and agree action plans including training, supervision and other support that will improve performance, tailored to meet individual needs;*
- *Set clear and reasonable targets / objectives / achievements, if appropriate phased over a period of time;*
- *Identify how and over what period improved performance will be assessed;*
- *Take account of an employee's disability, and how this may impact on performance. Specialist advice may be sought where required;*

- *Review and monitor an employee's performance and provide feedback where appropriate;*
- *Keep full and accurate records of meetings and action taken.*

There would then be a period of monitoring and review followed by a meeting to review progress:

If the required improvements have been fully met then the employee should be informed that the required standard of performance must be sustained. They should be told that if they fail to maintain this standard further action might be taken under this procedure. If the employee's performance falls below the required standard in the next twelve months, then the manager may proceed directly to Stage 2 of this procedure. This should be confirmed to the employee in writing and a copy placed on the employee's personnel file.

- *If in the managers view there is genuine progress towards the required standards but they have not been fully met, then a further period of monitoring and review may be set. If during the extended monitoring period no further progress is made and/or the standard drops again and/or another event occurs, then Stage 2 of the procedure should be initiated.*
- *If at the end of the monitoring period there is no improvement or insufficient progress towards improved performance, then Stage 2 of the procedure should be initiated. A manager must consult with Human Resources before proceeding. The manager will convene a Performance Review Hearing, normally within 10 working days of referral*

Stage 2 occurs in various circumstances including where the employee has failed to meet the standard set at stage 1:

A Head of Service or a Director will conduct a Performance Review Hearing. A Human Resources representative will attend to advise. The Hearing Officer must inform the employee in writing of:

- *Full details of the unsatisfactory performance and how the employee has not met the required performance standards;*
- *The status of the hearing and the possible consequences including dismissal or demotion;*
- *The date, time and location of the meeting;*
- *The identity of the manager who will be presenting the case;*
- *The right to be represented by a trade union representative or work colleague;*
- *The right to be heard and produce relevant information.*

Possible outcomes of stage 2 performance review hearing

A final opportunity to improve performance. The Hearing Officer will warn the employee that a failure to achieve the required improvement may lead to the employee's dismissal; the employee should be advised of their right to appeal against this decision;

Consideration of alternative employment. This may only be considered with the agreement of both management and the employee concerned and is subject to the availability of suitable vacancies. If this option is agreed the appointment will normally be to the first point of the grade or pay rate applicable to the new job and not the rate applicable to the old job i.e. there will be no pay protection. In the event that this option is chosen, the employee must be able to demonstrate that they have the skills, abilities and aptitude necessary for the job for which they are being considered. They also need to be advised that they will be subject to the Probation/Performance Review Procedure in the Local Conditions of Service, Part 2 and 3.

If the employee continues to fail to meet the required standards, there will be progress to stage 3 at which the options are to exit the procedure if performance is now satisfactory, to be given a final opportunity to improve, or to be demoted, transferred or dismissed.

Relevant chronology

7. On 1 October 1988, the claimant commenced employment with the respondent as a right to buy officer in the housing department. On 22 April 1991, she was redeployed to the transport and travel section.
8. On 12 September 2016 Mrs D Harrison rejoined the respondent having previously worked for the respondent and then had a period as a contractor
9. In 2017, there was a restructuring of the transport and travel section. The claimant was upgraded from an admin officer (scale 7) to a senior officer (scale 8). As of 1 September 2017, the claimant was employed in the role of transport and travel officer, working within the SEND Transport Hub ('the Hub'). We understood she had been doing the transport and travel officer role prior to this date and that it had evolved to some extent and accordingly the grade had been increased.
10. The Hub arranged transport for children with special education needs ('SEN') largely to special schools but also to some mainstream schools. Each transport and travel officer managed a case load. The claimant had two main schools plus other schools for which she planned routes for children and arranged provision of transport. Other officers also had main schools and other schools.

11. The role profile for the transport and travel officer role showed the main responsibilities:
 - Arranging transport for service users in a timely way;
 - Carrying out risk assessments for passengers;
 - Liaising with contacts at schools and transport providers to ensure smooth running of service;
 - Liaising with travel assessors in respect of new requests for travel assistance and reassessments of provision;
 - Completing route schedules and timing;
 - Carrying out spot checks on routes and checks when there are complaints;
 - Managing a number of passenger assistants.
12. The claimant had not historically been through any formal performance procedure or been subject to any disciplinary process. She had worked through some difficult times including periods such as the London bombings. We accepted that she was hard working and dedicated to the role.
13. Mr Campbell was the claimant's line manager in an interim role between December 2018 and July 2019. He gave a witness statement praising the claimant and also gave oral evidence. He said that the claimant provided more support to him than his deputy due to her depth of knowledge and experience and willingness to assist. He said his deputy provided help reluctantly but both the claimant and Mr French, another transport and travel officer, would help in any way they could despite having a vast amount of work. He said he gave her an excellent appraisal as she had met all her objectives. We saw the appraisal completed in March 2019; Mr Campbell gave the claimant an overall performance rating of E, which was the second highest grading, and praised the claimant in the narrative.
14. Mrs Quinn's evidence about Mr Campbell was that Mr Campbell applied for but was not appointed to the substantive role he occupied on an interim basis; she was not able to shortlist him. He had some strengths but she had concerns about his performance and the performance of the team under his management.
15. We also heard some evidence from Mrs Harrison about Mr Campbell and previous managers. She said that she thought there was a lack of effective management for some time before she joined. From what she was told by transport providers, things were not being dealt with. When she started to manage the team, people started to say when things were not right. Her impression was that Mr Campbell just did basic management functions and kept the team ticking over.
16. On 29 July 2019, Mrs Harrison commenced work in the role of transport and travel manager and becomes the claimant's line manager. She had some 19

years management experience, and previously worked in licensing for the respondent.

17. It was put to Mrs Harrison that she had previously performance managed out a black woman in licensing. She said that there was a black woman in that department who had not passed probation; she was the second line manager for that person, who left having been advised by her union she was not going to pass probation due to serious failings.
18. In respect of recruitment to the transport team during this time, Mrs Harrison said she had recruited four members of staff – two from a black background (including Ms T Covson, who was in her twenties, on a fixed term contract to cover when the claimant went on long term sick leave) and two Asian members of staff.
19. Mrs Harrison was line managed by Mrs Quinn.
20. There were 85 staff under Mrs Harrison: five transport and travel officers reporting to her and approximately 80 passenger assistants, managed by the transport and travel officers. We were told that there were some 600 service users at this point and that number went up to closer to 1000 over the relevant period.
21. The five transport and travel officers and their races and ages at the relevant time were:

The claimant: Then 61 - 62, African Caribbean background

Mr R French: 59, White British

Ms M Jaszcolt: 61 ,White British

Mr M Magon : 58, Asian-Indian

Ms P Masih-Rogers: 50 Asian-Indian.

22. Mrs Harrison said that during her first year as her manager she became concerned about aspects of the claimant's performance:
 - communications with the council and stakeholders
 - organisation – management of workloadprioritisation of tasks and structuring workload.
23. She said that at first there was just a trickle of things and she did not consider there was a problem, then the issues increased to the point where she was being contacted by providers and schools and being copied into emails. She thought the problem got worse when home working started.
24. When Mrs Harrison started work as the claimant's line manager, the team were very busy getting ready for and starting new school term – it was

'pandemonium'. Then by February 2020, Covid was becoming an issue. She was new to the service and initially not judging anyone.

25. She said that she waited for some time to see if the claimant's performance would improve without significant intervention. She then commenced the informal stage of the MUP procedure after about six months of persistent under performance.
26. We were not provided with documentary evidence about the period of perceived underperformance before commencement of the informal stage of the MUP procedure, as discussed further later in these Reasons.

Change in workload due to the pandemic

27. The claimant said there was more work to do because of the pandemic; when questioned about what the extra work consisted of, she said that there was extra work distributing PPE. This could take a whole day; she seemed to suggest when pressed that it could be a whole day per week but her evidence was unclear. It was clear that the claimant also found it more difficult working from home.
28. Mrs Harrison's evidence was that because large amounts of PPE were given out at a time, the PPE task could take, in the early stages, a day a month then, later in the period, a day every three months. She said that during some parts of the pandemic there were far fewer children being transported to schools, so fewer journeys to plan.
29. Mrs Quinn said that there were far fewer children being transported especially during the first lockdown but also later, however there were other tasks to do because of the pandemic; she said that there was about the same amount of work altogether taking into account the increases and decreases. We accepted that assessment which seemed to be corroborated by Mrs Harrison.

Communication methods

30. We heard some evidence about methods of working and communicating with parents and others. The claimant told us she would telephone and leave voicemails for parents then send hard copy documents if possible; that was not always possible during the pandemic. Sometimes parents did not pick up their voicemails and sometimes they did not speak English, which made this method of communication seem to the Tribunal rather hit and miss. It appeared that there would be no record of phone calls if follow up emails were not sent. There was no electronic case management system. The claimant suggested that she wrote things in a diary which she left at the office but that was not a book that others had access to.

31. Mrs Harrison told us that other officers would send emails to communicate with parents.
32. There were occasions during her evidence when the claimant said that she had left voicemails for parents when that seemed unlikely given the other documentary evidence. The claimant did not mention in MUP meetings or one-to-ones that on occasions when she was criticised for not communicating she had left a voicemail save for in relation to a single incident. In general we were not persuaded that she had communicated with parents in this way in relation to various incidents where she was criticised for failing to communicate with parents.
33. In any event the failure to follow up in writing meant there was no record / paper trail; the claimant's system appeared to be unsatisfactory.

SENT inbox and personal inboxes.

34. We heard some evidence about emails. Transport and travel officers had individual email addresses but there was also a SENT inbox to which correspondence about the cases was supposed to be directed. All the officers had access to this inbox.
35. Mrs Harrison said that the system was that email in the SENT inbox would be colour flagged for the officer whose responsibility the matter was by whoever picked up the particular email first.
36. The claimant said in evidence that Mrs Harrison opened her emails then did not mark them as unread so the claimant might miss them and not deal with them.
37. The complaint in the claimant's solicitor's letter to Ms Finley of 20 April 2021 is somewhat different:

However, Ms Harrison would continue to access our client's inbox and colour code and flag emails for the Claimant to address. This included those our client had in fact already dealt with, causing duplication of work and resulting in further difficulties and confusion for our client. It appeared that Ms Harrison was attempting to sabotage the process to ensure that our client would not succeed.
38. Mrs Harrison said all the officers were subject to the same system. She said that the claimant would take flags off her emails without moving the email so she and the claimant would end up looking at the same emails again and putting the flag back on.
39. Mrs Harrison said she asked the claimant to send emails from the SENT inbox so everyone could see what had occurred in relation to work matters. The

claimant had previously been sending some emails from her own email address.

40. The claimant was inconsistent about what her complaint about Mrs Harrison's handling of the claimant's emails was and we accepted Mrs Harrison's consistent evidence about what the system was and how it was the same for everyone. We did not accept that Mrs Harrison was doing anything untoward with emails which were the claimant's responsibility.

41. 16 April 2020 was the date scheduled for the claimant's appraisal meeting with Mrs Harrison. The meeting was cancelled due to the pandemic. Appraisals for all council staff were cancelled.

42. On 6 August 2020, Mrs Harrison sent an email to the transport and travel officers about risk assessments for passenger assistants. These needed to be done for passenger assistants before they went back to work, especially as many of the passenger assistants were BAME and statistics pointed to a greater risk for them from exposure to Covid:

As you know you need to complete an individual risk assessment with each PA before they return to work in September. If you are struggling to get them to contact you, and you have tried to contact them more than twice, send them a text to say that until the RA has been completed they cannot return to work and this leave will be unpaid, that may encourage them to reply to you.

You will need an email address from them (can be a family members email address if they dont have one), as youll need to email the completed RA to them and theyll need to reply to confirm acceptance. If they dont know anyone with an email address you can arrange for the post room to print and post it to them, theyll need to sign and return (try to avoid this if possible as it will cause delays and youll end up chasing to get it back).

43. On 19 August 2020, Mrs Harrison invited the claimant to a meeting to discuss her performance:

This is an informal performance management meeting to discuss concerns I have regarding your work performance.

We will discuss everything in detail at the meeting, we'll also discuss any concerns you have, training needs and the required standard of work going forward (I will document this all in a letter following the meeting).

44. She emailed Andrew Inett in HR to say that she had arranged this meeting and that she 'had let Mary and Lydia' from Unison, the claimant's trade union, know.

45. Also on 19 August 2021, Mrs Harrison sent an email to the claimant, Mr French and Ms Jaszcolt about risk assessments not having been done which contained a warning that performance procedures might be followed if work was not done in the future:

I am emailing to follow up our previous discussions and emails regarding the following and to confirm work requests going forward;

1. Contacting PA's to find out who can access their mobile phones

2. Carrying out an individual risk assessment with the PA's prior to their return to work in September

We have discussed the first 2 essential tasks at our meetings of 14th July and 5th August. I also followed up with the attached emails dated 5th and 6th August.

I was on leave last week and so didn't attend the group meeting last Wednesday. Today Ray, Sharon and Maria all said that you have not carried out any risk assessments with the PA's as you are too busy. No-one has notified me that you have not been able to start this task or that you have any issues or concerns. I appreciate that you wouldn't have completed all of the RAs yet but I am shocked that you haven't started/completed any. When we have discussed this at our weekly Wednesday meetings I have been very clear that these must be completed before the PA's can return to work. I have also given instructions on what to do should the PA's not return your calls. The RA's are an essential requirement corporately and are particularly relevant for this employee group in preparation for the return to school in September.

I have also checked the PA phone spreadsheet today and, despite numerous requests and me giving you a deadline for this to be finalised by 10th August, it has not been completed, I will be emailing you individually about this.

I have previously asked you to let me know if you are not able to carry out a piece of work by the specified deadline or if you have any issues relating to your work, so that we can address it. I have not been made aware that you have any issues or that you have not been able to start/complete the work.

From today, all work requests will be sent to you by email with a deadline for response/work to be completed. If you have any concerns or issues you must call or email me to discuss. You need to review your organisation and time management in order to balance your workloads and meet priorities. I am happy to work with you on this and support you; I also suggest you look to see if there is any relevant training that could help you available on elearn

<https://elearn.ealingservices.net/login/index.php>

Going forward, if work is not completed in a timely and accurate manner the Council's performance management policy will be applied.

The RA's for the PA's is essential and must be completed in order for them to safely return to work. You have been aware of this for weeks and therefore it

must be completed individually with each PA prior to 3rd September. You will need to review and prioritise your workload in order to ensure that this is completed and provide me with a weekly update on how many you have completed or any issues that arise.

If you have any queries or concerns please check my calendar and book a meeting for us to discuss.

46. Around this time there was a remote meeting with the team at which the claimant said that Mr French raised this email and asked why Mrs Harrison was threatening them with the performance procedure. The claimant said that Mrs Harrison refused to apologise and turned off her camera.
47. Mrs Harrison said that there was a heated team meeting after she sent the email about performance management if risk assessments were not done. Mr French asked why she was threatening them and she said that it was her role as a manager to performance manage if required. She said Mr French was quite rude, she asked him to leave and he refused so eventually she left herself. She followed it up with a face-to-face meeting with Mr French.
48. There was no material difference between these accounts; it was clearly a difficult meeting and eventually Mrs Harrison left.
49. Mrs Harrison's evidence was that other transport and travel officers' performance improved after this and hence they were not subject to any formal action. The only significant issue for the other officers related to the risk assessments for passenger assistants. The claimant gave no evidence of any performance issues she was aware of other transport and travel officers having and we had no evidence to contradict Mrs Harrison's evidence, which we accepted.
50. It seemed to the Tribunal that it was clear from Mrs Harrison's evidence that Mrs Harrison was determined to make the department work well; if there were other performance problems we considered she would have addressed them.
51. On 20 August 2020, there were mails between Mrs Harrison and Ms Ahmed of Unison to set up a discussion about the claimant's performance procedure. The claimant said that Mrs Harrison had not asked her permission before contacting Ms Ahmed. Mrs Harrison could not recall exactly how it came about that she contacted Ms Ahmed. She said that she thought that Ms Ahmed wished to be involved as she had assisted the claimant before in relation to performance.
52. The Tribunal found it surprising and somewhat inappropriate that Mrs Harrison approached Ms Ahmed in this way. We accepted she had good intentions and was concerned for the claimant but it seemed to us somewhat highhanded and

a breach of confidence for her to approach the claimant's union representative independently and without having obtained the claimant's consent.

53. On 25 August 2020, there was a one-to-one supervision meeting between the claimant and Mrs Harrison.
54. On 3 September 2020 Mrs Harrison met with the claimant as planned to discuss performance concerns. The claimant said that when she asked Mrs Harrison during the meeting if she could have a trade union representative present, Mrs Harrison said that if she had a trade union representative. it would become formal.
55. This assertion was not clearly put to Mrs Harrison so it was difficult to make a finding as to what this conversation was about but Mrs Harrison said in evidence that she explained the procedure to the claimant. We think it likely that the claimant had a garbled recollection of what was in fact said, which included a discussion describing the difference between the formal and informal stages of the procedure. Ultimately the point was not one which went directly to any issue we had to decide.
56. On 7 September 2020, there was an issue with a school raising concerns about transport needing to be in place urgently and not having heard from the claimant.
57. On 10 and 11 September 2020, transport providers notified Mrs Harrison that the claimant had wrongly sent data to them.
58. On 11 September 2020 there was a complaint received from a transport provider about communication with the claimant and Mrs Harrison discussed the complaint with the claimant.
59. That day Mrs Harrison emailed the transport and travel officers:

I know the general rule is no leave in September but I am conscious that we have all been working hard this month, it's been full on and we've been doing additional hours. I know there are still outstanding matters to be resolved and we are all working towards them, I'm also concerned about everyone's wellbeing so would like to encourage all of you to book a days leave (use up flexi or TOIL) before the end of September in order to switch off work for the day and recharge batteries.

Can you please liaise with each other so you all book a different day. Mac is off Monday and Tuesday.

She approved the claimant's leave request that day.

60. On 15 and 16 September 2020: there was a difficulty with route schedules. A transport provider had done route schedules themselves as schedules sent by the claimant were not as they should have been.
61. Also at that time, a headteacher raised a safety concern about a booster seat and passenger assistant not having been provided for a four year old child attending school by taxi:

Dear Donna

I am very sorry to have to raise a safeguarding concern about transport this morning. is a new pupil at - he started yesterday on roll. This morning he arrived in a taxi

Route 1

He is a pupil – so only 4 years old. There was no passenger assistant on the route –it had been assessed as not needing a PA. Please see the transport sheet attached.

The taxi turned up to the JCS entrance with [child] in the back, no booster seat and he was not restrained safely for transporting- he was trying to take his seat belt off and was insecure.

We had not been given this transport sheet.

I do not know where the problem came- the assessor or the route- however this is a serious safeguarding concern as a four year old was assessed to be safe on transport route with no booster seat or PA

I would appreciate this being investigated as a priority. I am so sorry to have to add to a workload that is already probably overflowing. If you need me to contact someone else about this, please let me know.

62. Mrs Harrison raised the issue with the claimant, who said that the booster seat was not on the referral form. That was true but Mrs Harrison said in evidence it was the officer's responsibility to make sure the referral form was correct. The need for a passenger assistant was on the referral form.
63. The claimant gave some oral evidence in cross examination about this incident. She suggested that there was already a passenger assistant on the route and the school was mistaken as the four year old was dropped off first and the passenger assistant remained with the other child. Mrs Harrison said that was not the case; the twelve year old child on route did not have a passenger assistant. It was clear from the email sent by the school that school staff saw the child in the car without as passenger assistant and we accepted Mrs Harrison's evidence which was consistent with the email.
64. On 16 September 2020 Mrs Harrison sent the claimant a letter summarising their informal meeting regarding the claimant's performance:

Informal Discussion - Unsatisfactory Performance

This letter is to confirm the informal discussion we had on 3rd September regarding your work performance.

We discussed the following areas:

- Organisation – managing email inbox, organising workload for the day/week*
- Prioritisation – managing priorities more effectively, responding to situations and being able to prioritise key tasks/structure your workload*
- Communication – internal and external, complaints received from key schools and transport providers*
- Responding to emails – reading and actioning emails in a timely manner*

During the discussion you stated that:

- You felt you are working hard and are performing*
- You and the team are very busy*
- You have organized your email inbox*

I advised you of the required work performance standards and the actions we agreed to remedy the situation:

- You will manage your personal email inbox and the emails flagged for you within the sent box. You will read them and sort them accordingly so you are aware of the work that has been dealt with and what is outstanding*
- You will prioritise your workload so you action more urgent tasks first*
- You will provide a response or acknowledgement to all emails within 24 hours*
- You will communicate effectively with colleagues, customers and key contacts*
- You will identify any training needs or areas of support required*
- If you are unable to meet a deadline you will discuss with me*

In the meantime, I will continue to monitor and review your work performance in the above areas during your normal 1-2-1 meetings, which we agreed will be fortnightly.

Should you require any additional help or advice please do not hesitate to ask. Please contact me if you wish to make any comments on this letter so that it can be placed on your employee file.

I also advised you at the meeting that formal action under the Council's Managing Unsatisfactory Performance Procedure may be taken if your work performance does not improve and meet the required performance standards by 3rd November, please note that if there is a deterioration in your performance before this date we may move to the formal stage before 3rd November.

I hope that the actions set out above will enable you to improve your performance.

65. The claimant said in evidence that during this period there was 'extreme' weekly one-to-one supervision and Mrs Harrison took control of her emails. She said that she felt 'suffocated'.
66. Mrs Harrison said that she increased supervision to assist the claimant with managing her caseload. She did not take over her emails. The support and one-to-one meetings were to help the claimant to get through her workload—otherwise less would have been achieved.
67. In September 2020, we note that the supervision meetings were fortnightly. In the past the norm had been a meeting every four to six weeks. We accepted that the supervision felt intense to the claimant, particularly given her long history in the role and the fact that serious issues had not been raised about her performance in the past.
68. The claimant said that Mrs Harrison was copied in to all her emails. Mrs Harrison said that in June 2020 that she told providers and others which transport and travel officer they should deal with and to only copy her in / email her if there was a serious issue or an escalation. We saw no evidence that Mrs Harrison was copied in to all of the claimant's emails or asked to be.
69. In relation to the contents of this letter, it was put to Mrs Harrison that it was unreasonable to expect the claimant to always answer emails within 24 hours., Mrs Harrison said the response in that time period just needed to be an acknowledgement of receipt of the incoming email.
70. We heard evidence from the claimant about her workload at this time. She said that Mrs Harrison was putting pressure on her and setting her up to fail; on one occasion she said that she was given 19 tasks to do in 48 hours.
71. The evidence from Mrs Harrison about the claimant's workload was that she did not assign any additional tasks, just those which were expected of all transport and travel officers.
72. On 22 September 2020, there was a one-to-one meeting between the claimant and Mrs Harrison. The claimant was told that she would proceed to the formal stages of the MUP procedure. Mrs Harrison said that she explained to the claimant why this was happening before the end of the review period she had set. She told the Tribunal that she decided to proceed to the formal stage before the end of the review period because of the further concerns / complaints which had arisen since the informal meeting. The issue about the lack of a booster seat and passenger assistant in particular pushed the procedure along because it involved potential risk to the child.

73. Mrs Harrison wrote to Ms Ahmed:

Hi Lydia,

Just to let you know that I have had a 121 with Sharon this afternoon during which I advised her that we are moving into the formal managing unsatisfactory performance process.

During the meeting Sharon mentioned more than once that she is feeling stressed and her sleep is affected etc so I will be undertaking a stress risk assessment.

74. On 23 September 2020, Mrs Harrison provided the claimant with details about Workplace Options, an information, counselling and advice service and said she would arrange a stress risk assessment.

75. On 27 September 2020, the claimant was invited to a Stage 1 Performance Review Meeting under the MUP procedure.

76. We note at this point that the claimant said in oral evidence that she said she was being subjected to race and age discrimination in all the meetings, both one-to-ones and meetings under the MUP procedure.

77. This suggestion was not put to the respondent's witnesses and in any event seemed to us to have been unlikely. There was no reference to these complaints in any contemporaneous document although the claimant was sent letters, emails and/or minutes recording the meetings and her trade union representative also received these documents. Neither ever said there was anything incorrect or missing in the notes of meetings. We did not accept that the claimant raised the issue of discrimination in these meetings.

78. On 28 September 2020, Mrs Harrison completed a stress risk assessment with the claimant.

79. On 6 October 2020, there was a Stage 1 Performance Review Meeting, chaired by Mrs Harrison. Mr Inett from HR and Ms Ahmed also attended. Afterwards the claimant received a letter recording the meeting and its outcome which was a two month review period to conclude in December:

This letter is to confirm the outcome of the Stage 1 Performance Review meeting on 6th October 2020.

I advised you that your work performance was not satisfactory in the following areas:

- Organisation – managing your emails and the emails in SENT, planning your working day*
- Prioritisation - managing priorities, responding to situations and being able to prioritise key tasks /structure your workload*

- *Communication – delayed responses with internal and external communication, complaints from schools and providers, require better communication with colleagues*
- *Attention to detail – reading all relevant information in referral, communicating with parents and schools to ensure needs are met*
- *Managing referrals/routing – need to manage referrals effectively and regularly review routing to ensure it is appropriate (eg pick up points are not too far from someone’s home or length of time on transport is not too long)*
- *Record keeping – need to update transport log for all new routes and amendments, log issues/incidents, ensure schedules are up to date and unnecessary information is removed*

At the meeting you stated that:

- *You always try your best*
- *You feel that the pressures of work stop you from being able to do your job*
- *The phone rings frequently and interrupts you completing tasks*
- *Working from home makes communication with colleagues difficult*

I advised you at the meeting of the required standards of work performance as follows:

- *All emails must be read the same day and replied to within 48 hours*
- *Manage your inbox and the sent-transport inbox, move completed emails*
- *Use skype and calls to communicate with colleagues (if you are dealing with an issue with a route send a skype message to your colleagues to let them know you are dealing with it before you answer the next call)*
- *Review all referrals within one day of receipt, review all relevant information, contact parents and schools if additional info is required, to ensure service users needs are met*
- *Ensure transport is arranged within 10 days of receiving transport referral*
- *Update the transport log for every new route arranged/ pricing amendments for routes, also update incidents/issues log*
- *Ensure schedules are up to date with all relevant information and password Protected*

We discussed and agreed that to remedy the situation the following actions must take place:

- *You will work in the office every Tuesday*
- *You will not answer sent-transport phone calls all day every Tuesday to give you more time to focus*

- *You will book training via elearn for skype, managing change and prioritisation*
- *If you have any communication with any internal or external contacts that you find distressing in any way you will discuss with me asap*
- *If I receive any complaints about you I will discuss them with you asap*
- *We will have weekly 121's to discuss your performance and any support you need from me*

You are expected to reach the standards of work performance described above by 8th December 2020 when a further meeting will be held to review your progress. In the meantime, your work performance will continue to be monitored in weekly 1-2-1s and feedback will be provided as appropriate.

If you do not reach the required standards of work performance by the date stated, further formal action may be taken under the Council's Managing Unsatisfactory Performance Procedure. One of the possible outcomes of further action is that a decision to terminate your employment due to unsatisfactory work performance may be taken.

In the meantime, I will provide all necessary support to help you achieve the standards of work performance required, and you should ensure that you let me know of any additional support you feel you require.

80. We note that in this meeting the claimant was not recorded as saying she was not making mistakes; what she was saying was that there was a lot of pressure of work.
81. The claimant said in evidence that she was asking at this stage for three days in the office but Mrs Harrison refused that. Mrs Harrison's evidence was that there was limited working in office at that time due to the pandemic. The claimant did ask for two days but she was able to negotiate one day for her at that time and two days later.
82. We note that a request for two days in the office is what is mentioned in the near contemporaneous stress risk assessment, which corroborates Mrs Harrison's account.
83. We could not see any evidence that Mrs Harrison had a questionable motive for keeping the claimant out of office. The Tribunal is aware that many workplaces had limited numbers of employees in the office during various stages of the pandemic and we accepted Mrs Harrison's evidence.
84. The claimant also gave evidence that despite being given a day off the phones to concentrate on work, colleagues were still ringing her on that day. It was not put to Mrs Harrison that this was an issue for the claimant and that it would have affected her performance. We note that the update to the stress risk assessment on 15 October 2020 itself does not suggest that this was an issue:

Sharon feels a bit more relaxed in herself.

Working in the office one day a week and not being on the phones one day a week is really helping to manage the workload.

85. A problem with still being interrupted by the phones was not mentioned in the meeting notes or other documents and in fact the claimant acknowledged in one meeting that she was assisted by having a day free from phone calls.

86. On 15 October 2020, there was a one-to-one meeting between the claimant and Mrs Harrison and the claimant reported she was feeling better and getting on top of her workload.

87. On 17 October 2020, Mrs Harrison wrote to the claimant about a failure to update a parent about the details of her child's new route. Mrs Harrison had had to inform the parent of the details and also found that the new schedule had not been sent to the transport provider.

You must ensure you pass all relevant information to parents so they know who is picking their child up, you also must send everything from the sent box, not your email.

88. The claimant's evidence was that she telephoned the parent and left a voicemail but she did not reply to Mrs Harrison in writing to say that is what happened nor did she say in meetings that is what she had done. We did not accept that evidence.

89. On 20 October 2020, the claimant was asked to provide correct transport schedules by a school. The claimant said in evidence that the provider had not uploaded the schedules and that the claimant had in fact sent the schedules. She said that she would have told Mrs Harrison this in a one-to-one meeting. This was not referred to in the notes of many one-to-one meeting or evidenced by any contemporaneous document and was not evidence we were able to accept.

90. On 22 October 2020 Mrs Harrison sent the claimant a letter confirming the outcome of the Stage 1 Performance Review Meeting and there was a one-to-one meeting between the claimant and Mrs Harrison. The transport and travel officers were also sent a Covid cases protocol with guidance as to what they should do if children or passenger assistants were affected.

91. On 5 November 2020, a transport provider emailed about not being informed of the need to pick up a child as a result of which the child missed school. The claimant said in evidence that she informed the parent but of course the issue was the provider not having been informed, not the parent. The claimant then said the problem was the workload and that she might have been waiting for further information.

92. Again there was no contemporaneous email from the claimant to set out her explanation nor is there an explanation in the notes of any meetings. Again it seemed to the Tribunal that the claimant was not coping with her workload and that significant mistakes were occurring.

93. On 24 November 2020, another officer replied to a query from a transport provider about one of the claimant's cases. The transport provider emailed Mrs Harrison with some criticisms of the claimant:

This is actually more information then I usually receive always have to chase f or the relevant info to complete the schedules.

Previously a request for placement was done over the phone but I have said t hat unless the information is emailed, I would not look at it and this is because the verbally information would generally be wrong.

On occasion Sharon has told me what route to place a student on but it is nev er the correct one I.e. if you have a UB2 student to go on, she would usually a ssume it would fit on a UB2 bus but unless you have actually routed it on map s you can never tell and it could end up being the wrong side of an area (if tha t makes any sense) or the bus may be full and can not accommodate another passenger... and times given are never correct.

So we would tell her where the child is best placed - we would update the sch edules and then send them over for all of the above reasons. Otherwise it is ju st incorrect schedules going back and forth and you end up with not knowing where you head is.....

I would put money on the fact schedules held in the Sen office and mine differ slightly anyway

As for risk assessments..... I was planning on bringing that one up (still catchi ng up my end) but I haven't seen any risk assessments for this school year at all... I could be wrong and if I am I apologise. In respect to receiving updated ri sk assessments following a change to the schedules - Never ever happens.

94. Speaking in evidence about complaints by transport providers, the claimant said that she was bullied by the two transport providers who had complained. She said that Mr French had commented on her being bullied by one of the transport providers, who wanted to arrange routes to suit herself. She said that she told Mrs Harrison 'over and over' about the bullying but she was not listened to or heard.

95. Mrs Harrison said that it was never suggested to her by the claimant or Mr French that the claimant was being bullied by a transport provider.

96. Nowhere in the documents we saw was it raised by the claimant that she was being bullied, in answer to complaints in meetings or in emails. She did not raise the matter in the formal performance management process. There was an awareness that the relationship between the claimant and one transport

provider was strained and that the claimant at times found some individuals aggressive or rude. There was a mediation meeting with one of the providers which Mrs Harrison perceived to have been helpful, as she said at the 26 January 2021 meeting. The claimant did not contradict that account at the time although she told the Tribunal that the mediation had not worked.

97. In the circumstances, we concluded the respondent was not in a position to consider whether there was a bullying issue in assessing the claimant's performance. It further seemed to us that the suggestion that providers were bullying the claimant was an ex post facto explanation for the complaints, although clearly the relationship with transport providers could be difficult.
98. On 25 November 2020, Mrs Harrison said that the claimant failed to provide parent contact details to a transport provider. By 26 November 2020, Mrs Harrison said the claimant had failed to process a referral for transport services sent on 12 October 2020.
99. On 30 November 2020, Mrs Quinn emailed Mrs Harrison with feedback from the head teacher of John Chilton school, which was one of the claimant's schools.

I spoke to Sue today regarding the outbreak in the school and the LA response and support more broadly. Getting feedback, what went well and what didn't.

Sue flagged that communication from transport team officer allocated to school was not consistent and other LA's were consistently responding very quickly, confirming arrangements and acting on the late notice changes.

She copies in london hire and the officer, most other LAs acknowledge and confirm things are in place. She doesn't hear back from our officer and leaves it unclear what has and hasn't been dealt with. Leading to instances of some children not returning on the correct dates or transport going to houses where children have been asked to remain at home

I have said I will feedback these concerns, and asked her to put any future instances in writing to you.

100. The claimant said in evidence that she disagreed with the feedback from the school although she did not particularise why she disagreed with it. There is no record of her setting out any detail of her disagreement with the feedback provided at the time; she said she would have provided the information in on-to-ones but the notes of one-to-ones do not reflect that. As we have observed, the notes were sent to the claimant and no corrections or amendments were made. The claimant's explanation for not making amendments was that she was under severe stress due to the one-to-one meetings.

101. The claimant said in evidence that she only had problems with two schools: John Chilton and Castlebar. These were the main two schools she dealt with. She said that she was bullied by these headteachers and there were racist comments.
102. The claimant said this issue was raised by her union representative at underperformance meetings but it is not reflected in minutes or something the respondent's witnesses remembered having happened. Again, in these circumstances, a suggestion that the claimant's performance was being affected by or misrepresented by the headteachers was not something the respondent was able to take into account as the claimant did not raise the allegation of bullying by the head teachers at the time.
103. On 1 December 2020 there was a one-to-one meeting between the claimant and Mrs Harrison:

Two late referrals where transport had not been arranged came to light last week. One of them had been sent to Sharon on 12th October and had not been put on transport. Discussed prioritising work to ensure that all referrals are dealt with within timescales. Must have a to do list/order of work in whatever format works for Sharon so that if she starts another piece of work the current piece of work is not forgotten

We discussed feedback received from John Chilton school yesterday;

Sue flagged that communication from transport team officer allocated to school was not consistent and other LA's were consistently responding very quickly, confirming arrangements and acting on the late notice changes.

Sue copies in London Hire and the officer, most other LAs acknowledge and confirm things are in place. She doesn't hear back from our officer and leaves it unclear what has and hasn't been dealt with. Leading to instances of some children not returning on the correct dates or transport going to houses where children have been asked to remain at home

You disagree with the above. I've included it in the notes so you can read the feedback. You need to be aware of this so that all communication is read and responded to within timescales and so you can act on changes to routes as a priority.

If you'd like to discuss anything in more detail let me know and I'll book a Teams call.

104. On 3 December 2020, there was a complaint from a transport provider to Mrs Harrison in particular about liaison with Castlebar School. The provider said amongst other things that emails and phone calls were regularly not being dealt with within the 24 hours previously agreed:

I hope you and your team are well.

I just wish to follow up from the meeting we had on June 29th regarding communication between our team, school and your transport officers.

Without doubt the working relationship is good and we are very grateful during this very testing 6 months for this.

I would like to highlight however that we are still having issues with liaison regarding Castlebar school.

I regularly receive feedback that emails or phone calls are not dealt with within the 24hrs we agreed at the meeting.

To this end I attach two emails from early this week to which we have had no response to date.

Unfortunately I cannot see any improvement since the June meeting with this particular school.

It would also be good to confirm that your dept should provide the contractor with suggested pickup and dropoff times for new children on routes or for route amendments. With this school I am conscious that we receive only a post code and are instructed to create / amend the route whilst for other schools we are provided with full details and the amended route to approve. Perhaps a reminder of the responsibilities of the transport officer / contractor might be appropriate. This week for example (1st December) I rang to advise that I had asked a crew to move on having waited for 20+ minutes (Springhallow 8) outside a child's house. Sharon took the call and when I suggested the parents need to be rung to be told that the bus had moved on she asked whether I expected her to do that. I replied that indeed I did.

Similarly your PAs have been asked to liaise directly with my office over pickup times and locations when they should really be arranging this through your transport officer.

I have also noticed that this school is often contacting us direct being not the correct procedure but out of frustration and necessity.

105. We note that we saw complaints from a range of complainants and that there was nothing on the face of the complaints to suggest that they were being solicited by Mrs Harrison.
106. On 4 December 2020 a transport provider reported that there was an incident involving children who were supposed to be self-isolating on one of the claimant's transport routes . Communication issues resulted in a child with Covid travelling on a bus:

Sorry to both[er] you again but this morning we had a serious incident with one of your transport officers.

Sharon rang us to say two children were not to be transported on Springhallo w routes as they needed to self-isolate.

Sharon however could only give us one child's name as she had forgotten the name of the other child.

Asserting that she could not get through to the school she advised our staff th at the parent would tell the crew on arrival that the child was not travelling.

Unfortunately the parent did not advise our crew(Sp3) and the child (A) was pi cked up. Two minutes later the school rang your PA on our bus to advise that the child was not to be picked up and that therefore they must be returned ho me. This was done.

I'm sure you understand the seriousness of this situation, where a child who is meant to be self- isolating ends up on a school bus because of what looks like a lapse in writing down details.

Sharon forgot not only the name of the child but also the route - thinking at firs t that the child was on SP9 until we informed her that the route did not belong to us.

We all need to be especially vigilant with the Covid19 crisis and I'm afraid this is really poor.

I will leave it with you.

107. The claimant said in evidence that she was given the wrong name by the school. She also suggested there was a sibling issue and that there was a mix up as to which school was involved – Spring Hallow or Mandeville. It was difficult for the Tribunal to understand her explanation and it was not one we could see that she had given contemporaneously in email or in any note of a meeting. It was very different from the account given by the transport provider. We were unable to accept the explanation.
108. On 7 December 2020, a transport provider complained to Mrs Harrison that the claimant had not provided feedback the transport provider requested on 4 December 2020.
109. On 8 December 2020 the claimant met with Mrs Harrison, Ms Ahmed and Mr Inett to review the claimant's performance over the last two months. The outcome of the meeting was a decision by Mrs Harrison that the claimant should progress to stage 2 of the MUP procedure. This was a decision by Mrs Harrison and not objected to by Mrs Quinn. Mrs Harrison considered that the concerns about the claimant's performance had persisted and the claimant had not by this point completed the online training courses which Mrs Harrison had told her to complete during the review period.

110. On 10 December 2020: The outcome of the meeting on 8 December 2020 was confirmed by letter:

When we met on 8 December, we discussed what steps you had taken to address the issues raised at the meeting on 6 October. Although you said you had tried to address the concerns raised, overall I consider that you have made insufficient progress for me to have confidence that you will be able to meet the required standards of work performance on a sustained basis.

In these circumstances, I have decided that the next step will be to arrange a Stage 2 Performance Review Hearing, which will be conducted by Tamara Quinn, Assistant Director. Please note this is usually within ten working days of me referring your case to her, however, due to me being on annual leave and the Christmas holidays, this has been scheduled for Friday 15th January at 10:30.

You will be written to separately to provide you with details and required notice to attend the Stage 2 Performance Review Hearing. If you have any queries in the meantime, please do not hesitate to contact me.

111. Mrs Quinn invited the claimant to a Stage 2 Performance Review Meeting on 15 January 2021. That meeting was subsequently postponed to 26 January 2021.
112. By 18 January 2021 the claimant had completed an online training course on Managing Your priorities on the eLearn portal, as requested by Mrs Harrison.
113. On 20 January 2021 Mrs Harrison sent a Stage 2 management report to Mrs Quinn which included the following content:

Management's assessment of Sharon's performance

The main concerns are that, despite measures being put in place to support and assist Sharon, she has not made sufficient progress in a number of areas. Sharon struggles to prioritise her workload, organise or structure her day/week, manage her emails, communicate effectively with key contacts, deal with changing or conflicting workload or meet deadlines. Sharon's performance continues to be unsatisfactory in the following areas:

- Adhering to deadlines or making management aware if unable to meet deadlines*
- Managing email communication in a timely and effective manner*
- Prioritising workload and adapting to changing priorities*
- Responding to queries in a timely and effective manner*

- *Effectively manage workload in a proactive manner*

Evidence for this is attached in anonymized emails/notes in Appendix 5

The areas of activity above, in which Sharon is falling short of the performance required, are significant to her role.

The Hearing Officer is asked to consider what further steps should be taken under the Managing Unsatisfactory Performance procedure.

114. We note that as well as the broad categories of performance issue which were outlined, the claimant was provided with the detail of particular complaints and concerns in the appendix to the report.

115. On 21 January 2021, there was an email from John Chilton school:

I understand transport went to collect TL this morning but parents hadn't been informed. This is really disappointing as it means that TL is missing yet another day from school and yet another day when he is unable to access his education.

116. It also became apparent that day that the claimant had waited ten days to notify the appropriate persons at the respondent about a passenger assistant being positive for Covid. There were concerns about her handling of another case of a passenger assistant with Covid.

117. Mrs Harrison produced an addendum to her report about these issues:

On 21st January 2021 I became aware of two separate cases of Passenger Assistants (PA's) testing positive for Covid-19.

Upon reviewing both cases, it became clear that Sharon had not followed the procedure that I had sent to the team on 22nd October 2019 (attached as Appendix 7) and an email update on 10th December 2020 (attached as Appendix 8).

XX route

On 21st January 2021 Sharon copied me in on an email sent to Raj Chowdhry (Corporate Health and Safety) and Public Health to inform them of a positive test for a PA who worked on the route.

The PA tested positive on 11th January 2021, so I was unclear why it had not been reported, as per the procedure, for 10 days I emailed Sharon to query if we had been notified at the time by the provider and asked Sharon to investigate and come back to me with her findings.

The provider confirmed by emails that they had notified us on 11th January 2021 and had followed their procedures accordingly. Sharon did receive this email and responded to it on 12th January 2021

Sharon called me on 21st January to advise me that she had called the school on 11th January to let them know of the positive case, she also called the provider and the mother of the child on the route. I asked Sharon why she had not followed the procedure (eg notifying public health, corporate health and safety etc) and she said she was not aware of the procedure until 20th January 2021 when I had forwarded to the team. I asked Sharon if she had discussed the positive test result or the procedure to follow with Mac Magon (Mac was deputising for me in my absence) and she said no because she finds it hard to get hold of Mac and he doesn't answer her calls.

I spoke with a member of staff at the school who advised me they had been made aware of the positive case by a parent of a child on the route. They said they were contacted by Sharon but were 'not given any specific information or for how long they would need to self-isolate for'. School also said in an email dated 21st January 2021 that they had to follow up with Sharon.

Public health, corporate health and safety and Stephen Dunham were not notified of this positive case, therefore we are not clear if any other action should have been taken.

There has been no follow up with the provider, school or parents regarding the date the isolation period ends and when the children can go back to school.

YY route

The PA called in sick on 12th January 2021 and notified us that she had tested positive for Covid on 13th January 2021 (Firstcare notification received 07:40 13th January 2021). At approximately 08:50 on 13th January, the school notified the provider that the PA had tested positive. The crew had already collected a child and were en route to school, the bus took the child home and the route has not been running since 13th January. The provider called the transport hub to discuss with Sharon.

Again the procedure I had sent had not been followed, public health, corporate health and safety and Stephen Dunham had not been notified, due to this we are not clear if any other action should have been taken.

There has been no follow up with the provider, school or parents regarding the date the isolation period ends and when the children can go back to school.

Communication from a school

On 21st January 2021 a member of staff at one of the school's Sharon is responsible for emailed Sharon and copied me in in relation to a pupil who had not attended school since the start of term. School had said it is imperative this pupil attends as he is blind and cannot access learning at home. Sharon had arranged the transport with the provider but had not informed the parents, therefore transport turned up and the child was not aware or ready;

Hi Sharon,

I understand transport went to collect X this morning but parents hadn't been informed. This is really disappointing as it means that X is missing yet another day from school and yet another day when he is unable to access his education. It is imperative that you inform parents today with the details of what has been put in place for X so that he can attend school from tomorrow onwards.

Kind Regards,

I am concerned that Sharon is not managing her emails effectively and was not aware of the procedure I had sent in October and followed up on in December. I am concerned that if Sharon was unclear what to do when receiving notification of a positive Covid case, she did not ask Mac for guidance.

The failure to communicate effectively and pass on all relevant information and seek guidance from PH and corporate health and safety could put people at risk of spreading Covid-19 and have a significant impact with transport providers and schools.

118. We note that the addendum of the report provided details of these concerns which the claimant would have been able to respond to at the subsequent meeting.
119. On 25 January 2021: Mrs Harrison forwarded to the transport team an email she received from the respondent's 'Learning' department about available courses in February including one entitled 'Planning for a positive retirement'.
120. On 26 January 2021, there was a Stage 2 Performance Review Meeting, chaired by Ms Quinn, with the claimant, Mr Inett, Ms Ahmed, a note taker and Mrs Harrison also present. Mrs Quinn provided the claimant with a further four-week monitoring period to meet required standards. In other words, there was an extension to the stage 2 period rather than a progression to stage 3.
121. The notes record the responses made by the claimant to the concerns raised in the report. The claimant said that the workload had increased because of the pandemic, that others have issues but she had been singled out and that her performance had improved:

I will read from my statement as agreed with LA. During the COVID pandemic there has been an increase in the demands on the service, everyone in the team feels overstretched and has the same issues as I have. There have been significant changes in children's well-being and high demands on the service and constant changes that lead to working long hours.

On top of this, our friends and families have been affected by the pandemic, but somehow, we still carry on.

Working from home is harder and not the same as in the office. In some instances, it does take longer to get things done or get answers from your work colleagues.

During the last 10 months I have had to take my laptop for servicing to IT in Perceval House twice, which causes more delays as I have lost my drives and time sheets.

I have been working in the LA for 33 years; I have been always professional. I have worked through many crises, that affected transport, but I have always made sure that I have worked to the best of my abilities. I have never been subjected to such excessive judgement

122. The claimant did not respond in detail to the cases that were included in the original report or addendum and did not provide any evidence that the criticisms were unfounded.
123. On 28 January 2021, there was an email from Liz Chiles to all staff with reference to courses which had available places including 'Preparing for Retirement'.
124. On 2 February 2021, there was a one-to-one meeting between the claimant and Mrs Harrison. We set the notes out nearly in their entirety because they illustrate the detailed discussions which were being had at this point.

We discussed the following;

PA hours, please confirm the hours for the following PA's to Mac and I by the end of the day tomorrow;

...

Aiming to complete Firstcare PA's return to work interviews and update itrent re PA's who are sick/shielding etc by the end of this week. Sharon will call PA's who are not working and update the risk assessments, to discuss anyone who is not happy to work with Donna to make decisions on individual basis

Working on two amendments to transport (Gerald and Reid Taylor), reviewing both today (liaising with SENTA)

Tearinye picked up some areas of your work last week whilst you were on leave, please discuss with Tearinye if not clear with anything. Follow up with Tearinye to ensure transport log and COT were updated for any changes made last week.

We discussed the stage 2 performance letter sent by Tamara today, you've not had a chance to digest it, if you have any queries please discuss them with Lydia, Tamara or me. You are meeting with Lydia on an ongoing basis for the next few weeks.

The performance review meeting will be scheduled after the 4 week monitoring period that started today. We discussed the following essential requirements of your job role that will be monitored point by point;

- ** Meeting all deadlines set, if you are not able to or have any concerns you must contact me to discuss*

- * *Managing email communication in a timely and effective manner (prioritise urgent matters and respond to those first, respond to all emails within 2 working days, ensure you reply to all areas and update all relevant parties)*
- * *Responding to other queries (eg telephone calls/messages) in a timely and effective manner (prioritise urgent matters and respond to those first)*
- * *Effectively manage all areas of workload in a proactive manner (including prioritisation and organisation)*
- * *Follow all processes and procedures, ask for clarification from Donna if unclear*
- * *All emails to be sent from the sent-transport email. If you receive transport emails in your personal inbox, please use the drop down to reply from sent (as discussed)*
- * *Transport referrals need to be organised in date order, oldest to newest. Transport must be arranged to start within 2 weeks of receiving referral (at the latest)*
- * *For new or amended transport, the transport log and COT spreadsheet to be updated within 3 working days of the transport being arranged*
- * *Schedules in Teams must be kept up to date with all current, correct information. Previous schedules must be moved to archive. When notified of a change, ensure the schedule is updated within working days and share immediately with providers and schools*
- * *Risk assessments must be updated immediately that any change is made to an existing route, or be created using the template for any new route, and shared with schools and providers. Previous RA's should be moved to archive in Teams. You will arrange a training session covering creating, amending and storing risk assessments with Patsie to be completed by end of next Monday 8th February*
- * *Check the sent-transport email inbox at least twice a day for emails flagged for you. Prioritise and respond to urgent emails straight away, all other emails to be responded to within 2 working days as above. Move any emails to your subfolder once complete (so only outstanding emails are in the inbox)*
- * *Liaise with providers regarding routing and scheduling, you are responsible for updating schedules and sending to providers and schools*
- * *Communicate effectively with colleagues via skype and email*
- * *Let me know if you are unable to complete tasks or have any queries/are unclear about anything. Let me know if you have any concerns regarding communication with customers (to include providers and schools)*

I stressed to you the seriousness of the next 4 weeks and the review meeting and the possibility that you could move to stage 3 of the process if you do not

meet all of the requirements of your role as per the stage 2 performance letter from Tamara and the above. If you have any concerns, queries, require clarification etc please ask me, I am more than happy to help.

I asked how you were feeling and you said the process is stressful, it's not an easy journey. I asked if you have support and people to talk to and you said you do.

I have scheduled the 121 meetings for every Tuesday at 14:00, we have our team meetings on Wednesday's. If there is anything you need from me at any time please do get in touch.

If you have any queries about anything contained in this email please let me know by end of Thursday 4th Feb.

125. On that date Mrs Quinn confirmed the Stage 2 outcome by letter.
126. On 5 February 2021 Mrs Quinn wrote to the claimant to inform her of the respondent's Wellbeing/Employee Assistance Programme and to remind her to seek support from her union, Mrs Quinn or Mrs Harrison as appropriate.
127. There were further one-to-one meetings between the claimant and Mrs Harrison on 16 and 25 February 2021. We could see from the notes of those one-to-ones that there were detailed discussions about various performance issues and reminders of standards.
128. On 3 March 2021, Mrs Harrison chased the claimant about risk assessments which were two months overdue. On 4 March 2021 the claimant sent some risk assessments; Mrs Harrison pointed out that one was lacking scores and others were missing.
129. The claimant's evidence was that the risk assessments had been assigned to other staff who been asked to help clear the backlog. She also said that she that did not have adequate training on risk assessments. These matters were not put to Mrs Harrison, who said that the claimant had turned down some training offered to her on risk assessments, and we noted that the claimant's response to Mrs Harrison raising the issues on 4 March 2021 was:

Sorry, and thank you.

Sharon

130. The evidence we had was that other transport and travel officers were completing these risk assessments.
131. Also on 4 March Mrs Harrison informed the claimant of negative feedback from a parent of a pupil. The parent had been trying to change to home pick up since

prior to Christmas but said that she had not been able to get a response from the claimant.

132. In evidence, the claimant did not explain the delay in dealing with this request. She said that she did not (at the Tribunal hearing) have access to information she would need in order to ascertain what had occurred, but it appeared that she had not challenged the parent's account at a time when she would have had access to documents.
133. On 5 March 2021, there was an issue about a transport provider being given late notice that a child did not need to be picked up. The claimant's evidence was again that she could only explain the issue if she had access to documents but again she had not challenged it at the time and had not sought to access relevant documents earlier in the proceedings.
134. On 9 March 2021, the claimant failed to action a head teacher's request to follow up an incident involving a driver inappropriately touching a child. In evidence the claimant said that the school should have dealt with it as it occurred on school premises. We observe that the school had no power over driver and we could understand the perception that the claimant had not engaged appropriately with the concern.
135. On 11 March 2021, Mrs Harrison became aware that the claimant had not told payroll if a passenger assistant she managed was still off sick. This issue had been ongoing since October 2020; chasers were sent to the claimant in February and March 2021. The problem had been created by an IT glitch but the claimant's failure to respond to queries had led to the passenger assistant being underpaid for a period.
136. The claimant said in evidence that she had spoken to payroll on the phone twice but she did not say this by email when chasers were sent. The paper trail makes it look like no action was taken by the claimant. The claimant said that she 'could not be held responsible for something she had no control over'. We did not find the claimant's evidence on this issue plausible and it seemed to us that there had been a failure by her to deal with the issue.
137. On 12 March 2021 there was a one-to-one meeting between the claimant and Mrs Harrison:

We discussed the following;

Spot check at Heathlands this morning, went ok, few things to follow up with the provider (eg fire extinguisher, first aid kit, wipes etc). Going to re-arrange to spot check Ellen Wilkinson as it was closed today.

Still 3 remaining outstanding RTW interviews to do, you will complete these next Tuesday, said it is difficult to get hold of PA's. You said you have left messages for PA's and they haven't called back, if unable to get hold of them

leave another message to say will be escalated to me if they don't reply. These RTW have been outstanding for weeks and have carried over week to week for the last 5 121's and are still not complete.

IT issues this week, keyboard wouldn't work last night, had to force log off, issues with Teams. Not reported to IT, advised to log on the ICT portal

Lots of calls from PA's and parents this week, complaining as they have been used to reduced number of children on route, now we have gone back to normal and parents and PA's are not happy

Horsenden and The Rise referrals complete, on CoT, risk assessments to be completed. New referrals for The Willows and Castlebar, both in hand

Missing tribal numbers etc for JC routes – ongoing, to pass over to Tearinye as Sharon is only able to update these in any free time. If tribal numbers are missing please email Roo and cc Marti to get the tribal numbers, enter onto the route schedule and COT spreadsheet

PA hours to be updated and completed today

...

Going through schedules, removing duplicates, tidying up, I have sent some emails this week with routes that need to amended asap. Discussed scoring on risk assessments

Recruitment, no update or news, waiting for HR

To book on the managers appraisal course on elearn

Very busy with phone calls, IT hiccups don't help, really trying to get on top of everything. Schools often send information through last minute. Work later to get things finished when it's quieter. We discussed that I'm concerned about the hours Sharon is working, needs to reduce the number of calls taken to focus on work rather than working late, should not work at the weekend unless discussed with me prior

Performance management meeting on Monday. Lydia has asked you to provide information but you haven't had time, you said you can't take time away from work because you are so busy, can't do it at the weekend or you'd be working 7 days a week. You said you don't have any evidence to provide on Monday. I said that I can see that you have been trying hard with aspects of your work, eg completing referrals on time and managing emails, however you are still not performing to the level you need to to be able to carry out the role effectively. I also have concerns about your wellbeing and the amount of hours you are working to try to manage your workload. I asked you to think about having to work to the level expected all the time and if you can manage that and maintain your wellbeing, you said you can.

138. On 15 March 2021, the claimant met with Mrs Quinn, Mr Ilett, Ms Ahmed, a notetaker and Mrs Harrison, to review her progress. Mrs Harrison provided an assessment of the claimant's performance in the review period. Mrs Quinn concluded that the claimant should progress to Stage 3 of the MUP procedure because she was satisfied that the claimant was still not performing to the required standard. She was particularly concerned about failures to carry out return to work interviews for passenger assistants and risk assessments for particular travel routes. The latter issue was a safeguarding issue for vulnerable service users and also a key part of the claimant's role.
139. We saw the notes of this hearing. Detailed points about her performance were put to the claimant and the claimant responded in generalities. The claimant was essentially saying she had too much work and that she was getting work done and meeting deadlines but she was not answering particular points raised.
140. The claimant raised the issue that she had been unfairly treated although without providing specifics and Mrs Quinn said that she should raise that with the respondent and seek advice from her trade union representative. The claimant told us in evidence that she did not pursue a grievance because of advice from her trade union representative.
141. Mrs Quinn also indicated to the claimant that she should provide evidence in support of her representations at the next stage of the MUP procedure. She directed Mrs Harrison to ensure that the concerns were clearly explained to the claimant, that she was given adequate time to address them and said that Mrs Harrison should continue to hold regular one-to-ones with the claimant:

SD explained that she has been unfairly treated and victimised. SD emphasised that she has been working to the best of her abilities to meet requirements of the role.

SD said that she felt anxious and nervous and that she was unable to ask for help.

SD felt that asking for help was seen as her incompetence to fulfil her role. SD felt that this process has undermined her confidence in her performance. SD said she felt she had been unfairly treated

TQ reiterated that if SD feels that she has been treated unfairly, she should raise this with the Council with evidence and seek advice from Lydia.

DH confirmed that she has discussed with SD the issues of her performance point by point in detail. DH confirmed that clear deadlines were set, and all the possible support offered, unfortunately some points were only partially met and some not met at all. Deadlines were agreed at 121s and SD continues to not meet them, does not come back and say she cannot meet them, therefore when something becomes urgent which is overdue SD has on occasion been asked to complete the task within a short timescale.

SD SD disagreed with DH. SD felt that she has addressed all the points that were raised, and she was confident that she met most of them. SD said that she felt confused as DH has told her in their 121's that she has made significant progress

142. On 19 March 2021 there was a one-to-one meeting between the claimant and Mrs Harrison.
143. On 30 March 2021, Mrs Harrison asked the claimant to prioritise some schedules for children with long journey times which were outside of the statutory limit for their age.
144. On 31 March 2021, Mrs Harrison wrote to the claimant about having not completed return to work interviews with passenger assistants which were now months overdue in some cases and which Mrs Harrison had been raising with her regularly.
145. The claimant's explanation in evidence about the return to work interviews was that she had had to learn how to use a new system for recording them; there was no evidence that she raised that as being an issue at the time and she eventually told the Tribunal that the training took half an hour. The claimant also said that she was inundated with Covid issues and it was hard to get hold of passenger assistants, who also worked as lunchtime assistants, but the return to work interviews were months after the relevant absences and the claimant's explanation did not seem to us to be a satisfactory one.
146. On 6 April 2021 there was a one-to-one meeting between the claimant and Mrs Harrison. They had a discussion about how the claimant was working in excess of her contractual hours.
147. On 8 April 2021 Ms Quinn wrote to the claimant inviting her to attend a Stage 3 Performance Review Meeting on 21 April 2021.
148. Mrs Harrison prepared a very detailed report about the claimant's performance. At this point Mrs Harrison said that she was effectively having to prioritise the claimant's tasks for her and that this level of management support was not sustainable long term.
149. On 12 April 2021, the claimant submitted a Data Subject Access Request ('DSAR') to Ms Finlay. Mrs Harrison did not have any involvement in the claimant's DSAR.
150. On 19 April 2021, the claimant commenced long-term sick leave. Due to the claimant's absence, the Stage 3 Performance Review meeting never took place. The claimant has been signed off work up until the date of the Tribunal hearing. We understand that she has recently been given notice to terminate

her employment but events which postdate the claim form in this case were not relied on by either party in relation to these claims.

151. On 20 April 2021 two further letters were sent by the claimant's solicitor to Ms Finlay: a letter including a further DSAR and a without prejudice letter
152. Mrs Quinn told us that there were then settlement discussions between the claimant and respondent which ended in very late July 2021. There was no progress made on or communication about the claimant's DSAR during this period. Mrs Quinn said that she thought there was an inaccurate view that the DSAR and the settlement negotiations were wrapped up together. The DSAR was not consciously ignored or delayed; there was simply confusion.
153. 27 April 2021 was the scheduled date for the claimant's appraisal meeting with Mrs Harrison. The meeting was rescheduled for 21 May 2021 but did not take place on that date owing to the claimant being on sick leave. The claimant did not end up having an appraisal during Mrs Harrison's tenure as her manager.
154. It was put to Mrs Harrison that she could not expect team members to know how to prioritise work if they had not had an appraisal and been set objectives. Mrs Harrison said that the day to day work was still there and had not changed. The standard workload and deadlines remained the same. It seemed to the Tribunal that it was not generally necessary for there to be an appraisal process for employees to understand what tasks were required as part of their work and not necessary on the facts of this case.
155. On 15 July 2021, the claimant started Early Conciliation and on 26 August 2021, the Acas EC certificate was issued.
156. Mrs Quinn said in evidence that there were staff holidays in August and September which slowed down dealing with the claimant's DSAR:
157. On 31 August 20021, the respondent's data protection team asked Mrs Quinn and others for material for the claimant's DSAR by 10 September 2021. On 7 September 2021, the claimant presented her claim form
158. On 8 September 2021, Mrs Quinn emailed the claimant saying that her DSAR had been passed to the data protection team who would be in contact shortly.
159. 9 September 2021 Ms S Van Stokom (Mrs Quinn's PA) wrote to the data protection team to say that they could not complete the DSAR by the following day due to staff having been on leave.
160. On 11 September 2021, the ICO emailed the respondent upholding the claimant's complaint that the respondent had failed to provide a response to the claimant's DSAR within a calendar month.

161. On 1 October 2021, the data protection team wrote to the claimant a with response to her DSAR.

The 'big birthday' discussion

162. The claimant's evidence was that at some point Mrs Harrison approached her in the open plan office where other employees were working and said, 'I noticed you had a big birthday recently and have kept it quiet.'
163. Mrs Harrison's evidence was that the practice was to do a collection, card and gift for big birthdays (20,30,40,50,60). She didn't recall this conversation in detail. She had spoken to someone else who mentioned that the claimant had turned 60 a couple of months before. We note that this would logically put the discussion some time in late 2019. Mrs Harrison did not think the conversation was in the open plan office. She recalled saying that she would have liked to get the claimant a present and a card. She said she would not have said it openly and in a way to embarrass the claimant.
164. It seemed to us that this remark by Mrs Harrison was well-meant but perhaps clumsy. Mrs Harrison agreed that the claimant is a private person and we accepted that the claimant had been affronted by the reference to her age.
165. This incident seems to have taken place before the performance management process. It also seems to have taken place before the pandemic so it may well be correct that it was in the open plan office, although we accept that Mrs Harrison would not have announced it openly to the whole team. There was no evidence presented by the claimant that there was not a practice of celebrating big birthdays and Mrs Harrison was not challenged on that aspect of her evidence.

Evidence about other DSARs

166. Mrs Quinn gave some evidence about two other DSARs which were delayed during this period but which she was not involved in. We were provided with some correspondence about these cases.. These DSARs were both from white staff who were under 60. In one case, the DSAR was responded to on 14 April 2021, having been presented on 5 February 2021, although in that case there was not a long gap in the employee receiving an initial response.
167. In the other case, the DSAR was submitted on 22 June 2021 and a full response provided on 13 December 2021. It appeared that after an initial prompt response to the DSAR, there had been a gap from late June until 27

September in communicating with the employee and then a further gap between 27 September and 13 December 2021.

Mrs Harrison's lost data

168. We also had some evidence from Mrs Harrison about loss of data from her OneDrive and Outlook accounts.
169. Mrs Harrison's had lost her sent emails from 12 November 2020 until 26 April 2021 due to a problem with technology. We saw emails demonstrating that Mrs Harrison had tried to recover the lost data via the respondent's IT department but had not had success.

Claimant's other witnesses

170. We saw witness statements from the following, none of whom attended to give live evidence:

Ms El-Saffi – daughter of a passenger assistant. She described how caring the claimant was during a period of her mother's sickness. She described how kind, supportive and upstanding she considered the claimant to be.

Ms A John – passenger assistant. She said that the claimant was very supportive and very professional as her line manager. She was reliable, trustworthy and took her job very seriously. Schedules were always sent out on time and minibuses checked to make sure they were up to standard.

Ms J Thomas – passenger assistant. She said that the claimant was professional and approachable, honest and full of integrity. She was a supportive manager and colleague.

Law

Direct discrimination

171. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.
172. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if

there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision. “

173. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that

inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

174. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.
175. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)
176. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

177. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'
178. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.
179. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.
180. In some cases, the question of whether there is 'less favourable treatment' is so intertwined with 'the reason why' that a sequential analysis can give rise to needless problems and should be dispensed with: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL.

Time limits

181. Under s 123 Equality Act 2010, discrimination complaints should be presented to the Tribunal within three months of the act complained of (subject to the extension of time for Early Conciliation contained in s 140B) or such other period as the Tribunal considers just and equitable. The onus is on a claimant to convince the tribunal that it is just and equitable to extend the time limit: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA.
182. Under s 123(3), conduct extending over a period is to be treated as done at the end of the period.
183. In order to identify the substance of the acts of which complaint is made, their nature and whether there is said to be a link between them it is necessary to look at the claim form, but it does not matter if the claimant has expressly pleaded that the acts amount to continuing acts. The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor (Aziz v FDA [2010] EWCA Civ 304).

Submissions

184. We received written and oral submissions from both counsel for which we were grateful. We took these into account but refer to them below also insofar as is necessary to explain our conclusions.

Conclusions

Disclosure issues

185. We considered carefully whether there were issues with the respondent's disclosure of documents because these might be part of material from which we could reasonably conclude that race or age played a role in the claimant's treatment.
186. There were a number of points raised about the respondent's disclosure:
- a) The claimant said that the respondent had failed to produce documents from the truly informal stage of performance management, ie the period before the informal part of the formal procedure was commenced. The respondent said that the issues in the list of issues post-dated the informal stage and Mrs Harrison said she therefore did not look for documents from that stage. We note that the claimant did not request disclosure of any such documents, although we bear in mind that she was unrepresented throughout most of the proceedings. We understood she had representation at the outset and then for the full merits hearing.
 - b) Mrs Harrison had lost some emails as described above. Her account that they were genuinely lost was supported by documentary evidence and we accepted her account.
 - c) There was a suggestion that the respondent had failed to produce emails which showed the claimant responding to some of the concerns raised in emails. The claimant remained employed throughout the period to date but said that she could not access her emails. The respondent said her access to email had not been deliberately cut off and it appeared that the issue was a technology issue. The claimant had not as part of the proceedings asked for emails nor had she asked the respondent for assistance in accessing her emails. When, during the hearing, access to her work emails was given to the claimant, she said there were too many to look through and no emails were ultimately produced by the claimant. Mrs Harrison said she had produced what emails she had (which would have been received rather than sent emails). At the request of the Tribunal, the respondent did a further search during the course of the hearing and found a very small number of further emails, in none of which did the claimant challenge the issues raised with her in the emails to which she responded. There was no application by the claimant for specific disclosure at the outset or indeed at any stage of the hearing. The claimant did not give any evidence as to any specific email she thought existed and which was missing and ultimately

we were not persuaded that anything material was missing or that the claimant believed anything material was missing.

187. For these reasons, we did not conclude that there was any material failure on the respondent's behalf to disclose relevant documents.

Credibility issues

188. The respondent said in submissions that the claimant's recollection was confused / unreliable, that she admitted some underperformance and that she made implausible allegations. There was some truth we found in that account to this extent - we concluded that there was an element of wishful thinking in the claimant's account of what had happened in relation to some of the performance issues raised. We considered that this arose because she, understandably, found the criticisms and concerns very hard to accept. She was, as Mrs Harrison, said a kind person and she cared very much about her role and doing a good job.
189. Although we did not accept the claimant's account of many of the incidents said to give rise to performance issues, we did not think her responses were intended to be misleading; we thought they simply reflected the claimant's inability to come to terms with the perceived deficiencies in her performance.

Issues

The Claimant describes herself as of an African-Caribbean background. For the purposes of her direct race discrimination complaint she compares herself to individuals who are white. In relation to her complaint of age discrimination the Claimant's age group is over 60 and she compares herself with people who are younger than 60.

Issue: Did the Respondent (Ms Harrison and/or Ms Quinn) do any of the following?

- a. Require her to attend a formal performance management meeting in September 2020*
190. This was a somewhat confusing allegation because the meeting in September was on its face the informal stage of the formal performance procedure. It appeared from submissions that what the claimant was saying was that because her trade union representative Ms Ahmed was invited to discuss the process and Mrs Harrison had notified HR, the 3 September 2020 meeting was in fact a formal meeting. There was no complaint that she was asked to attend an *informal* meeting under the MUP procedure.

191. This would be more than a matter of semantics if, after this meeting, the claimant then progressed through the process as if this meeting had been stage 1 of the formal process; however she did not. We accepted that Mrs Harrison contacted Mrs Ahmed because she was concerned about the claimant even though the procedure did not require or allow trade union representation at the informal meeting. It seemed to us entirely normal and unremarkable that Mrs Harrison informed HR.
192. We could see no evidence that this meeting was anything other than what it purported to be - which was an informal performance meeting under the respondent's MUP procedure.

Issue: Did the respondent set unreasonable targets/objectives thereafter?

193. Mrs Harrison told us that the tasks the claimant was set were BAU tasks which were part of her role as a transport and travel officer. The claimant said they were extra tasks. If one looks at the lists of tasks and objectives set out in the various meetings; they appear to be ordinary parts of the role as described in the job description.
194. The claimant did not describe in evidence any extra tasks she had been given that were not part of the role. Asked by the Tribunal for examples of the 19 tasks she said had been required to do within 48 hours, the claimant said there were return to work interviews and putting 'tribal numbers' on schedules. Those tasks seemed to fall squarely within the job description. The claimant also said that six had been set one week and six the following week and so it was unclear to us why exactly she said there were 19 required within 48 hours. There was no date put on that incident, and we found the claimant's evidence vague and unsatisfactory.
195. So far as the time requirements for tasks are concerned, it was said that it was unreasonable to require the claimant to respond to email within 24 hours. However, the requirement was simply to send a holding email within 24 hours. We were told by Mrs Harrison that these requirements did not differ from the requirements for other transport and travel officers.
196. We had no evidence that the claimant had a heavier workload than any other transport and travel officer, which might have shown that the expectations were unreasonable. The claimant did not give any evidence which enabled us to compare her workload at the material times with either her previous workload or the contemporaneous workload of other officers. We preferred Mrs Harrison's detailed and specific evidence to the claimant's, which again we found vague and unclear.

197. The only evidence which might have suggested that the claimant was working to unreasonable targets was the evidence that she was working in excess of her contracted hours at one stage. However, in the absence of other evidence of difficulties with the targets, it seemed to us likely that the issue was that the claimant was not working efficiently.
198. We did not find that there were unreasonable targets set.

Issue: did the respondent subject her to excessive supervision?

199. At most the claimant had weekly supervision sessions which we were told averaged about thirty minutes, although they were sometimes longer.
200. We did not find that Mrs Harrison was copied in to all of the claimant's emails or that she was interfering with the claimant's emails in the ways the claimant suggested. There was no evidence that she was soliciting complaints about the claimant.
201. We concluded that the claimant was subject to significant supervision during the MUP procedure, but, given that there were issues about safeguarding, given the number and seriousness of complaints, and given that, because of the nature of the work, mistakes could have serious consequences, we did not consider that the supervision could properly be characterised as excessive. Mrs Harrison's evidence was that without that level of supervision not as much would have been done.
202. We accept that this was an extremely stressful and difficult time for the claimant and that she found the supervision very difficult.

Issue: Did the respondent require her to attend a stage 2 meeting

203. There was no dispute that the respondent required the claimant to attend a stage 2 meeting.

Issue: Did the respondent subject her to continued unnecessary supervision after the stage 2 meeting

204. For the same reasons as outlined above, we did not consider that the ongoing supervision was excessive.

Issue: Did the respondent require her to attend a stage 3 meeting the outcome of which would be that she would be demoted or dismissed

205. There was no dispute that the claimant was invited to attend a stage 3 meeting. She *could* be demoted or dismissed as a possible outcome not *would* be.

Issue: Did the respondent fail to respond to her DSAR request within 30 days

206. There was a failure to respond to the DSAR request within 30 days.

Issue 2. If so, has the Respondent (Ms Harrison and Ms Quinn) treated the Claimant less favourably than they would have treated a white comparator in materially comparable circumstances?

207. When looking at a hypothetical comparator, we considered it was appropriate to take a Shamoon approach and consider the 'reason why' question at the same time as the issue of less favourable treatment. Was the claimant treated less favourably than a white comparator and was that because of her race? We found that there were significant performance concerns in relation to the claimant, so the characteristics of the hypothetical comparator included a similar level of performance concerns, at least in respect of the two allegations relating to the MUP procedure which were made out on the facts.

208. We looked at the three alleged detriments which we found occurred:

Requiring her to attend a stage 2 meeting

209. We looked carefully at facts which might have caused the burden to shift, without looking at this stage at the explanation for the treatment.

210. We carefully considered aspects of the facts pointed to by the claimant:

- The fact that there was a black woman in Mrs Harrison's team whose employment was terminated during probation. We had no material to contradict what Mrs Harrison told us about the circumstances, ie that race did not play a role, and clearly there was no statistical significance in a single other case. This did not form material which we considered could tend to shift the burden of proof. It had in any event to be seen with the relevant contextual fact that Mrs Harrison appointed two black and two Asian staff to this team during this period.
- We considered the fact that the claimant had 33 years' service and no previous performance processes together with Mr Campbell's evidence about her excellent performance. This was material which we thought had potential to cause the burden to shift, however we looked also at contextual evidence which we accepted from Mrs Quinn and Mrs Harrison, that there had been issues with the department and that Mr Campbell was not doing the full job.
- We considered the statements from the claimant's colleagues. None of these colleagues were at a level where they would likely have been aware of the issues which were arising with the claimant's performance and they did not appear for to be cross examined so were not able to place very much weight on their evidence to the very limited extent which it touched on the issues we had to decide.

211. Looking at those matters together with other contextual facts such as Mrs Harrison's record of appointing BAME staff, we concluded that the burden did not shift.
212. If case we were wrong about that, we went on to consider whether the respondent had provided an explanation which satisfied us that there was no discrimination.
213. We concluded that we were entirely satisfied that there was ample and cogent evidence of the performance concerns and why they needed to be addressed. We accepted Mrs Harrison's evidence that, in effect, before she took over management of the team, users and providers had got used to a lower standard of service and that there was a need to improve standards in the interests of service users.

Required her to attend a stage 3 meeting the outcome of which would be that she would be demoted or dismissed

214. This was an allegation against Mrs Quinn. There were no contextual factors which were pointed to as suggesting Mrs Quinn discriminated against other black employees.
215. We could not see any facts from which we could reasonably conclude that Mrs Quinn, presented with cogent evidence of performance issues, had made a decision to progress the claimant to stage 3 because of her race. Insofar as it is suggested that Mrs Quinn should have stepped in to change Mrs Harrison's decision about the stage 2, the same reasoning applies.
216. If we are wrong and the burden of proof does shift, we were satisfied by Mrs Quinn's explanation for her decision (ie that she was presented with persuasive evidence of the claimant's ongoing performance issues) and that her decision was free from conscious or unconscious race discrimination.

Delayed responses to DSAR

217. We were not entirely persuaded the claimant herself thought there was any discrimination involved in the delay to the DSAR. At the outset of the hearing, it appeared that she was going to withdraw the claim but she then decided not to do so after a discussion with the Tribunal about whether her other complaints were on their face presented out of time. In evidence she appeared to be concerned about the failure to follow procedure and only belatedly said she thought her race and age played a role.

218. In terms of who the failure was ascribed to, it appeared that it could be said to have been Ms Finlay or Mrs Quinn who had not told other staff to get on with the DSAR but it was somewhat unclear. It was not put to Mrs Quinn that she herself had discriminated against the claimant in her involvement with the DSAR.
219. The only fact that we could see that might cause the burden of proof to shift was that responding so late to the DSAR and not initially responding to it at all was on the face of it unreasonable, however we noted that other employees without the claimant's protected characteristics also had DSARs delayed. We did not gain from the materials we saw a sense that the requirements in relation to DSARs were well understood or implemented by the respondent. Furthermore, we had an explanation for the unreasonableness from Mrs Quinn – the mistaken impression that the WOP discussions in some way suspended the need to address the DSAR because the possible proceedings and the DSAR were bound up together.
220. Looking at the whole picture it did not seem to us that there were facts from which we could reasonably conclude that the claimant's race had played a role in the delay. But even if the burden had shifted, the respondent's explanation seemed to us to be a credible one and untainted by race.

Issue: In respect of the complaint of race discrimination did the Respondent treat the Claimant less favourably than it treated Mr French and Ms Jaszczolt. (In comparing the Claimant's treatment with Mr French and Ms Jaszczolt there must be no material difference between their circumstances and the Claimant's)

221. We considered whether there was any evidence that the purported comparators had a similar level of performance concerns to those we found existed in respect of the claimant. The claimant had no evidence that there were any beyond the complaint raised in September 2020 about officers needing to complete risk assessments.
222. Mrs Harrison said and we accepted that that issue was addressed. There was no documentary evidence to suggest the issue continued. Mrs Harrison said that if there had been ongoing performance concerns with other staff, she would have pursued formal procedures with those staff.
223. We concluded that the lack of performance concerns was a material difference between the claimant's circumstances and those of the proposed comparators and they were therefore not appropriate comparators. We did not therefore have to go on to consider whether the difference in treatment was due to race.

*Issue: Equally, has the Respondent treated the Claimant less favourably than it would have treated an individual who was under 60 in materially comparable circumstances
If so, was that treatment because of the Claimant's age?*

224. We again took the Shamoon approach of looking at these issues together.
225. We looked first at the performance procedure allegations.
226. We looked carefully at the contextual factors which might cause the burden to shift. It was relevant to us that other officers not taken through process were around the claimant's age.
227. As to the retirement course email; it was clear that had been sent to everyone. There was no evidence at all that the claimant was being targeted by Mrs Harrison or encouraged to retire.
228. The 'big birthday' discussion seemed to us to be neither here nor there. We accepted that there was a practice of celebrating big birthdays. We accepted also that the claimant would rather not have had the issue of her age brought up and that Mrs Harrison may have made an error in raising it. However there was nothing at all about the incident which is evidence that Mrs Harrison wanted to get rid of the claimant because of her age or had otherwise negative views about the claimant which were related to her age.
229. Another fact pointed to was that an employee who was working in the team on an agency basis when the claimant went off sick and was then appointed to a transport and travel officer role on a fixed term contract was a black woman in her twenties. It did not seem to us that this was evidence which without more tended to shift the burden of proof, particularly in circumstances where other older transport and travel officers were not performance managed.
230. We looked at the features we discussed in relation to the race discrimination allegations including the claimant's long service and clear record, however we considered that there were no facts from we could reasonably conclude the claimant's age had played a role. Alternatively we were satisfied with the respondents explanations for reasons we have explained above.

DSAR

231. We did not find that the delay to the DSAR amounted to age discrimination for the same reasons essentially that we found it did not amount to race discrimination

Time issues

232. Because we did not uphold any of the complaints on the facts, we did not go on to consider the time issues.

Conclusion

233. For all of the above reasons the claimant's claims are not upheld and are dismissed.

Employment Judge Joffe
London Central Region
24/06/2022

Sent to the parties on:
24/06/2022

For the Tribunals Office