EMPLOYMENT TRIBUNALS

Claimant: Ms R Odunuga

Respondents: CACI Ltd
Mr J Coombes

Heard at: London Central **On:** 15, 16, 17, 18 & 19 July 2024

Before: Employment Judge Emery
Ms H Craik
Mr D Shaw

REPRESENTATION:

Claimant: Mr Odunuga (claimant's husband)
Respondent: Mr P Jones (solicitor)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaints of direct race discrimination and direct sex discrimination are not well-founded and are dismissed.

2. The complaint of breach of contract succeeds in part.

REASONS

1. Judgment and reason were given at the hearing; written reasons were requested.

The Issues

2. The claimant alleges direct race discrimination, direct sex discrimination and Equality Act 2010 s.14 'dual characteristics' discrimination. The client is a Black British woman.

3. It was explained at the outset of the hearing that Equality Act 2010 s.14 was not in force, that a claim could not be pursued for dual characteristics discrimination. The claimant withdrew this claim at the outset of the hearing.

Direct discrimination

4. The agreed issues are: did the respondents directly discriminate against the claimant on grounds of her race or sex by -

    a. The Respondents terminating the Claimant's employment on 20 June 2023;

    b. The Respondents undermining the Claimant in her responsibilities; in particular:

        i. The Second Respondent asking Mike Wilkinson what the Claimant did in her role, in November 2022;

        ii. The Respondents terminating the employment of the Claimant's assistant, Ms Cazas on about mid-July 2022;

        iii. The Second Respondent removing the Claimant from meetings with a digital marketing consultancy, SEO agency meetings and website agency meetings, without prior communication, after the Second Respondent joined the business, from about July 2022 - September 2022;

        iv. The Second Respondent not setting up a performance review, or appraisal, for the Claimant at any time between the Second Respondent joining the business in June 2022 and the Claimant's dismissal in June 2023 ;

        v. The Second Respondent not setting up training plans and/or a career development plan for the Claimant at any time between the Second Respondent joining the business in June 2022 and the Claimant's dismissal in June 2023.

    c. The Respondents denying the Claimant usual lines of communication; in particular:

        i. 1:1 meetings between the Claimant and Mr Coombes regarding the Claimant's appraisals, training or career development, at any time between June 2022 and the Claimant's dismissal in June 2023 (as opposed to "task catch-up" meetings, which did occur);

    ii. Calendar sharing via 'synchro access' from June 2022 to the Claimant's dismissal.

d. The Respondents announcing publicly (in the office) that the Claimant had been dismissed on 20 June 2023;

e. The Respondents cancelling a 1:1 meeting on 05 June and 19 June 2023;

f. Mr Coombes indicating that he was unhappy with the Claimant's role in the Diversity and Inclusion Initiative, during the development of the Diversity and Inclusion Initiative and in a conversation on 22 May 2023;

g. The Respondents failing to provide specific examples of under-performance to the Claimant on 22 May 2023;

h. The Respondents failing to provide time for the Claimant to improve her performance from 22 May 2023 to 20 June 2023;

i. The Respondents failing to provide written warning of performance concerns before dismissing the Claimant;

j. The Respondents failing to provide a plan to assist the Claimant in meeting their performance concerns;

k. The Respondents not affording the Claimant an opportunity to put forward a defence to allegations of under-performance;

l. The Respondents not informing the Claimant of a right to appeal against dismissal

m. The Respondents failing to communicate performance concerns to the Claimant on 22 May 2023.

Breach of Contract

5. Did the 1st respondent breach the claimant's contract by:

    a. Breaching an express contractual notice term on 20 June 2023;

    b. Breaching a contractual performance management procedure between June 2023 and the Claimant's dismissal on 20 June 2023.

Witnesses

6. We heard evidence from the claimant. For the respondent we heard from:

a. Mr Justin Coombes, the 2nd respondent, the claimants line manager and the dismissing manager
b. Ms Alison Brooks, the 1st respondent's Human Resources Director who provided advice to Mr Coombes on the dismissal process

7. The Tribunal spent the first half-day of the hearing reading the witness statements and the documents referred to in the statements before hearing evidence from the witnesses.

8. The judgment does not recite all the evidence we heard, instead we confine our findings to the evidence relevant to the issues in this case. It incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions. Where there is a page number reference after a quote, this is a quote from a document.

The facts

9. The claimant was employed as Marketing Operations and Compliance Manager. She initially reported into Mike Wilkinson, acting Marketing Director. Her performance was regarded as good and Mr Wilkinson confirmed the claimant in post at the end of her 6-month probation period in July 2022 without comment or criticism.

10. It is the claimant's case that Mr Coombes, who was appointed as Marketing Director at end June 2022 and took over the claimant's line management shortly after, discriminated against her throughout the rest of her employment, culminating in his decision to dismiss her. She contends that her performance remained good, that there was no reason for Mr Coombes to think negatively of her performance.

11. Mr Coombes argues that within a month of joining the team he started having concerns about the claimant's performance. He says that there was a lack of proactivity, errors, a lack of contribution by her. The respondents say that this was the cause of the treatment – much of which the respondents accept occurred – alleged to amount to discrimination.

12. Mr Coombes evidence describes several errors in the claimant's work which started to give him cause for concern. The first was a booklet which was printed in the wrong shade of the respondent's corporate red branding. Mr Coombes describes this as an error in choosing a 'screen ready' colour rather than a print ready colour. It was when it came back from the printer and shown to the CEO that the wrong colour was spotted.

13. The claimant's case is that this error was the fault of a junior employee, Connor. She accepts that she "oversaw" production, that she was Connor's manager, but she argues that the "overarching responsibility" for branding is Mr Coombes.

14. Mr Coombes argues that the claimant was "the manager of the graphic design and this was her print run", that she was responsible for the booklet's production, including visual identity. Mr Coombes also accepts that he was the manager with the "key responsibility" for brand identity, that the buck stopped with him. He also accepts that the claimant had shown him the booklet and he had not noticed a colour issue. While the CEO was critical of this error, which led to the booklet being reprinted, no action was taken against the claimant or Connor over this issue.

15. One of the claimant's reports was Ms Cazas, a black employee. The claimant alleges that Mr Coombes undermined her in/around August 2022 by seeking to dismiss Ms Cazas on performance grounds. The claimant argues that Ms Cazas was valued and capable, and that it was undermining to her to have to dismiss Ms Cazas on grounds she did not believe and against her wishes. The claimant does not accept Ms Cazas would have been dismissed had she been a different ethnicity – she points to Connor who had made a significant mistake and was not dismissed.

16. The claimant also does not accept she would have been asked to dismiss Ms Cazas had she been a different ethnicity, or a man.

17. Mr Coombes accepts he wanted to dismiss Ms Cazas. He accepts that the claimant challenged him on his view of Ms Cazas's performance. He took HR advice, and was told to make Ms Cazas redundant.

18. M Coombes argues there were issues with her work, "… I did not see the value of her role, and I wanted to use those resources. I did not feel we needed two people… " [Ms Cazas and the claimant]. He considered the claimant could take over the majority of this work.

19. The claimant did not challenge this rationale – "… if I am told the role is not required, he chose to make the role redundant". The claimant contacted HR to get support for the redundancy process, and the claimant went through a redundancy process with Ms Cazas.

20. By September 2022 Mr Coombes had concerns about the claimant's understanding of the Polaris programme. He says that she set up meetings and was present at them, but "she did not contribute and I expected more." He says he decided to take the claimant out of the Polaris meetings, the "trigger" for doing so was a September 2022 meeting in which the claimant said to the Polaris representatives "you might as well be talking Chinese."

21. The claimant accepts that she made this comment as a joke, it was a technical meeting, and she did not understand much of what was said. Mr Coombes argues that Polaris is a search engine optimisation programme important for marketing purposes, that all the marketing team should understand how it works. He accepts

that the technical side of how the programme works is not for the claimant to know, "… but it is poor performance not to have a basic level of understanding … [the claimant] did not have grasp at all, most of my team do."

22. Mr Coombes says he told the claimant she would not be attending future Polaris meetings, that he was planning on hiring a digital marketing head who would lead on this and other digital projects. He says the claimant made no objection when he told her. The claimant denies there was a conversation; she says she was moved from these meetings without communication – they were removed from her diary without explanation.

23. The claimant alleges that on 17 October 2022 Mr Coombes singled her out by asking Mr Wilkinson, "what does she do." Mr Coombes accepts he asked Mr Wilkinson this question – Mr Wilkinson had passed her probation but, he says, he was concerned, noticing a lack of proactivity and mistakes and he was not clear about all of the claimant's role. He accepts he did not ask this question about other staff members. He denies having this conversation at an event which was overheard – he accepts that the claimant may have been told about his conversation by Mr Wilkinson at this event.

24. The claimant argues that Mr Coombes could have talked to her about her role, that he never told her he believed she had a lack of knowledge in digital marketing. She argues that he would not have acted in the same way to a staff member of a different ethnicity, or a man.

25. There were, says Mr Coombes, various other issues/concerns. One was a 'profit party' booked for July 2023. His concern was that it was only booked in February 2023 – very last minute. The claimant argues that there was a "back and forth": about party requirements, meaning it could only have been booked in February. She accepts that she had not realised a DJ was not part of the price, meaning that the event went overbudget by £1,500.

26. Mr Coombes argues that a further challenging issue was the location planning for the 1st respondent's 2023 Christmas party. This took lots of planning – the team had a brief for type of venue, day of week and numbers, "… it takes time to find but … I felt that for the 2023 party the search was going on for months, far too long." He said that the claimant would respond with venues out of brief "there was constant checking" to make sure the claimant was on brief. He argues that they started looking in January, it was not booked until June 2023 (123).

27. Another issue was an email the claimant sent to Mr Coombes as a 'test' before it went officewide. A link in the email was broken, noticed by Mr Coombes; the claimant accepted it was an error sending a broken link, she argued that this is the reason it's a test email – to check it's working.

28. Mr Coombes argues there was “a continual series of mistakes and lack of proactiveness” by the claimant. He says there were concerns about “small things, but a lot of small things.” He says he raised issues with her “as things came up”. Of the incidents referred to in his statement the claimant accepts that they all occurred, she does not accept that they were because of faults of hers, or that the faults were her responsibility.

29. One issue of contested evidence was the claimant’s involvement in organising a Pride event (the D&I Initiative allegation). The claimant argues she was undermined over the booking of a speaker. The claimant told Mr Coombes that a colleague, Stuart, had friends who could speak at this event. Mr Coombes accepted he was initially dismissive, believing it was “a couple of buddies” of Stuart, and he told the claimant so, telling her to source speakers elsewhere. In questions to the claimant, it was suggested that Mr Coombes was irritated with her because she would not do as she asked.

30. Mr Coombes then spoke to Stuart at work, “and got clarity” that his contacts were suitable as speakers. He says there was no issue with the claimant, he did not sideline her, that after speaking to Stuart the three of them had a conference call to sort out the speaker details.

31. The respondents characterise this as ‘confusion’, the claimant argues a comparator’s suggestion on speaker would not have been snubbed, there would not have been any irritation, “he is irritated by me doing my role”, a comparator would not have been sidelined.

32. Mr Coombes accepts that he did not raise his first formal performance concerns with the claimant until 22 May 2022, in a Teams call. This was set up as a usual Monday 1-1 meeting and the claimant was unaware of what was to be discussed. There are no notes of the meeting. Mr Coombes took advice from HR prior to this meeting, but it appears he was not advised on how to conduct this meeting.

33. The claimant says he said “‘are you happy at the company’, out of the blue”. He suggested she was lacking in capability but, she says, he gave no examples of his concerns. Mr Coombes says he told the claimant he had “concerns over time” about her performance that he was “hoping may right itself”, he says he referred to “getting through stuff quickly and also mistakes, I felt I was constantly chasing because she was not proactive, was late, did not understand the brief… these are the themes.”

34. Mr Coombes says he mentioned specific examples of concern, his statement refers to an issue which occurred that day with errors in a cost-of-living email (132). The claimant denies he raised it, saying this is the type of email which would go back and forward, for two sets of eyes to properly edit. She denies he raised the Christmas party delays, or a failure to update the HIVE system.

35. Mr Coombes denies saying she had “no capability”, he says he said let’s see how it goes, that he wanted to see improvement. He said the meeting was awkward, brief lasting less than 10 minutes, that at the end he asked if the claimant wanted to say anything, she said no.

36. An allegation is that Mr Coombes decided to dismiss the claimant by at the latest 13 June; he was on leave immediately after the 22 May 2022 meeting, back on 5 June, this did not give time to assess her performance.

37. There was a lack of evidence as to whether the 5 June 2022 usual weekly 1-1 meeting took place. The claimant says no, Mr Coombes can’t recall. The evidence shows that Mr Coombes sent the claimant a Teams meeting invite that morning, the claimant responded with an agenda and an email saying she would call him at 11.00 (144, 146-7). There are messages later that day between them, none reference rearranging this meeting. We conclude that the fact that Mr Coombes initiated the exchange on the morning of 5 June suggests he wanted the meeting to proceed. We accept that it likely did not take place in the end.

38. Mr Coombes evidence is that after 22 May 2022 he was planning to give 4 weeks for the claimant to improve, but “very quickly” there were continued errors. One involved the cost-of-living email, a failure to change the ‘scheme rules’ so they matched the body of the message. The claimant accepts she made this error.

39. Mr Coombes says the claimant’s “disengagement got worse”: one team meeting was booked for Wednesday pm; the claimant booked a ½ day leave coinciding with that meeting, the meeting date was changed so she could attend but she did not. He says she was in the office only 4 days between 11 May and 20 June (the claimant took some leave in this period but, he says, she should have been in 5.5 days).

40. Mr Coombes was in touch with HR during this period. He wrote an email with his concerns to Ms Brooks on 14 June 2023 providing information to be added to the termination letter, stating there was a lack of proactivity, attention to detail and driving the operational aspects of the team, giving examples of the Christmas party and others “this same pattern of behaviour...” (191). The first draft dismissal letter was prepared by HR and was added to by Mr Coombes.

41. The usual 1-1 meeting did not take place on 19 June. The reason, as is made clear from his emails with Ms Brookes, Mr Coombes had already decided to dismiss the claimant shortly after the 22 May 2023 meeting. Given this, we accept Mr Coombes evidence that as he intended on having a dismissal meeting shortly, there was little point the 19 June meeting taking place.

42. The claimant complains that no process was followed, despite the respondent having a policy on capability which, the policy says, applies to all employees who have passed their probation. While the policy may be, as she accepted, non-

contractual, she argues that the wording of the policy, and the fact it was not applied to her is evidence of discrimination, a desire by the respondents to dismiss her without giving her any opportunity to improve, per the policy.

43. The Capability Policy (107-114) states that employees should not be subject to sanctions for poor performance "unless they have been given a written statement of the reasons for concern", a fair hearing has been held, and a right of appeal has been provided. It states it applies to all employees "regardless of length of service, save where employees are within their probationary period."

44. The Policy states that there will be informal discussions including setting targets for improvements; the formal process involves a three stage process with capability hearings "… at each stage of the procedure". There is a right to be accompanied at the hearings and the policy allows for questions and representations. At each stage, the outcome including time-scales for improvement, training requirements etc. will be set out in writing.

45. The respondents' case is that Ms Brooks advised Mr Coombes that the claimant could be dismissed without following a capability or a performance improvement process; that this was the "reason why" no process was followed. He says he asked for HR support at the meeting and was told none was necessary, but that HR was on standby if needed. He says he was "surprised" to be told by HR that he need not offer her a colleague to accompany her, that it was odd that no-one from HR felt it necessary to be present.

46. Ms Brooks argues that the claimant was treated no different to any other employee with under two years' service, that it is the 1st respondent's "usual practice not to follow the full capability policy … he could dismiss her without a full process …" if performance was unsatisfactory and unlikely to improve (paragraph 9 statement). Ms Brooks confirmed that "generally" the respondent would not follow the capability process for employees with under two years' service, unless for example that employee had a medical condition.

47. Ms Brooks argues that it would be "misleading" for the policy to state that it does not apply to employees under two years' service, as the 1st respondent will apply the policy if there is a health condition or other protected characteristic which may be an issue. She accepts that an employee who had passed their probation may feel the policy would apply to them, but argued that managers "need to be able to act quickly" to deal with underperformance and consistent mistakes – "they can act without spending time setting up meetings if there has been no improvement".

48. Ms Brooks says it did not cross her mind to consider that the claimant's ethnicity or sex could be a factor in Mr Coombes's decision, that the Capability policy was never followed "if there are general performance concerns and there is nothing more serious to warrant us following a full process".

49. Mr Coombes account of the dismissal meeting is that it was short, he said to the claimant that it was “not great news” that they were going to dismiss her for the reasons in the 22 May 2022 meeting – that she was continuing to make mistakes, he felt she was “more disengaged”, not coming to the office. He says that at this point she “stood up, banged the desk and walked out saying, “right, we’re going to sort this out.”. He says that the claimant left the meeting room and he could see her talking to colleagues, “she was animated, looked angry” and when she had then left to speak to HR he told them, “… discretely, ‘unfortunately we’ve had to lead Ruth go, she’s clearly upset, will explain later’.”

50. The claimant says she told Mr Coombes “you have a problem with me, and I’m going to speak to HR”; she accepts she left the meeting, but she denies banging the table, and she denies speaking to colleagues at this point. She says that after she had spoken to HR she texted colleagues to bring her coat, colleagues met her in the car park and told her that Mr Coombes had told them he had “let me go”.

51. The respondents accept that the letter of dismissal did not give a right of appeal; it says that this was an oversight, but says the claimant was verbally told she could appeal.

52. Mr Coombes accepts he did not carry out a formal appraisal for the claimant or consider a career development plan, he says he did not do so for any of his employees in his first year in role when he was getting to know the role and his staff. Ms Brookes argues that “it is not uncommon” at the 1st respondent not to do regular appraisals, many managers do an annual review only. The claimant had no evidence that appraisals/development plans were carried out by Mr Coombes for other employees.

53. Mr Coombes does not accept he would have treated a colleague of a different ethnicity, or a man, differently. The claimant argues she has 15 years’ experience and has never before ‘felt bullied, harassed, incompetent’; she does not accept that comparators would have been treated in this way.

Closing arguments

54. Mr Jones and Mr Odunuga made closing arguments. Where relevant they are incorporated into the ‘conclusions’ section below.

Relevant legislation

55. Equality Act 2010

s.13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

s.23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

s.136 Burden of proof

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

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

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

Relevant case law

56. Direct Discrimination

a. *Glasgow City Council v Zafar [1998] IRLR 36):* Has the claimant been treated less favourably than a comparator would have been treated on the ground of his disability and (in relation to one allegation) on the ground of his race? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of [race or sex]

b. *Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337:* The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is [of a different ethnicity, or a man].

c. *Nagarajan v London Regional Transport [1999] IRLR 572*: The tribunal has to determine the *"reason why"* the claimant was treated as she was and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142).*

d. *Chondol v Liverpool CC UKEAT/0298/08:* *"*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*"*

e. *Nagarajan v London Regional Transport [1999] IRLR 572, HL*: Was the claimant treated the way she was because of her sex, or race? It is enough that her sex or race had a 'significant influence' on the outcome - discrimination

will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [sex] or [race]? Or was it for some other reason...?".

f. *O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*: "What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained of?"

g. *London Borough of Islington v Ladele*: *[2009] EWCA Civ 1357* provides the following guidance:

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572:* "this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial

(3) As the courts have regularly recognised, direct evidence of discrimination is rare, and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

h. *Watt (formerly Carter) v Ahsan [2008] IRLR 243*: "It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated…"

Conclusions on the facts and law

57. We start at the end of the issues, as it is here which we have the most serious concerns about what occurred with the claimant. While we do not consider the treatment was less favourable treatment on the ground of sex or race, we have serious concerns about the respondents' conduct.

58. We are surprised that the respondents' arguments started by attacking the claimant's credibility. We believe she was a credible witness, who sincerely believed her poor treatment was discriminatory, in part because of the 1st respondent's practices towards her significantly deviating from its capability policy.

The 22 May 2023 meeting

59. The respondent's alleged failures –

(a) to provide examples of underperformance
(b) to provide time for the claimant to improve her performance
(c) to provide written warning of performance concerns
(d) to provide a plan to assist the claimant to address their concerns
(e) not allowing the claimant to defend the allegations

60. The tribunal has serious concerns about the conduct of the 1st respondent in the way it operates its Capability Policy. The Policy says that it applies to all employees past probation, when the 1st respondent says in practice it only applies it to employees with two years' service, or if it suspects a disability.

61. We conclude that it is fundamentally dishonest and misleading to employees to say its Capability policy applies to all employees past probation but have a hidden practice that it will not. It is only during these proceedings that the claimant was informed of the 1st respondent's true position. We conclude that this amounts to corporate dishonesty by the 1st respondent towards its employees.

62. We also accept that had a capability policy been put in place for the claimant, it is more likely than not that she would have gone through a process of understanding what the issues of concern were. She is intelligent and generally capable in her role. Some of the issues arose because of the claimant's view that she and Mr Coombes would sort out document inaccuracies together, two sets of eyes as she put it, but Mr Coombes wanted to see documents only when they were ready to go. A capability process may have highlighted this. Errors were made by the claimant, and there was a lack of curiosity as to the reason why – whether it was capability, communication, or some other issue.

63. We can therefore understand why the claimant was taken aback on 22 May 2023. There was no script; Mr Coombes had been in contact with HR but he was given little steer for this meeting, no notes were taken, nothing was followed up in writing after, for example bullet points for improvement. There was no format to the meeting – the claimant was told of general concerns and was asked if there was anything she wanted to say – the onus was put on the claimant to raise issues – which understandably she was unable to do.

64. We have considered carefully whether Mr Coombes attitude would have been different with a comparator of a different ethnicity, or a male, with similar performance as the claimant. We take the concerns in writing as recorded by Mr Coombes to HR on 14 June 2023 (206) as his main concerns. Some are issues which are relatively trivial, but they were accumulating mistakes which were irritating to him.

65. We consider that Mr Coombes was irritated by the fact he had to make changes to copy, things which he considered were the claimant's responsibility. Some issues were embarrassing as they came to the notice of the CEO. There was a lack of knowledge of Polaris, the excessive time spent on party venue planning, errors in event planning. We accept that these were errors by the claimant. We believe that Mr Coombes irritations would have manifested similarly with any employee who was making similar errors.

66. On dismissal, Mr Coombes took advice from HR. There were some issues, Mr Coombes was concerned about the claimant's performance, as he would have been of a comparator. We considered carefully whether Mr Coombes would have put in more effort into an employee of a different ethnicity, or a man.

67. We conclude that the fact Mr Coombes approached HR shows that he did have genuine concerns, he believed the claimant was not performing as he wanted in role, he did not know how to deal with this situation, and he needed to seek advice. We conclude that he would have sought advice from HR for a similarly performing comparator.

68. We also conclude that Mr Coombes would have accepted the advice he was given by HR, whatever it was. Had he been told to prepare a script, write down examples of poor performance, follow-up in writing, or follow a performance management plan, he would have done.

69. This is where we conclude that the claimant, and in part Mr Coombes, were let down. The legal test is not the reasonableness of the respondents' actions, it is whether the claimant was less favourably treated than a comparator. We conclude that HR would have given the same advice to a similar request in respect of a comparator employee – meet the employee, give a short time to improve and if not sack.

70. Because Mr Coombes was not advised to bring a note taker, had no script, he was effectively asked to manage a difficult meeting without assistance. It meant that there was no structure to the 22 May or the dismissal meetings, there was no plan in place after 22 May to monitor the claimant's progress, or steps to improve.

71. This means that the claimant was dismissed on performance grounds after 18 months employment following a performance related meeting which lasted less than 10 minutes and a dismissal meeting which lasted less than 5 minutes. With no structure or plan and no follow-up meeting to discuss progress, the claimant was demoralised, she felt she was being set up to fail and she was very suspicious of Mr Coombes motivation, particularly given the conspicuous failure to follow the capability process.

72. However, given the critical finding that Mr Coombes would have approached HR no matter the employee's ethnicity or gender, and given the advice he would have received would have been the same, we feel that there was no less favourable treatment in the decision to have the 22 May meeting, what occurred at this meeting or in the decision to dismiss.

73. On the specific allegations of discrimination during employment:

<u>Asking Mr Wilkinson what the claimant did – November 2022</u>:

74. This remark was not made in this way about other employees. But it was asked not long after the claimant had made remarks at a Polaris meeting which concerned Mr Coombes. He had noticed a lack of input at these meetings, he had some concerns about her quality of work.

75. We conclude that he was not sure of all that the claimant did in her role as some of her input was below what he expected for her role, and this caused him to raise the question. We therefore conclude that the reason why this question was asked was because of these concerns, rather than the claimant's ethnicity of sex.

<u>Terminating Ms Cazas's employment</u>

76. The claimant was told there were performance issues, she objected, she was told to make Ms Cazas redundant. Was this undermining the claimant? It is undermining to lose a report when you consider that employee is required. But we also accept that Mr Coombes had concerns, he wondered whether her role was needed, her salary could be better used elsewhere. We concluded that he genuinely considered this role was not required, that this was a business decision.

77. In reaching this decision, we note the claimant's point that she does not believe Ms Cazas would have been dismissed had she been a different ethnicity or a man; that this caused questions in the claimant's mind. But the role was not replaced, and we conclude that anyone in this role would have been made redundant; that the reason why this occurred was not because of the claimant's ethnicity or sex.

Removing the claimant from Polaris/other meetings

78. The evidence we heard related solely to Polaris. Mr Coombes explanation for removing the claimant was her lack of knowledge and proactivity, and her comment in the September 2022 meeting; also, his decision to employ a specialist Head of Digital Marketing.

79. We accept that the decision could have been better communicated to the claimant. However, we found that these reasons were the reason why she was removed from the Polaris meetings – it was not because of her race or sex, we conclude that Mr Coombes would have acted similarly to an employee of a different ethnicity or a man in the same circumstances.

Failing to set up a performance review or appraisal

80. We accept that Mr Coombes did not set up any such meetings for his direct reports – there was no differential treatment.

Failing to set up training plans or a career development plan

81. We accept that Mr Coombes did not set up any such meetings for his direct reports – there was no differential treatment.

Denying usual lines of communication

82. The claimant accepts she had regular 1-1 meetings with Mr Coombes. The issue is that he did not discuss appraisals or career development at these meetings. As above, we do not consider that Mr Coombes used 1-1 meetings for appraisal or career development plans for any of his direct reports – there was no less favourable treatment.

83. The claimant complains that there was no 'synchro access' of her and Mr Coombes diaries. We heard little evidence on this issue, but again we accept the claimant was not treated differently than Mr Coombes direct report, or how a hypothetical comparator would have been treated.

Mr Coombes announcing to the office she had been dismissed on 20 June 2023

84. Mr Coombes agreed he made a remark, there is a dispute about his tone and precise words.

85. We have no doubt that the remark was made because of the difficult circumstances of the meeting, the fact that some of the team witnessed the claimant leaving the meeting. We accept that Mr Coombes felt he needed to say something, equally he could have chosen not to say anything at this time. We feel that his was a spur of the moment decision, caused by the difficult circumstances of the meeting. Again, this comes to a lack of assistance from HR, assistance that Mr Coombes feels in retrospect should have been provided, we agree.

86. There was no less favourable treatment – we consider that any meeting which happened as this did – no colleague present for the claimant, no HR present, a lack of script, a lack of options other than dismissal – Mr Coombes would have been equally lacking in control. We consider that had a member of staff of a different ethnicity or a man had similarly left the meeting to speak to HR, Mr Coombes would have felt compelled to say something similar to the team. There was no different treatment.

The Respondents cancelling a 1:1 meeting on 05 June and 19 June 2023

87. We accept that these meetings did not take place. We do not accept that the claimant was less favourably treated. The 5 June meeting was Mr Coombes first day back from leave, he intended for it to occur, it was postponed. It is likely that Mr Coombes was finalising his view that he would dismiss the claimant and that this was a factor in postponing it. But again, we consider that Mr Coombes would have acted in the same way to an employee of a different ethnicity, or a man, in in the same circumstances.

88. The meeting of 19 June was cancelled because Mr Coombes had made up his mind and was shortly to initiate a dismissal meeting. Again, there was no less favourable treatment.

The Diversity and Inclusion initiative

89. Was the claimant sidelined over the Pride event? We accept that it is troubling that Mr Coombes was irritated by a suggestion from the claimant which he subsequently enthusiastically accepted once he had spoken to the idea’s originator, a man. We wonder whether Mr Coombes would have been dismissive if – say – a white man had similarly acted as intermediary for the idea. Was it that he did not properly listen to the claimant because she is Black, or a woman?

90. However, we also accept that Stuart would have had a far greater detail of his friends' abilities and experience than the claimant, she accepts she said to Mr Coombes that “friends” of Stuart’s were available. We heard no biographical detail from the claimant of these speakers, and we conclude that she likely, and understandably, had only a sketchy idea of their relevant experience. Mr Combes clearly had high expectations of the speaker, and we conclude on balance that Mr Coombes would have been similarly dismissive to a comparator who raised the issue of ‘friends of Stuart’ in the same way.

The Respondents not informing the Claimant of a right to appeal against dismiss

91. The letter of dismissal did not offer a right of appeal. The respondents characterise this as an oversight. We agree – it was an oversight, poor practice, but not less favourable treatment.

Breach of contract claim

92. Did the 1st respondent breach the claimant's contract by:

    a. Breaching an express right to notice of dismissal
    b. Failing to follow its capability process?

93. The 1st respondent accepts that its employment contract does not provide for immediate termination and payment in lieu of notice. It therefore accepts that it breached the claimant's contract by dismissing her without notice. However, it says it paid the claimant her notice pay in full, which the claimant accepts.

94. The breach of contract claim in respect of notice of dismissal succeeds. As the claimant has suffered no financial loss – her losses in such a claim being limited to a claim for notice pay – there is no award of compensation to the claimant.

95. The claimant accepts that the 1st respondent's capability process is non-contractual. Many employees would believe this to mean that the policy may be changed or amended without that change amounting to a breach of the employee's contract; but they would also reasonably believe that the capability policy in place at any time *will* be followed for all relevant employees – i.e. those who have passed their probation.

96. We accept that because the policy is not contractual, the respondent is not contractually obliged to follow it. As Ms Brooks points out in her statement, the 1st respondent appears to regularly dismiss employees without following this policy. We have made our position clear on this practice, and we consider that the failure to follow the policy has been a substantial cause of the claimant believing she was discriminated against.

Employment Judge Emery
9 October 2024

Judgment sent to the parties on:

22 October 2024
……………………………………
For the Tribunal:

……………………………………