EMPLOYMENT TRIBUNALS

Claimant			**Respondent**
Mrs A Colston		**v**	Oasis Dental Care Limited
Heard at:	Cambridge (via CVP)	**On**:	1st & 2nd March 2023
Before:	Employment Judge Conley		

Appearances
For the Claimant: Herself, in person
For the Respondent: Mr Hitesh Dhorajiwala (Counsel)

RESERVED JUDGMENT

The Claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 2 June 2021, following a period of early conciliation between 7 April 2021 and 19 May 2021 the claimant sought to pursue a complaint of 'unfair dismissal' against the respondent, a dental practice based in Guildford, Surrey. The claimant had been employed by the respondent as a dental receptionist.

2. The claim was resisted by the respondent and on 26 July 2021 they presented a response which included comprehensive Grounds of Resistance to the claim. In essence, the claim is resisted on the grounds that there was a fair reason for dismissal, namely the claimant's perfomance and capability; that alternatives to dismissal were considered; and that a fair procedure was followed in reaching the decision to dismiss; and that as a result dismissal was justified.

THE ISSUES

3. A comprehensive list of issues was prepared by Employment Judge Reindorf at a Case Management Hearing on the 7th June 2022 for which the Tribunal is extremely grateful. The list is reproduced here for ease of reference.

Reason for dismissal

(1) Has the Respondent shown what the reason was for the Claimant's dismissal? The Respondent relies on poor performance. The Claimant asserts that the real reasons for her dismissal were:

   (a) that she had brought a Tribunal claim against James Hull & Co Ltd in 2013, which the Respondent was told in November 2018 by Marian Clark or alternatively by another person; and/or

   (b) personal dislike by her line manager Angela Macfarlane.

(2) Has the Respondent shown that the reason for the Claimant's dismissal was a potentially fair reason?

Fairness in the circumstances

(3) If so, did the Respondent act reasonably or unreasonably in the circumstances in treating the reason as sufficient reason for dismissing the Claimant, taking into account the size and administrative resources of the undertaking and equity and the substantial merits of the case? In particular:

   (a) did the Respondent give the Claimant adequate opportunity to improve in terms of both time and support (having regard to her status, length of service and the nature of her role);

   (b) did the Respondent act reasonably in not finding alternative employment for the Claimant;

   (c) given the degree of under-performance, was dismissal within the range of reasonable responses open to the Respondent; and

   (d) did the Respondent and the Claimant comply with the ACAS Code of Practice?

(4) The claimant alleges that dismissal was too harsh a sanction and that the Respondent acted unfairly by:

   (a) putting her on an informal PIP on 8 July 2019;

   (b) failing to give her warning of the informal PIP meeting on 8 July 2019;

   (c) permitting Nikki Lenai to attend the informal PIP meeting on 8 July 2019 as a notetaker;

   (d) putting her on a formal PIP on 13 September 2019;

   (e) including items on the informal and formal PIPs which were the job of both receptionists;

(f) including in the PIPs points which were duplicates, or which related to a time when she was not working at the practice or which were historical;

(g) failing to grant her access to the facility to check patient appointments, which would have assisted with recalls;

(h) failing to grant her access to make amendments to finances;

(i) Angela Macfarlane shouting at her and making derogatory comments about her, from summer 2018;

(j) issuing her with a warning on 9 December 2019;

(k) keeping "recalls" on the formal PIP and appraisals until March 2020 although this task was removed from the receptionists on 11 December 2019;

(l) keeping the formal PIP in place after the warning was rescinded on 3 February 2020, contrary to policy;

(m) telling her in 2020 that she could only have 30 minutes for lunch, which was different to other staff members;

(n) not listening to her or allowing her voice to be heard; and

(o) failing to have an HR presence at the dismissal meeting on 10 February 2021.

THE EVIDENCE

4. The evidence in this case came from the following sources:

a) The written and oral evidence of Caroline Simmons (Practice Manager) and Gayle Clague (Area Manager) on behalf of the respondent, who each provided initial and supplemental witness statements.
b) The written and oral evidence of the claimant (who also provided intial and supplemental witness statements)
c) A very substantial agreed Bundle of Documents amounting to 781 pages, although I was only referred to a comparatively small number of those pages during the course of the hearing.

FINDINGS OF FACT

5. The claimant was employed by the respondent as a dental receptionist. Her period of employment began on the 27 August 2013, and was terminated by the respondent on 10 February 2021.

6. She was originally employed by another company which merged with the respondent and her contract of employment with the respondent took effect from the 25 November 2013.

7. Her total period of continuous employment, therefore, was 7 years 5 months and 14 days.

8. The claimant's job description included, answering the telephone; accurately inputting data into the computer system, accurately charging the patients, and required that she 'ensure knowledge of and adhere to practice policies and procedures in relation to: Telephone procedure, Emergency bookings, FTAs, Recall and Referral systems, lab process, waiting room protocol, post.'

9. The role also included administration of the patient 'call back' system, which will be discussed in greater depth below.

10. Caroline Simmons, the Practice Manager, joined the respondent in October 2018. At the time of Ms Simmons joining the respondent, the claimant and another receptionist, Caroline Aucutt, reported to the lead receptionist, Angela McFarlane.

11. It was clear that the relationship between the claimant and Ms McFarlane, described as 'fractious' by Ms Simmons, was very poor indeed by the time of Ms Simmons arrival at the respondent and was a source of considerable tension in the workplace and feelings of upset and resentment on the part of the claimant.

12. On 12 November 2018, Marian Clark (lead reception at the respondent's Epsom branch) attended a lunch and learning training session with her manager, where she met Ms Simmons. Ms Clark asked Ms Simmons in conversation, in reference to the claimant, 'how was Pauline getting on', to which Ms Simmons replied that she (the claimant) was 'fine'. Ms Clark then revealed to Ms Simmons that the claimant had brought a claim in the Employment Tribunal against her previous employer but did not have any of the details. Ms Simmons did not enquire further and made no reply.

13. The claimant considers this incident to be highly significant, indeed central to her complaint that she was subsequently placed on a long-term, unwarranted Performance Improvement Plan which ultimately led to her dismissal. I do not accept this. I am satisfied that Ms Simmons paid little or no attention to what she considered to be at best anecdotal information and at worst office gossip. I have not found any reliable evidence to support the assertion that this revelation in any way turned Ms Simmons against the claimant or affected the way in which she was treated.

14. Ms Simmons assumed the role of manager of the claimant in March 2019. I find that this was as a direct result of two matters pertinent to this claim: firstly, the animosity that she had observed between Ms McFarlane and the claimant, which was being aggravated by the fact that the claimant was required to report directly to Ms McFarlane, and secondly, the fact that Ms Simmons had become aware of a number of performance issues relating to the claimant and she decided to take direct responsibility for trying to remedy them.

15. Shortly after joining the respondent, Ms Simmons issued the receptionists with a checklist, setting out precisely what duties each receptionist was responsible for and how those responsibilities must be discharged in order to be compliant

with the respondent's policies. This document was signed by both Ms McFarlane (as 'Trainer') and by the claimant (as 'Receptionist') on 26 November 2018. This checklist was introduced as a result of Ms Simmons conducting a review of the claimant's file by her predecessor which indicated that there had been a number of performance related issues, and also as a result of Ms Simmons own observations of the claimant's performance in the early weeks of taking up the role. Although the checklist was ostensibly an aide memoire for all receptionists, I find that in reality its introduction was intended as a training tool in respect of the claimant.

16. Despite issuing the claimant with the checklist, Ms Simmons continued to note basic and in some cases serious errors being made by the claimant in performance of some of her core duties. This led in February 2019 to an informal conversation between Ms Simmons and the claimant in which she highlighted some of the errors and explained the potential consequences for the respondent of those errors. However, the continued lack of improvement in due course led to Ms Simmons initiating the respondent's Performance Improvement Policy.

17. The respondent's policy for managing performance issues is set out succinctly and accurately in Ms Simmons' witness statement (this aspect of her evidence was not challenged by the claimant) and is as follows:

> Oasis carries out "Performance Conversations - Goals, Development and Conversations" every six months as a means to manage the performance of full and part time employees. The three performance ratings below are set out in the Managers Guide to Performance Conversations policy.
>
> In accordance with Managers Guide employees are scored a performance rating based on their performance in their role. There are three levels of potential achievement as follows:
>
> - Work to do – indicating a degree of under-performance;
> - Working well – indicating the employee is performing at the expected level; and
> - Working wonders – indicating the employee is performing exceptionally well and above their expected level.
>
> Where an employee receives a 'Work to do' performance rating, their Team Manager will initially seek to manage them informally over a period of 4 weeks in order to establish if there are any training needs or any particular support needed. Once training has been completed, the employee will be given a set of targets to achieve which should assist the employee with addressing any concerns and meeting their expected performance level.
>
> If an employee's performance has not improved to the "Working well" performance rating after the 4 weeks, it will be discussed with Employee Relations and together the manager and ER will take the decision to move the employee to an informal performance review specifically tailored to address the needs of the individual employee. The employee is given additional time to improve as a means of supporting the employee through this process. If the employee's performance has not improved to the "Working well" performance rating after a further 4 weeks, they will be moved to a formal performance review and follow the Performance Improvement Policy.
>
> Under the Formal PIP Policy, an Action Plan will be developed and agreed with the employee to improve performance over a set period of time not less than 4 weeks. In summary, the employee will be offered further support through coaching and training and if their performance does not improve the Formal PIP Policy provides that the PIP may be extended,

they may be issued with a range of warnings, varying from a verbal warning to a final written warning.

Once started, the employee can only be taken off the PIP if their performance improves to a "Working well" rating or there is sufficient improvement that leads to a cancellation of the PIP. If the employee's performance has not improved the Formal PIP Policy provides that they may be dismissed after 16 weeks. This timescale would be without any appeals, grievances, annual leave or furlough due to Covid lockdown factored in.

Employees who do not improve whilst on a final written warning and are ultimately dismissed are dismissed on capability grounds and not on grounds of misconduct.

18. I am entirely satisfied of the following three matters: firstly, that the policy of the respondent is as set out above; secondly, that claimant was aware of and understood the PIP policy; and thirdly, that Ms Simmons followed and applied the policy assiduously and fairly throughout her management of the claimant.

19. The claimant was placed on an informal Performance Improvement Plan (PIP) on the 8 July 2019, which concluded on the 19 August 2019. During the course of the PIP, a number of errors on the part of the claimant were discovered and were recorded in the Improvement Plan documents. These matters were discussed during a meeting on the 21 August 2019.

20. At the conclusion of the informal PIP, the claimant's performance was still classified as 'Work to Do', indicating a degree of under-performance and a need for further improvement measures to be put in place.

21. As a result of the claimant's failure to improve sufficiently during the course of the informal PIP, she was placed on a formal Stage 1 PIP on 13 September 2019.

22. The claimant submitted a grievance on the 24 September 2019, in which she raised a number of complaints, primarily relating to Ms McFarlane's treatment of her at work. In essence she complained that Ms McFarlane was persistently and unfairly finding fault with her work and then reporting the supposed faults back to Ms Simmons, shouting at and belittling her, and wilfully obstructing the claimant's own performance in her role. The claimant felt that it was as a result of Ms McFarlane's conduct towards her that she had been placed on the PIP. Her desired outcomes of the grievance were that she wanted Ms McFarlane to stop monitoring her work and for the PIP to be removed, stating that she did not feel that it should have been put in place at all.

23. On the 11 October 2019, Marie Archer, the Area Customer Service and Operations Co-ordinator, conducted a grievance hearing, the outcome of which she reported back to the claimant on 8 November 2019. She upheld 3 of the seven points raised in the grievance - all 3 of which related to the conduct of Ms McFarlane. Of particular importance was the general observation that Ms McFarlane had 'demonstrated overbearing levels of performance supervision' of the claimant. I agree with the finding of Ms Archer in this regard and I do not underestimate the likely impact that this would have had upon the claimant in her daily work.

24. However, in relation to the PIP, Ms Archer did not uphold the claimant's complaint that the PIP should be removed, and stated that 'I am comfortable procedural fairness has been afforded to you and relating to the implementation of the formal PIP as outlined in Bupa's Performance Improvement Policy'.

25. I am impressed with the thoroughness and, in my judgment, scrupulous fairness of the process adopted by Ms Archer and I cannot find fault with her decision in respect of the grievance as a whole.

26. The claimant sought to appeal against those points of her grievance that were not upheld by an email of 21 November 2019. She was unhappy that the PIP reviews were scheduled to continue even whilst her appeal against the imposition of the PIP was ongoing, believing that the PIP ought to have been suspended. This was a misunderstanding on the part of the claimant. However, notwithstanding this, Ms Simmons agreed to delay the PIP meeting temporarily until 2 December 2019. This meeting identified that errors were still being made consistently by the claimant. As a result, the claimant was invited to a Formal Performance Review Meeting to take place on 9 December 2019, and was warned that the meeting could result in the imposition of a Stage 1 Formal Warning.

27. During the course of that meeting, a number of patient-specific errors, primarily in relation to the 'call back' procedure, were identified and the claimant was given an opportunity to comment on each of them. Principally, her mitigation was that she many of the errors took place when she was being required to cover the role of receptionist in relation to multiple surgeries, which she considered to be unfair whilst she was herself on a PIP. At the conclusion of the meeting Ms Simmons confirmed that she would be issuing the claimant with a Stage 1 Formal Warning.

28. The claimant lodged an appeal against this on 19 December 2019, citing (primarily) the assertion that the errors that she made in respect of recalls should not have been taken into account because it is not a task that receptionists should be completing (see below) and objecting to the fact that Ms Simmons was monitoring her performance when it was she that placed the claimant on the PIP in the first place.

29. Meanwhile, the Appeal hearing in respect of her earlier grievance was scheduled to take place on 11 December 2019. The claimant continued to raise objection to the fact that the Appeal (which, if successful, could have resulted in the PIP being removed) was to take place after the Formal Performance Review.

30. There is some support for the assertion that it would have been best practice to delay the Performance Review in an email from Vicky Tozer (who conducted the Appeal hearing on 11 December 2019) to Ms Simmons on the date of the Appeal in which she advised Ms Simmons not to conduct any further review meetings with the claimant until the conclusion of her investigation into the appeal. Furthermore, in the same email, Ms Tozer directed that 'Reception staff

are not to set recalls. Under NICE guidelines, recalls are to be set by the treating GDP. Please remove this task from the reception team with immediate effect.'

31. On the face of it, this statement would tend to be strongly supportive of the claimant as it suggests that the task in which she made the greatest number of errors was one that she should not have been doing in the first place. This is clearly the interpretation that she has made and it was a matter she returned to again and again in her evidence. However, it was a misunderstanding - of hers and of Ms Tozer's.

32. Ms Tozer was correct in saying that the need for patients to be recalled by the surgery, and by which date, should be based upon a clinical need identified by the treating dentist on a case by case basis. However, this was not what the receptionists were being tasked with. Their role was to ensure that the call backs identified by the dentists were then scheduled correctly, and carried out accordingly. This was an administrative, rather than a clinical, procedure and one which did form part of the receptionists' job description. This unfortunate misunderstanding formed a central plank of the claimant's case which is regrettable. I find that any assertions of unfairness based upon this misunderstanding are to be disregarded.

33. On 9 January 2020, Ms Tozer wrote to the claimant with the outcome of the Appeal against the grievance findings of Marie Archer. In the letter she corrected her earlier mistake concerning the role of receptionists in carrying out the recalls. She upheld Ms Archer's decision in full, stating that she was 'wholeheartedly satisfied the outcomes upheld by Marie Archer are fair and reasonable'.

34. On 13 January 2020, Ms Simmons carried out a 'Performance Conversation' with the claimant. This identified that she still fell within the 'Work to Do' categorisation, although it was positive in terms of the claimant being well liked by patients and was generally supportive in tone.

35. On 28 January 2020, Kate Moore, Area Support Manager, held an appeal hearing in respect of the Stage 1 Formal Warning issued to the claimant. By letter of 3 February 2020, she indicated that she allowed the appeal against the Formal Warning in relation to all of the points advanced by the claimant save one, and directed that the warning be removed from her personnel file, but confirming that the PIP should remain in place. She made this clear once again by email on 10 February 2020.

36. This was the source of yet another misunderstanding on the part of the claimant, who seemed convinced that, having successfully quashed the Formal Warning, the PIP should also have been removed. I find no basis for this belief. The appeal conducted by Ms Moore was solely in relation to the formal warning and not the PIP. The claimant has clearly conflated the roles of Ms Tozer and Ms Moore.

37. Although the PIP remained in place, because the Formal Warning had been quashed, it essential recommenced as a Stage 1 PIP.

38. On 10 February 2020, Ms Simmons commenced a further Stage 1 PIP with the claimant and held an initial meeting, during which yet more errors of a similar nature were identified and discussed. The form records that the claimant 'was shocked by the number of mistakes there are'.

39. On 9 March 2020 a further meeting took place. The PIP was then interrupted by the COVID lockdown during which the claimant was furloughed until mid-May, and did not resume until a pre-review meeting on 19 June 2020.

40. This is turn led to the claimant being invited to attend a Stage 1 PIP review meeting on 3 July 2020, once again being made aware that a possible outcome could be the imposition of a Formal Warning. At the meeting, Ms Simmons identified a significant number of basic errors made by the claimant during the course of the PIP, described as '14 incorrect addresses, 3 incorrect appts, 1 hygienist name incorrect, 2 MH form address changes, 1 wrong payment and 1 safe access log incorrect.' As a result of what was described as 'continual poor performance', Ms Simmons issued the claimant with a Stage 1 Formal Warning. Importantly, the errors that were identified by Ms Simmons which formed the basis for the imposition of the warning excluded errors in relation to the call back process, which was a concession made by Ms Simmons in recognition of the fact that this was a task that the claimant found particularly difficult.

41. The claimant duly lodged an appeal against this Formal Warning on 9 July 2020. This appeal was heard, once again, by Ms Marie Archer on 30 July 2020, and the outcome letter, in which none of the points of appeal were upheld, was sent to the claimant on the 7 August 2020. In summary, the Appeal was refused because i) the appeal was in respect of the Formal Warning only, and was not an appeal against the PIP itself as the claimant had believed; ii) any errors made by the claimant in relation to recalls were excluded from the decision made by Ms Simmons and therefore were not relevant; iii) the reason the PIP included errors which did not necessarily correlate with the PIP periods was due to the numerous appeals lodged by the claimant and the fact that the PIP had been interrupted by the furlough period; iv) it was not accepted that the claimant had been given conflicting instructions in relation to the process for dealing with NHS patients who did not attend their appointments.

42. As with the previous appeal conducted by Ms Archer, the thoroughness and fairness of the procedure cannot be faulted.

43. The claimant commenced a Stage 2 PIP on 22 July 2020, which in turn was reviewed on 14 August 2020 and 4 September 2020, and which resulted in a Stage 2 PIP Review Meeting on 30 September 2020. The meeting followed the same format as previous meetings. Ms Simmons gave the claimant due credit for a number of areas of improvement in her performance during the course of the preceding weeks whilst on the PIP. However, she also correctly identified a large number of errors, despite the fact that, as a result of the previous PIP decision, the claimant had been given additional training on the IT systems used by the respondent.

44. These were: 4 incorrect addresses; 9 cancelled or incorrect appointments; 1 MHF changed by herself; 6 missed or incorrect safety tariff's; 4 missing e mails in comms for patients; 1 duplicate notes; 13 missed fridge temperatures (am and pm); 7 missed toilet checks (am and pm); 8 incorrect/missing Covid checklists; 2 missed NHS data capture; and 1 instance of not alarming the practice.

45. In the absence of any mitigating factors, Ms Simmons issued the claimant with a stage 2 final written warning. This was a reasonable decision in light of the numerous continued errors in the claimant's work. Once, again, the claimant appealed against this decision, and the appeal was heard, once again, by Ms Marie Archer on 21 October 2020. A request by the claimant for the appeal hearing to be conducted at an alternative venue was accommodated. The basis for the appeal was broadly that the decision was too harsh in all the circumstances, and that the decision included errors that were made outside of the PIP time frame. As previously stated, this second ground was misconceived as there had been interruptions to the PIP due to furlough, annual leave and the lodging of a multiplicity of appeals, but in any event the errors that were referred to did fall within the stage 2 PIP.

46. The appeal process was fair and thorough. On 16 November 2020, Ms Archer issued her decision in which she upheld the final written warning. The reasons given were sound. They identified a large number of errors that the claimant had committed despite receiving additional training, and also some potentially serious errors such as failing to secure the building, a matter that had been raised with the claimant on a previous occasion. I find no fault in the decision.

47. From the 18 December 2020, a Stage 3 PIP commenced. This in turn was reviewed, in accordance with the respondent's policy, on 28 January 2021, reviews having been postponed on three earlier occasions (22 December 2020, 31 December 2020 and 14 January 2021), during which 11 separate errors, primarily in relation to patient bookings. The claimant was noted as saying that she 'wants to do better than this' and that she 'appreciate[s] [Ms Simmons'] support'.

48. The claimant was thereafter invited to a Formal Performance Review meeting on the 10 February 2021, and was warned that the meeting could result in her dismissal. At the meeting, yet further evidence of errors made by the claimant were identified by Ms Simmons and the claimant given an opportunity to comment. At the conclusion of the meeting Ms Simmons dismissed the claimant on the grounds of her continued poor performance. This decision was confirmed in writing by Ms Simmons in a letter dated 11 February 2021, which sets out in clear, well-reasoned detail the basis for her decision to dismiss the claimant.

49. On 22 February 2021 the claimant lodged an appeal against her dismissal which was heard by Ms Gayle Clague on the 5 March 2021. However, following this initial meeting, the claimant requested a further meeting with Ms Clague as she felt that she had some further unanswered questions and wanted to provide

some additional detail in support of her appeal. Ms Clague granted this request and held a second meeting with the claimant on 12 March 2021.

50. Ms Clague's preparation for these meetings was thorough; the claimant was given every opportunity to state her case; and all relevant matters were considered.

51. On 29 March 2021, Ms Clague wrote to the claimant, upholding the decision to dismiss and explaining her reasons in detail. She addressed each and every one of the issues raised by the claimant in detail, setting out the chronology where appropriate and explaining in clear and well-reasoned language the basis for her refusal of each of the claimant's points of appeal. This was a fair, thorough, and professionally-conducted process.

THE LAW AND CONCLUSIONS

Legislation

52. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by his employer (Employment Rights Act 1996, section 94). The Claimant plainly has served the relevant period and therefore has acquired that statutory right.

53. The legislative basis for 'capability' being a potentially fair reason for dismissal stems from s98 of the ERA 1996 which reads:

> 98.— General.
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it— (a) relates to the capability or qualifications of the employee for performing work of
> the kind which he was employed by the employer to do
> …
> (3) In subsection (2)(a)—
> (a) "capability" , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality
> …
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case."

54. An employer will have acted reasonably by having regard to the 'band of reasonable responses', including by reference to s 98(4) ERA 1996 (*Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT)

Capability dismissals

55. Specific guidance on reasonableness in relation to capability dismissals was provided in the leading judgment of *Alidair Ltd v Taylor* [1978] ICR 445 (CA), where Lane LJ identified two key elements when attempting to establish a lack of capability:
a) does the employer honestly believe this employee is incompetent or unsuitable for the job; and
b) are the grounds for that belief reasonable? This will likely involve an employer conducting a reasonable investigation, which may involve reference to any relevant capability procedure including job descriptions or performance appraisals.

56. It is also reasonable for small, but persistent errors to constitute sufficient reason for dismissal. In *Miller v Executors of John C Graham* [1978] IRLR 309 (EAT), the Appeal Tribunal upheld a Tribunal's finding that a farm manager, who made seven small errors in his role, despite each error itself not being of great significance, could add up to a situation where there can no longer be confidence in the employee as to their future capacity for the role.

57. Upon establishing the reasonableness of a dismissal, having identified that there was a lack of capability, various factors will be relevant to the Tribunal's assessment. The key factors, as identified in *James v Waltham Holy Cross Urban District Council* [1973] 1 ICR 398, are
a) proper investigation/appraisal of the employee's performance and identification of the problem;
b) warning of the consequences of failing to improve; and
c) a reasonable chance to improve.

58. In *NSPCC v Dear* UKEAT/0553/08/JOJ, the Employment Appeal Tribunal reversed a Tribunal's decision in favour of a Claimant's claim of constructive unfair dismissal, brought by an employee that was monitored daily by his employer for failing to follow company procedure, and held that:

> "… where there has been a failure to follow proper procedures it is normal for an employer to require monitoring to secure compliance with those procedures. That monitoring is not regarded as a punishment or as a sanction but as a legitimate management instruction."

59. Moreover, there is no principle that an employer will be acting unreasonably in a capability dismissal situation if it "does not give the employee an opportunity of alternative employment in a less demanding role, even if it were the employer who placed the employee in the more demanding role." (*Awojobi v LB Lewisham* UKEAT/0243/16/LA)

60. It was clear from the evidence that there were issues concerning the claimant's performance which pre-dated the arrival of Ms Simmons. I fully accept this and I reject the suggestion made on the part of the claimant to the effect that all had been well prior to Ms Simmons taking over the role of Practice Manager.

61. I find that Ms Simmons, as a 'new broom', had joined the respondent with an open mind but had decided, entirely reasonably, to take a more robust approach to management than her predecessor, and put in place measures at a relatively early stage in her tenure to eradicate some of the errors and lapses in procedure that she identified upon her arrival into the role.

62. This is reflected in the fact that she quickly identified the very poor working relationship that had been allowed to develop between the claimant and Ms McFarlane and took appropriate steps to address this situation, most notably by assuming the role of direct manager to the claimant, removing that role from Ms McFarlane in March 2019.

63. The claimant has made two allegations in particular in relation to what she perceives to have been the reason for her dismissal. Firstly, that it was as a direct result of Ms Simmons' discovery, as a result of an informal conversation with Marian Clark, of the fact that the claimant had made a previous complaint to an Employment Tribunal against her former employer some years earlier in 2013; and secondly, that the dismissal came about because of Ms McFarlane's dislike of her.

64. I reject both of these assertions. Dealing first with the previous complaint to a Tribunal, I find that this assertion is not supported by any of the evidence in the case, and in any event it does not stand up to any degree of scrutiny.

65. Firstly, I entirely accept Ms Simmons evidence that she adopted a professional attitude to something which she believed to be little more than office gossip. There is no evidence that she formed any sort of adverse view of the claimant as a result of the discovery. Nor is there evidence that she sought further details of the matter or even that she accepted the allegation at face value. She did what a mature and responsible manager ought to do - broadly speaking, she paid little attention to it. I cannot find any reason to suppose that it coloured her opinion of the claimant in any way, still less that it caused her to initiate a drawn-out disciplinary process culminating in the claimant's eventual dismissal.

66. Secondly, even on the claimant's own account, it isn't at all clear to me *why* the news of a previous complaint many years in the past would have been a reason to seek to bring about the termination of the claimant's employment if there were no other issues with the standard of her work.

67. Regarding the poor working relationship with Ms McFarlane, it is quite clear that this was the source of a great deal of tension in the respondent's workplace. I am prepared to accept, also, that this tension very likely affected the claimant and her standard of work. But I cannot find any support for the suggestion that this was the true reason behind the claimant's dismissal. As I have already observed, Ms Simmons took steps to resolve the situation.

68. I therefore find that there was a fair reason for the claimant's dismissal, namely, her poor performance over the course of a significant period of time which, unfortunately did not improve significantly despite the numerous measures that were deployed with that objective in mind.

69. The respondent afforded the claimant a considerable degree of support over a long period of time in which to improve her performance which I find to be entirely commensurate with the nature of the respondent's business, and the claimant's status, length of service and role.

70. As I have previously stated, Ms Simmons adopted a robust approach but it was not an unreasonable one. She clearly identified the areas of improvement required, including identifying specific errors and offering guidance as to how such errors could be avoided in the future. This was not, as is sometime the case, a manager who was being harshly critical of an employee in a general and unfocussed way and without trying to help her improve.

71. It was notable that even with the PIP in place and being kept under regular review, and indeed being offered, and receiving, additional training in her role (in particular the aspects of her role that she found especially challenging, namely the use of the R4 software system utilised by the practice) the claimant appears to have continued to make the same errors repeatedly. It is possible of course that the stress of being so closely scrutinised may have had an unsettling effect upon the claimant and therefore prone to error; but that would not render the process unfair.

72. I don't accept the suggestion (if indeed it was being made at all) that the respondent should or could have found the respondent alternative employment. The respondent took steps to alleviate the pressure on the claimant by removing her responsibility for the 'call backs' which clearly were an area of difficulty for the claimant.

73. On the subject of the call backs, I noted that this was a subject which loomed large in the mind of the claimant. I find that she placed a disproportionate emphasis on this part of her role when describing the difficulties that she faced. My view of the evidence was that the respondent had reached the view that this was a task that the claimant was struggling with and as a result decided not to require her to continue with it. The reality of the situation is that the problems with the claimant's performance went far beyond the issue regarding the call backs.

74. Accordingly I find that the decision to dismiss the claimant was within the range of reasonable responses in all the circumstances of the case.

75. I have considered with care the list of matters of alleged unfairness set out in the list of issues. It is not necessary to deal with each of them individually here; rather, they can be divided into three broad categories.

76. The first category relates to each of the performance improvement and disciplinary measures that the respondent put into place during the period commencing with the arrival of Ms Simmons in post. I do not find that any of these were unfair and I consider that they were proportionate, robust measures targeted at the elimination of errors.

77. The second category relates to matters of which I was not satisfied on the evidence that was before me. I did not find any, or sufficient, evidence that the claimant had been singled out for a reduced lunch break, or that she was not listened to. On the contrary, she was given numerous opportunies to discuss problems that she was experiencing in her role, and she availed herself of the appeal and grievance processes of the respondent at each and every stage in the process which ultimately led to her dismissal. The appeal hearings were conducted with open minds and in some cases upheld complaints made by the claimant, and in others a sympathetic approach was taken and she was offered further support and training to assist her in performing her job.

78. Neither was I satisfied that the claimant was disciplined as a result of historical errors or errors which related to dates when she was not working. I accept the evidence of the respondent that the errors may have come to light later, or on dates when the claimant was not working, but the errors themselves were committed by the claimant on dates when she was working.

79. The remaining category is of incidents which I consider to be irrelevant to the central issues that I have to determine, or are founded upon a misunderstanding on the part of the claimant. Permitting Nikki Lenai to act as notetaker at the informal PIP meeting, the supposed lack of sufficient access to the computer system, and the lack of HR presence at the dismissal meeting are all examples. Likewise, the fact that the claimant received a warning on the 9 December 2019 did not, in my judgment, play any part in the ultimate decision to dismiss, as it was removed from the claimant's file when her grievance was partially upheld. This did not, however, mean that the PIP should have been removed as the claimant appears to have believed.

80. The issue in relation to Ms McFarlane's behaviour is of course important to the claimant, and I do not underestimate how frustrating and upsetting must have been to have had such an unhappy relationship with a colleague with whom she was working at such close quarters. As I've already said, it very likely impacted upon her performance. But I do not find that it had any bearing on the fairness of the dismissal.

81. Finally, returning to the issue of the 'recalls', I am afraid that I do find that the claimant has built up this issue on the back of a number of misunderstandings - in relation to the task itself and the role that it played in her dismissal. In reality the recall issue was not a fundamental part of why the claimant was dismissed.

82. Very little need be said about the appeal process conducted by Ms Clague save that it was thorough and fair.

83. For all these reasons this claim is dismissed.

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Employment Judge Conley

Date: 12 June 2023

Sent to the parties on: 12 June 2023

GDJ
For the Tribunal Office