EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms S Christie-Allen		Birmingham Citizens Advice Bureau Services Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 18 - 22 February 2019
25 – 27 February 2019
28 February 2019 (In deliberation)

EMPLOYMENT JUDGE Lloyd **MEMBERS** Ms S Campbell
Mr P J Simpson

For the Claimant: Mr N Brockley, Counsel
For the Respondent: Mr R Hignett, Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

1) At all relevant times the claimant was not a disabled person under s.6 EqA 2010.

2) The claimant's claim of disability discrimination is therefore dismissed.

3) The claimant was fairly dismissed by the respondent for reason of capability. We dismiss the claimant's claim of unfair dismissal.

4) We therefore dismiss the claimant's claims in their entirety.

REASONS

Background

1.1 The claimant has brought a claim of unfair dismissal pursuant to sections 94 and 98 Employment Rights Act 1996. She contends that she was unfairly dismissed for reason of capability. She contends that her dismissal was both procedurally and substantively unfair. She claims that the decision reached by the respondent was outside the range of reasonable responses open to the respondent

1.2 Further, and in the alternative, she has contended that she is a disabled person under the Equality Act 2010. She claims to suffer from anxiety and depression. She argues that such impairment had a substantial adverse effect on her ability to perform day-to-day activities. The claimant contends that the decision to dismiss her was unfavourable treatment arising in consequence of her disability (s.15 EqA). Further that the respondent failed to make reasonable adjustments in relation to her disability, pursuant to sections 20 and 21 of the Equality Act 2010

1.3 The claimant, who is 46 years of age, was employed as a well-being adviser by the respondent, a local independent publicly funded charity. It is a member of the national Citizens Advice charity. It provides free advice on a range of issues to individuals; many of whom are vulnerable.

1.4 The role of well-being adviser was charged with developing and delivering a partnership outreach service in GP surgeries. This is achieved by supporting clients to seek non-medical interventions to improve their well-being and in providing a broad spectrum of generalist advice. Well-being advisers are required to present and explore options and implications to enable clients to make informed decisions.

1.5 The respondent established the well-being team in June 2015. The respondent maintains that training and support was provided to the whole team, including the claimant.

1.6 The respondent's evidence was that, by October 2015, it had become evident that some team members including the claimant needed additional support to undertake the role in order to meet the required quality standard. In these circumstances, team members were instructed to attend the GPs' practices in the morning and return to the office for additional support from senior managers in the afternoon. As an individual employee reached the required standard they were signed off as competent by a manager and the requirement to return to the office afternoon was removed.

1.7 The respondent's evidence was that with the exception of the claimant, each team member was signed off by January 2016; having met the required standard and being deemed competent to advise clients.

1.8 It is the respondent's case that the claimant failed to reach the required standard; despite the respondent providing the claimant with additional support and training. By January 2016 the respondent stopped the claimant from attending GP practices. The respondent

felt concerned about the claimant's competence and her ability to be left to work independently with clients. Thereafter the claimant was required to see clients in the city centre office where management support was on hand on a daily basis. The respondent's case is that in January 2016 it became evident that the informal support was not sufficient for the claimant and that a formal capability procedure was required to be initiated. The respondent informed the claimant on 7 January 2016 that she was not meeting Quality of Advice Audit ("QAA") standards and that the formal capability process would be commenced in line with the "Managing Performance-Capability Procedure Policy". The QAA standards are group standards which are set by the Citizens Advice Bureau and which standards the respondent is required to adhere to.

1.9 Between January 2016 and December 2016, a total of three formal capability hearings were held; with Performance Improvement Plans ("PIPs") being agreed with the claimant after the first and second capability hearings.

2.1 The claimant was given a final warning in relation to her performance following the second capability hearing.

2.2 The claimant appealed at each Stage of the capability process. None of the appeals were upheld. The claimant's performance was managed for some 11 months. The respondent's case is that during that time there was little or no improvement.

2.3 On 5 August 2016 the claimant was requested to attend a third capability hearing, scheduled for 6 September 2016. For operational and staffing reasons, however, the hearing did not take place until 25 November 2016. At that hearing, the claimant was dismissed with effect from 30 November 2016, but with 8 weeks' notice beginning on Thursday 1 December. The dismissal was confirmed in a letter of 30 November (1166).

2.4 The reason for dismissal was capability; namely, that the claimant's *"work performance [had] consistently fallen below an acceptable standard".* The respondent's case is that the decision was based on the quality of advice given by the claimant, the number of clients seen by her, the pace with which she carried out her work and issues surrounding her being able to work independently.

2.5 The claimant appealed her dismissal on 5 December 2016.

2.6 In summary, the claimant's appeal was expressed in the following grounds:

2.6.1 *"The written reasons for dismissal with notice repeat all the previous inaccuracies and errors, misconceptions entrenched views, unfairness and unreasonableness and justifications deployed in previous correspondence, findings and hearings…"*

2.6.2 <u>Quality of Advice</u>: the scoring given should not have been equated to capability (full disclosure of work progress report sheets is required). The outcome letter concludes that improvements have been made in regard to the quality of advice, but the

expectation is that 100% is to be achieved-this is unrealistic and not a target that any of my team members have met since my monitoring began.

2.6.3 *Number of clients: I have been prevented from seeing 12 clients per week, and prior to this I was seeing the target number. No evidence was provided from the management case on how the allocation of clients was distributed. This appeal also highlights that I have been prevented from working in GP surgeries - therefore it is contested that I have failed to meet my target number of clients across four different GP practices.*

2.6.4 *Pace of work: the management case illustrates all contracted time but does not illustrate what the expectation is in regard to the time allocated for the following activity which varies from client to client and from adviser to adviser: client interview, research, case recording, client care letters, compiling updates on risk tracker/Petra, remedial work*

(a) the complexity and nature of cases has not been given proper weight in relation to the maximum three-hour target

(b) the time recorded relates to the time spent in total on each of the cases JP was supervising. It does not take account of time spent working on other cases and carrying out other tasks.

2.6.5 *It is noted that point 4, independent working and appropriate accessing of support, has been met as an improvement target – however points 1-3 of the target plan are intrinsically linked to this criteria and the Capability Chair did not consider this fully*

(a) I have an outstanding grievance in regard to the performance targets set and my dismissal occurred before I was provided to present the facts of my grievance

(b) psychological consequence of the process on my mental health and well-being

(c) proper and sufficient weight was not given to what my witnesses have to say

(d) inaccurate information has been given in response to what the witnesses said

(e) the statistical analysis is predicated on an inaccurate basis

(f) the dismissal has [a] career threatening impact on my job prospects

(g) the contract for the well-being team is not due to be renewed and I believe that my dismissal was a route to avoid redundancy pay."

2.7 One of the grounds of the appeal, therefore, was that it had been acknowledged by the respondent that her performance had improved. Also, that the respondent had relied on the fact that the claimant was not achieving 100% in relation to the quality of her advice; despite the fact that none of her co-workers were achieving that specified target either. The respondent had stated that the specific target had to be achieved immediately

2.8 A collective grievance was submitted by a group of five well-being advisers on 26 September 2016. On the face of it, the claimant was party to it; but it was not signed by her. That grievance was acknowledged by the respondent on 3 October 2016 with a decision to commission a full and independent review of the well-being service. Kelly Danks (KD) was appointed to conduct the review. The claimant was by that time subject to capability proceedings and had been summoned to a third capability hearing.

2.9 The claimant's dismissal appeal hearing was scheduled for Monday 19 December 2016; to be heard by LT and NW. She was sent notice of the hearing on 14 December 2016. The appeal outcome letter, dismissing the claimant's appeal, was dated 10 January 2017.

3.1 A second collective grievance was lodged by the claimant's former colleagues on 9 January 2017 and was submitted directly to the respondent's trustees – with the contention that JN had reneged on her commitment to an impartial external service review. The date for the hearing of the collective grievance was not until 17 May 2017. The claimant's dismissal appeal was considered and rejected; she contends, despite the collective grievance remaining outstanding.

The issues

3.2 The tribunal has read the Annex to Employment Judge Broughton's order issued on 4 September 2017; at its pages 7 – 10. There, E J Broughton has in his words, definitively recorded the issues between the parties. The Judge observed that it was expressly confirmed to him that the claimant's principal complaint was that of unfair dismissal.

3.3 As regards the disability claim, there are two impairments relied on; depression and anxiety. The Respondent's concession is that the Claimant suffered from a mental impairment leading to anxiety and that that was long term. The issue for the tribunal is whether it had a substantial adverse effect at the relevant times.

3.4 Employment Judge Broughton observed at 2.1 of the case management summary that …the impairment may be stress, anxiety and depression. He then goes on to remark that also impacted on her under-active thyroid.

3.5 At this hearing, the respondent's concession was "mild anxiety"; there was no concession in relation to stress. There was no concession in relation to depression and also what if any impact the under-active thyroid would have.

3.6 The claimant's case is anxiety and depression. The underactive thyroid is not mentioned in the claim form at all.

3.7 Importantly we think, the concession of the respondent (at p.160) was in relation to anxiety, and there is no concession in relation to depression.

3.8 Counsel for the respondent, Mr Hignett, put it to the tribunal that he and his client had not understood until the commencement of this hearing that the underactive thyroid was separately relied upon as a disability. The Annex within the Case Management Order is shown as being the definitive issues of the case;(p.104, p.109-111). The tribunal heard argument around the distinction between anxiety and depression and what the claimant says about her underactive thyroid.

3.9 It has fallen to the tribunal to make the determination as to the precise nature of the disability pleaded by the claimant. We did so as part of our hearing of these preliminary points on Day 2 of the hearing.

3.10 We accept that E J Broughton correctly viewed this claim as one essentially of unfair dismissal, with an added jurisdictional layer ("an added dimension"), arising from the claimant's assertion to be disabled under s.6 EqA. The Respondent had acknowledged mild anxiety which was ongoing for a period of 14 years. That is the impairment for the purposes of the disability claim we conclude.

4.1 The overtly contentious matter amongst these preliminary issues, was the question of the claimant's underactive thyroid condition. Counsel for the claimant, Mr Brockley, sought to persuade the Tribunal that the issue of the Claimant's underactive thyroid was potentially a free-standing disability; and that the Claimant could attach a disability claim to it. Moreover, Mr Brockley argued, that such followed from the way in which Employment Judge Broughton had expressed himself at p.109. Counsel for the respondent argued that when the Judge made his order (at p.109), it wasn't being suggested to him that the underactive thyroid would be relied on as a separate disability. At p.109, paragraph 2.1, the Employment Judge said, *"does the Claimant have a physical or mental impairment in the stress, anxiety and depression"*. The underactive thyroid was not in the ET1.

4.2 On Day 1 of this hearing there was a concession by the claimant that the underactive thyroid was not being pursued as a contended disability. However, the claimant's position changed by the start of Day 2. That potentially affected the rest of the disability claim; especially in relation to the s.15 EqA claim. The essence of the Section 15 claim it could be anticipated, would be an acceptance that the claimant was under-performing for reasons related to her disability. In relation to a matter arising in consequence of the Claimant's disability, the claimant's case is a difficulty coping with workload. In a case pleading underactive thyroid as well, the tribunal would be required to consider the effects of that condition. That part of the case was not set out in the impact statement or the witness statement. The was no information on the basis of which that part of a disability case could be responded to. The respondent presented to this hearing with a position based on the claimant's pleaded case of anxiety. The same problem arose in relation to the reasonable adjustment claim and the issue of substantial disadvantage.

4.3 There was also an issue giving rise to some controversy at paragraph 53 of the Claimant's statement. The claimant had referred to exchanges with the respondent which were without prejudice matters. After hearing the views of both parties on the issue, the tribunal agreed that an amendment of paragraph 53 would be made by consent, and consistently with the documentary evidence at p.1187 (referenced by the claimant at line 11 of paragraph 53). The said paragraph, line 5 to 11 should read;

"Both he and Janice Nicholls subsequently offered me sums of money to leave my job with the CAB. In the CAB's "Management Statement of Case" document, dated 15 December 2016, which was relied on in order to dismiss me (see paragraph 22, page 1187), there are references to negotiations which did not result in agreement."

4.4 The Claimant's witnesses produced supplemental statements which referred to the collective grievance appeal outcome. That was a matter which post-dated the original statements. We admitted those further statements. In the collective grievance appeal outcome, there was reference to a document "Appendix 10". Jane Priest (JP) supplied the information used to compile Appendix 10 in her own supplemental statement. The tribunal agreed to admit it.

4.5 In summary, with regard to the preliminary matters set out in the preceding paragraphs, we ruled as follows, prior to the commencement of the live witness evidence;

a) The claimant's underactive thyroid condition is not part of the claim before this tribunal; and the tribunal does not treat it as such. The claimant's case on disability discrimination is based on a contended impairment of depression and anxiety and that such impairment brings her within s.6 EqA. The tribunal acknowledges that the respondent accepts that the claimant has an impairment of anxiety, but the respondent does not accept an impairment of depression.

b) We admitted the supplemental witness statements on both sides but ordered that no further statements would be admitted following the commencement of evidence.

c) Paragraph 53 of the claimant's witness statement was amended by consent of the parties in the terms we have set out above.

4.6 In relation to the substantive issues of the case, the following matters underpin the tribunal's assessment of this case.

The unfair dismissal claim

4.7 What was the reason for dismissal? The respondent has asserted that it was a reason related to capability, being a potentially fair reason under section 98(2) Employment Rights Act 1996 ("ERA"). It must be shown that the respondent had a genuine belief in the claimant's incapacity, specifically her work performance, and that this was the reason for dismissal.

4.8 Did the respondent hold that belief in the claimant's incapacity on reasonable grounds having followed a fair procedure?

5.1 Was the decision to dismiss a fair sanction; that is was it within the reasonable range of responses for a reasonable employer?

5.2 If the dismissal was unfair, did the claimant contribute to the dismissal by any culpable conduct? This requires the respondent to show on the balance of probabilities the claimant was responsible for the conduct alleged. If so by what proportion should the compensatory award be reduced as a result?

5.3 Can the respondent prove that if it adopted a fair procedure claimant would/may have been fairly dismissed in any event? If so to what extent and when?

Disability qualification

5.4 Did/does claimant have a physical or mental impairment, in this case stress/anxiety/depression.

5.5 In relation to the claimant's underactive thyroid we confirm our conclusion at paragraph (a), namely that the underactive thyroid is not a part of this claim.

5.6 Did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

5.7 If so, was that effect long-term? In particular when did it start and: did the impairment last at least 12 months? If not, is or was the impairment likely to last at least 12 months or was it likely to recur after at least 12 months and if so from what date.

5.8 What measures were being taken to treat or correct the impairment? But for those measures will the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities? The relevant time for assessing whether the claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is throughout 2016.

6.1 *Section 15*: the allegations of unfavourable treatment are:

6.2 The claimant's performance warnings in February and June 2016, and, her dismissal. No comparator is required.

6.3 Was the claimant's difficulty in coping with her workload and/or her need for medical time off, something arising in consequence of the claimant's disability?

6.4 Did the respondent treat the claimant is alleged because of "something arising" in consequence of the disability? Alternatively, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following;

6.5 As to the business aim or need sought to be achieved, the need for employees to perform their work to an acceptable standard.

6.6 As to the reasonable necessity for the treatment, that employees in the claimant's role needed to work independently and with vulnerable clients.

6.7 As to proportionality: the respondent alleges that they have given considerable support and training and had considered all reasonable alternatives.

6.8 The claimant has suggested that the response was not proportionate because the respondent did not seek to update medical advice and did not consult with her including about her condition and its effects and because they failed to make reasonable adjustments.

7.1 *Reasonable adjustments*; section 20 and section 21:

7.2 Did the respondent apply the following provision, criteria and/or practice ("the provision") generally, namely;

7.2.1 requiring employees to have increased/excessive/unrealistic workloads

7.2.2 the application of the performance management process

7.3 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that, her condition meant that she was unable to cope with the workload and any alleged performance failings arose as a result and which rendered her subject to the performance management process warnings and, ultimately her dismissal.

7.4 Did the respondent know or could the respondent be reasonably expected to know that the claimant; has a disability, and, was likely to be placed at the disadvantage which is set out herein?

7.5 If so, did the respondent take such steps as were reasonable to avoid the disadvantage?

Discussion of the issues

7.6 The claimant contended that the respondent treated the claimant unfavourably because of something arising in consequence of her disability. It was alleged that the claimant's disability meant that she could not cope as well as her colleagues with an increased and/or excessive and/or unrealistic workload and that the respondent subjected the claimant to procedures and imposed sanctions on the claimant because of this - that is to say the claimant was disadvantaged.

7.7 Such sanctions, including dismissal, amount to discrimination arising from disability unless it is objectively justified. It is claimed that the claimant was also treated unfavourably because of something arising in consequence of her disability; as she needed to seek and attend medical treatment - and yet the respondent did not amend the claimant's workloads or targets, despite reducing the claimant's working hours.

7.8 The respondent it is argued, failed to get up-to-date medical advice or to follow the advice that had been given and consult properly with the claimant. It was said that the respondent had made improper assumptions about the claimant's condition which meant that the respondent's actions had not been proportionate.

7.9 The claimant was placed at a substantial disadvantage by the respondent's provisions, criteria and practices (PCPs), being the respondent's requirement for employees to cope with an increased or excessive or unrealistic workload which put the claimant as a disabled person at a particular disadvantage compared to non-disabled persons-and as a result of the respondent's PCPs. The duty to consider making reasonable adjustments rested with the respondent. It was contended that reasonable adjustments may have included; allocating some of the claimant's duties to another worker, assigning some of the claimant's excessive or unrealistic caseload to another worker, assigning the claimant

to a different place of work for work or training which was supportive in nature, giving or arranging supportive training, mentoring and/or supervision for the claimant and/or providing the claimant with slightly different or longer training or time periods. Or, transferring the claimant to fill a suitable alternative post.

8.1 In applying its PCPs strictly in relation to the claimant, the respondent had made no proper assessment of whether the claimant's performance was acceptable in the circumstances or was not acceptable. The respondent did not satisfy itself that any adjustments made were all that could have reasonably been made.

8.2 In relation to the contended disability and evidence thereof, Mr Brockley, for the claimant acknowledged that the references were generally to anxiety; and more especially a mild anxiety state. However, the fit note had referred to stress and work-related stress alike. The claimant spoke of pressures at work from time to time; but those were sporadic. There was a significant attack made by the claimant upon the procedure adopted by the Respondent. That to all intents and purpose was the most significant aspect of this case and relates to the question of the alleged unfairness of the dismissal. The claimant asserts that there was a significant departure from that procedure, and an abandonment of the informal process.

8.3 Counsel for the claimant raised the issue of ***Polkey*** in his submissions. Mr Brockley argued that no evidence as such had been called in respect of ***Polkey*** issues and that the tribunal had no real basis on which to make ***Polkey*** findings.

8.4 This tribunal is satisfied that its principal consideration should be the statutory test of fairness within the meaning of Section 98(4) ERA. The claimant's case seeks to persuade the tribunal that its starting point is, what Mr Brockley calls a "predisposition or an alignment" against the claimant which arose from the relationship between the claimant and Jane Priest (JP). That refers to what is said to be a history starting in 2012 and the claimant's first written warning and followed by her two grievances against JP.

8.5 A further controversy raised on behalf of the claimant is that the dismissing officer (Janice Nicholls), JN, and the appeals officer, Linden Thomas, (LT), knew of the existence of the collective grievance which raised common issues of complaint. LT sat jointly with Neil Warner (NW), the chair of the trustees. Also, in relation to the appeal Stage, what was the job of LT in chairing the final appeal? There are a number of pertinent matters, but the first relates to how the appeal should be conducted. LT was asked whether or not she agreed with the proposition that if there was discretion as to whether or not the matter should be dealt with by way of a review or a rehearing, that discretion should be exercised fairly.

8.6 The second point in respect of the appeal is the issue of NW's capacity to act impartially, Counsel for the claimant invited the tribunal to make the finding that NW could not possibly act impartially because of his involvement in the 2012 first written warning appeal; though of course that that was outside the capability procedure. He was involved in the collective grievance appeal and in the notes of the collective grievance appeal. On one level, there were distinctions between the collective grievance appeal and the appeal on the

Claimant's capability case. But, the claimant's counsel would submit that NW was obviously partial, and the consequences of that partiality was that the Claimant was not afforded a fair hearing for the purposes of her appeal.

8.7 Also, was there inconsistency in the approach adopted by the respondent to Cecilia Ford-Jones?

The Hearing; Evidence

9.1 By agreement, the respondent led its live witness evidence.

9.2 The respondent's witnesses were;

a) Samantha Catchpole (SC) – Generalist Service Manager
b) Jane Priest (JP) – Service Manager, MacMillan and Mental Health Projects
c) Janice Nicholls (JN) – Chief Executive Officer

9.3 We heard the live witness evidence of the claimant, and from two further witnesses called for her;

a) Andrew Hipwell (AH) – former Wellbeing Adviser
b) Jasbir Matharu (JM) – former Wellbeing Adviser

9.4 Upon the claimant's application we issued witness orders to Ms Kulsum Miah, Ms Jasbir Matharu and Mr Alan Espley. Only Ms Matharu complied with the order. She was indeed in attendance at the hearing on each day. Ms Miah informed the claimant's solicitors that she could not attend because of a professional examination. Mr Espley made no contact at all.

9.5 There was a set of common hearing bundles organised in 4 lever arch folders and a ring binder and extending to more than 5,100 pages. Miscellaneous additional documents were added during the course of the hearing.

9.6 The documents bundle was accompanied by a separate ring binder containing the main witness statements on both sides.

9.7 The Respondent's witnesses accepted in principle that the main purpose of the capability procedure was to get an individual back to the point where they could perform. It was not about frustrating their performance. It was not about getting them to dismissal. The dismissal was a last resort.

9.8 At the same time, the claimant acknowledges that dismissal is one of the permitted outcomes which comes under the capability procedure. The claimant argues there was an "abandonment" of informality. What the claimant suggests happened was a rush to ensure that the prescribed period did not expire so as to take the Respondent back to the beginning of the capability procedure.

The capability case

10.1It is necessary we think to begin the tribunal's analysis of the claimant's capability case with a resume of the respondent's capability procedure. We summarise the principal sections of the procedure as follows: -

"*Policy statement*

The primary aim of this procedure is to provide a framework within which managers can work with employees to maintain satisfactory performance standards and to encourage improvement where necessary.

It is our policy to ensure that concerns over performance are dealt with fairly and that steps are taken to establish the facts and to give employees the opportunity to respond at a hearing before any formal action is taken.

This procedure does not form part of any employee's contract of employment and it may be amended at any time. We may also vary any parts of this procedure, including any time limits, as appropriate in any case.

Who is covered by the policy?

This policy is used to deal with poor performance. It does not apply to cases involving genuine sickness absence, proposed redundancies or misconduct. In those cases, reference should be made to the appropriate policy or procedure.

Identifying performance issues

In the first instance, performance issues should normally be dealt with informally between you and your line manager as part of day-to-day management. Where appropriate, a note of any such informal discussions may be placed on your personnel file but will be ignored for the purposes of any future capability hearings. The formal procedure should be used for more serious cases, or in any case where earlier informal discussion has not resulted in a satisfactory improvement. Informal discussions may help:

(a) clarify the required standards;

(b) identify areas of concern

(c) establish the likely causes of poor performance and identify any training needs; and/or

(d) set targets for improvement and a timescale for review

Employees will not normally be dismissed for performance reasons without previous warnings. However, in serious cases of gross negligence, dismissal without previous warnings may be appropriate.

If we have concern about your performance, we will undertake an assessment to decide if there are grounds for taking formal action under this procedure. The procedure involved will depend on the circumstances that may involve reviewing your personnel file including any appraisal records, gathering any relevant documents, monitoring your work and, if appropriate, interviewing you and/or other individuals confidentially regarding your work.

Disabilities

Consideration will be given to whether poor performance may be related to disability and, if so whether there are reasonable adjustments that could be made to your working arrangements, including changing your duties or providing additional equipment or training. We may also consider making adjustments to this procedure in appropriate cases.

If you wish to discuss this or inform us of any medical condition you consider relevant, you should contact your line manager or a member of the Human Resources Department.

Notification of a capability hearing

If we consider that there are grounds for taking formal action over alleged poor performance, you will be required to attend the capability hearing. We will notify you in writing of our concerns over your performance, the reasons for those concerns, and the likely outcome if we decide after the hearing that your performance has been unsatisfactory. We will also include the following where appropriate:

(a) a summary of relevant information gathered as part of any investigation

(b) a copy of any relevant documents which will be used at the capability hearing

(c) a copy of any relevant witness statements, except where a witness's identity is to be kept confidential, in which case we will give you as much information as possible while maintaining confidentiality.

We will give you written notice of the date, time and place of the capability hearing. The hearing will be held as soon as reasonably practicable, but you will be given a reasonable amount of time, usually 2 to 7 days, to prepare your case based on the information we have given you.

The procedure then continues to set out the following provisions:

Right to be accompanied at hearings

Procedure at capability hearings

Stage 1 hearing: first written warning

Stage 2 hearing: final written warning

Stage 3 hearing: dismissal or redeployment

Appeals against action for poor performance

10.2 This tribunal has concluded that the capability procedure was fairly and lawfully followed by the respondent in the claimant's case.

10.3 The purpose of the role in which the claimant was employed was to ease pressure on GP surgeries to ensure that clinicians might be able to allocate their surgery time to addressing medical rather than non-medical issues. The process is sometimes referred to by the medical profession as "social prescribing". The role of the well-being adviser was expected to be carried out at various partnership surgeries. In the case of the claimant, this did not occur. This was because, in the respondent's view the claimant at no time, became sufficiently competent to undertake such a role, working independently on an outreach basis. Such view was not accepted by the claimant.

10.4 The claimant's background with the respondent prior to taking up the well-being adviser role was that of welfare benefits adviser. Such post was in a specialist rather than a generalist role. The claimant's case has been that the nature of the clients that she was required to see in her new role had a direct impact upon the time that it took to provide advice. That impacted upon the attainability of the targets which were imposed upon the claimant by the respondent.

10.5 It is also the claimant's case that the existence of the collective grievance from other well-being advisers alerted the respondent to the fact that the matters which were being raised by the respondent against the claimant were matters, about which the five other signatories to the collective grievance were complaining. The claimant contends that the rejection of these complaints was necessary in order for the respondent to be able to argue that the claimant had not been subject to disparate treatment.

10.6 The claimant acknowledged that capability – in this case competence - is a *prima facie* fair reason for dismissal, within the meaning of section 98(2)(a) of the Employment Rights Act 1996. The claimant's case is advanced on the basis that not only was the procedure which respondent adopted an unfair one but that, ultimately her line manager, JP was motivated by personal issues; to seek to ensure that the claimant failed in her role as well-being adviser. The claimant contends that is made doubly clear by the fact that JP had been responsible for the process in 2012 which had given rise to the claimant's first written warning and in respect of both the grievances and critically in the second grievance. There was, Mr Brockley argued a predisposition or an alignment against the Claimant which arose from the relationship which existed between the Claimant and JP. Notably, JN determined the second grievance in part in favour of the Claimant.

10.7 Of course, in considering all the evidence on these matters and drawing its conclusions, the tribunal must be vigilant to make its findings with strict objectivity; and not to replace the view of the employer with the view of the tribunal.

10.8 The respondent's witnesses accepted the proposition that the purpose of the capability procedure was not that of dismissal but rather of securing an improvement in performance. Moreover, that in the first instance performance issues were directed to be dealt with informally.

10.9 Para 5.1 of the procedure imposes a positive requirement upon the respondent to consider whether performance may be related to a disability. The procedure does not, as a matter of fact refer to a disability within the meaning of Section 6 of the Equality Act 2010 ("EqA") but there is reference to reasonable adjustments in the procedure.

11.1 The procedure at Stages 1 and 2 (paras 10.3 and 11.3) provided that respectively a first and final written warning would be disregarded (in future capability proceedings) after (normally) six months from the end of the review period. This, in terms, dictated that a move to dismissal under the Stage 3 would be inappropriate if that period of 6 months were allowed to elapse (from the end of the review period at Stage 2). It was argued for the claimant that this provided a motivation for the respondent to ensure the continuation of the procedure against the claimant, with such restrictions in mind.

11.2 The appeal Stage of the procedure (para 13) provided that a discretion was afforded to the respondent as to whether it conducted a review or a complete re-hearing (para 13.5), a decision which LT indicated was required to be taken fairly. Moreover, the appeal procedure specifically identified the need for any appeal hearing to be conducted impartially (para 13.5). Furthermore, it was provided that where possible the appeal hearing should be conducted by a more senior manager who had not previously been involved in the case. This begs the question why it was thought appropriate, given that there were some 10 trustees, that NW be appointed to the dismissal appeal. He sat on the First Written Warning appeal in 2012 [501-504] though it is acknowledged that this was a different procedure. He also, thereafter, sat on the 1st Stage capability appeal [[966-969] in April 2015; and then upon the appeal against dismissal [1227 –1233]. Also, he subsequently sat upon the collective grievance appeal [1395 s – z]. The tribunal has not heard evidence from NW, but it is clear that his ability to act impartially had been raised by Sittu Ahmed, the claimant's union representative.

11.3 The claimant asserted that it was unfair that JP should be responsible for the preparation of each investigation report, namely those dated 8 January 2016 [728 – 733], 18 May 2016 [980-985] and 17 November 2016, [1112-1114]. Particularly so, the claimant argues, when such reports were to be presented by JP to JN; who was or should have been aware of the issues between the claimant and JP. We have not however found the reports of JP to be fundamentally flawed. It was not perfect, and we acknowledge that it seemingly did not attach a statement by PC as it purported to present. But in our view the report was, in terms of fairness, fit for purpose.

11.4 The claimant has referred to a "rush" by the respondent to initiate the capability process. The claimant's evidence was that she did not start in her role until 1 September 2015 and by about 30 November in the same year the respondent was moving towards placing her on capability. The email sent by SC to JP and PC, which was not to be shared with the claimant, raised the issue of a deadline of 24 December 2015 [714a]

and went hand in hand with the compilation of a list of some 20 cases suggesting that there were issues with the claimant's performance of her role. The list was considered by JP within her investigation report, dated 8 January 2016.

11.5 The quality target is part of a national standard. The respondent cannot of its own discretion disapply it or vary it. The evidence suggests the claimant was not able to consistently achieve the required quality target even after coaching and feedback.

11.6 Moreover, the claimant's supporting witnesses say they were not achieving 12 clients per week or consistently getting QAA scores of 2 when their work was checked. On the basis of that the claimant submits that placing her on a capability plan - or keeping her on such a plan - was unfair.

The relevant Law

12.1 We intend to offer a distillation of the relevant law; we do not believe it is necessary to embark upon any extended and erudite academic analysis of the black letter law *per se*.

12.2 These were the principal pieces of case law, which were cited to us by counsel on both sides;

Newport City Council v Gallop [2013] EW CA Civ 1583

In order for the Respondent to be fixed with knowledge of a disability it must have actual or constructive knowledge of all the constituent elements that comprise disability, *[Gallop]*

The Post Office v Fennell [1981] IRLR 221

Hadjioannou v Coral Casinos Ltd [1981]

Proctor v British Gypsum Ltd [1992] IR LR 7

Paul v East Surrey District Health Authority [1995] IR LR 305

Pnaiser v NHS England [2016] IR LR 170

Taylor v Alidair Ltd [1978] IR LR 82

Beckford v London Borough of Southwark [2015] UKEAT 0210

Archibald v Fife Council (2004) IR LR 653

Chief Constable of South Yorkshire Police v Jelic [2010] IRLR 744

12.3 We have turned firstly to the law relating to the disability discrimination claim. We have begun by identifying the definition of disability for the purposes of Section 6(1) EqA and Schedule (1) EqA. The prerequisites of disability under the EqA are (1) a physical or mental impairment and (2) the impairment has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities. In the present case, the Respondent has disputed that the Claimant is a disabled person. Whether the

claimant is disabled under s.6 EqA is a finding we must make in the context of this Judgment. The consequence of the Claimant being found not to be disabled under Section 6(1) Schedule (1) is that we have no jurisdiction to hear a claim of disability discrimination. In the claimant's case, those discrimination claims are advanced under Section 15, namely, discrimination "arising from" disability and under Sections 20 and 21, namely the duty of an employer, the respondent, to make reasonable adjustments for the claimant.

12.4 Our findings upon applying the relevant legal principles are that the claimant was not at any relevant time for the purposes of her claim a disabled person. Our reasoning is set out in the succeeding paragraphs.

12.5 Turning to capability;

12.6 We have proceeded to direct ourselves as to the definition of capability in the ERA.Capability is defined by reference to the skill, aptitude, health or any other physical or mental quality of the employee.

Section 98(3), In subsection (2)(a)—

(a) "capability", in relation to an employee, means his[her] capability assessed by reference to skill, aptitude, health or any other physical or mental quality,

12.7 The burden of proof is on the employer to establish that capability was the reason for the dismissal. An employer does not have to prove that the employee was incapable of doing their job; but that the employer honestly believed the employee could not do it and had reasonable grounds for that belief Taylor v Alidair Ltd [1978] ICR 445.

12.8 To discharge the burden of proof, the respondent requires evidence both of the standards that apply to the employee and of the employee's failure to meet them.

12.9 Before dismissal an employer should inform the employee what is required, inform the employee of the ways in which he is failing to perform his job adequately, warn him of the possibility that he may be dismissed because of this and provided him with an opportunity to improve; for example, James v Waltham Holy Cross UDC [1973] ICR 398. Also, in James it was suggested that a capability defect may be so extreme that there is an irredeemable incapability, with the result that a warning would be of no benefit to the employee. There is no general principle that an employer will be acting unreasonably if he does not give an underperforming employee an opportunity of alternative employment in a less demanding role; even where it was the employer that put the employee in that role in the first place. Whether this is required will depend upon an assessment of what is reasonable in all the circumstances (Awojobi v London Borough of Newham UKEAT/0243/16/LA).

13.1 It is well settled that with regard to capability and performance management, employers should follow procedures agreed with or notified to their employees.

13.2 The claimant raised an issue of differential treatment.

13.3 The claimant's supporting witnesses say they were not achieving 12 clients per week or consistently getting QAA scores of 2 when their work was checked. On the back of that the claimant submits that placing her on a capability plan (or keeping her on one) was unfair.

13.4 It was held in the case of The Post Office v Fennell [1981] IRLR 221 at para 12, that the expression 'equity' in the forerunner to s98 ERA 1996 "comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment…and where…one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating the offence as a sufficient reason for dismissal". However, in the same case this concept was noted to have its limits by virtue of the latitude which an individual employer has to deal with particular cases in a particular way: "*There is an area for manoeuvre within which it cannot be said that an employer is being unreasonable, but that area is bounded by a boundary (Para 15).*

13.5 Later cases have sought to identify where that boundary line lay. Three important refinements emerged from the case of Hadjioannou v Coral Casinos Ltd [1981] at para 352 followed in Procter v British Gypsum Ltd [1992] IRLR 7 at paragraph 25. Firstly, that although the employer should consider how previous similar situations have been dealt with, the allegedly similar situations must be truly similar before arguments based upon disparity will arise. Secondly, even where truly similar situations are present the emphasis is on the particular circumstances of the individual employee's case and therefore by implication, not on detailed comparisons (paragraph 25). Thirdly, a tariff approach to dealing with misconduct which restricts flexibility is to be discouraged.

13.6 Further important refinements emerge from the case of Paul v East Surrey District Health Authority [1995] IRLR 305 at para 36 namely that in taking a different approach in similar cases there may be all manner of differences which justify the different approach:

"The employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether repetition is likely. Thus, an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely."

Findings of material facts

Background findings

14.1 The claimant was a long-standing employee of the respondent. She worked initially as a case worker for a number of years from 2008. The respondent undertook a redundancy exercise in 2015. As a result she was placed at risk of redundancy (552-553) and she was required to compete for her role. She was not successful.

14.2 She was however invited to apply for an alternative role of "Wellbeing Adviser". The claimant's application for that role was not successful (560 – 580). The claimant was made redundant (583, 585).

14.3 Subsequently, she successfully appealed the redundancy dismissal (628) and as part of the appeal outcome she was offered and accepted the alternative post of well-being adviser at a lower salary. After a period of training, she was selected for intensive coaching. However, following the period of intensive coaching, the claimant's managers, SC and JP concluded that she was not able to work independently. The claimant's poor performance had a significant impact on the team and the well-being service as JP explained in her evidence; and which was unchallenged, (paras 74 – 82).

14.4 A report by JP recommended that she be placed on a capability plan (728 – 734). That was what happened. Part of the case advanced by the claimant is that JP had a grudge against because of their previous history and was "out to get" the claimant. In the face of that there is quite clear evidence before this tribunal that JP had been supportive throughout the capability process. Accordingly, during the cross-examination of the claimant she was asked if she genuinely believed that there was a conspiracy against initiated by JP. She maintained throughout her evidence that she had indeed been edged out of the respondent by JP.

14.5 However, we say now that we have found no evidence to support such a contention. It is true that there had in the past been some friction between the claimant and JP, and such tension had resulted in two grievance complaints being lodged by the claimant against JP. We think that such grievances were investigated and decided fairly and then as far as the present proceedings are concerned nothing turns on these previous matters. Indeed, there was clear evidence that the claimant had acknowledged openly that JP had been supportive to her. The claimant implied when asked about that acknowledgement that because the team was very small, and the managers were mutually supportive she wouldn't have wanted to say anything different. She acted she said, so as to try to ensure that everything was going to stay "on an even keel". She remarked in cross examination that every day she had either to work with JP or SC and she suggested that they assisted her in some part but that on the whole she didn't find the working support very effective for her.

14.6 We do not accept that the support provided for the claimant was inadequate or ineffective. We think that much was due to the very often negative attitude which the claimant showed in addition to her intrinsic difficulties in carrying out the work to the volume and standard required by the respondent. We considered the observations from

the claimant, but we find no evidence to show that there was any oppressive regime at the respondent which kept the claimant in silence. On the contrary, we find that the claimant had been encouraged to express her feelings and concern about her work and her difficulties in carrying out work.

14.7 The capability plan ran for 11 months. During that time the claimant's performance was monitored and supported. She was given a graduated system of warnings. At its conclusion the claimant was judged not to be capable of achieving the standards of performance required by the wellbeing adviser role. She was dismissed with effect from 1 December 2016; the letter of dismissal being dated 30 November 2016. (1166).

The respondent's decisions

15.1 We set out below the specific paragraphs of the dismissal letter which we think merit citation. The letter was under the signature of JN as chief executive officer of the respondent.

"*I am writing to confirm that following your Stage 3 capability hearing held on 25 November 2016, your employment with citizens advice Birmingham is to be terminated on the grounds of capability: that is, your work performance has consistently fallen below an acceptable standard for your role. You will not be expected to work your notice period, you will be paid in lieu of notice according to the terms and conditions of your contract. The reasons for my decision are set out below*

The capability hearing was chaired by me, and Janice Wall attended to make notes. JP presented the management case based on your performance of the improvement plan put in place following Stage 2 of the capability process. You attended and were supported by Sittu Ahmed, Unison. During the hearing you and your representative were able to ask questions of JP, as well as present your own case including calling a number of witnesses.

JP's case was presented under four headings of the Performance Improvement Plan:

1. Quality of advice

2. Number of clients

3. Pace of work

4. Independent working and appropriate accessing of support

15.2 [The tribunal shall now quote selectively, but relevantly we say, from the main parts of the dismissal letter.]

1. <u>Quality of advice</u>

JP presented a report to the hearing about your progress since the Stage 2 hearing on 1 June 2016. On 3 June you had agreed a new performance improvement plan with JP and this was to start on 6 June in order that you could complete outstanding work. This

improvement plan was intended to cover the period from week commencing 6 June to week commencing 27 June after which JP had planned to submit a report to the Stage 3 hearing then scheduled for July 2016. The improvement plan stipulated that all advice work completed by you should meet the standards set out by the citizens advice quality framework and enquiries should achieve the QAA score of at least 2. Given the long history of the performance management system, this level of quality had to be achieved immediately.

JP stated that despite allowing sufficient time to clear the outstanding cases you still rolled some forward into the new improvement plan period. During the Stage 2 hearing you asked to shadow someone else in the field and you were given the opportunity to shadow PC (then team leader for the well-being team) for a morning. You said you took away from this exercise how to use interview time more efficiently by having risk tracker open and recording information from the client during the interview.…

…… Jane reported that over the period of this report you had made some small progress in terms of the quality of your cases. On average you have achieved a score of two or above for 53.21% of cases. This is slightly higher than at the last hearing on 1 June 2016 when on average 45.66% of enquiries achieved a score of two or more. However, this was offset against you seeing a lower percentage of the number of target clients in the period and is still well below the 100% 2 or more on your QAA scores as required.

2. <u>Number of clients</u>

JP produced a plan of the target number of clients you should have seen each week: from the start of the plan you are expected to see 3 clients per day totalling 12 per week (with adjustments down where you had taken leave or was sick). At 17 November 2016 you had seen 62 clients from a target of 132, this is 46.96% of the total. At the previous hearing this was 55.4%. I noted that over 14 weeks, 62 cases averaged at 4.4 cases per week - this would be equivalent to seeing 1 client per day.

JP attributed your seeing so few clients to your not writing up client enquiries in a timely manner. She showed how you had a backlog of clients to write up over a period of time… Despite changing the pattern of work you still have a backlog of 14 to write up.

3. <u>Pace of work</u>

JP went on to explain that the Performance Improvement Plan required you to deal with all enquiries in no longer than three hours, you were to record the time taken on daily work progress reports…

The maximum three-hour target was met in 72.58% of enquiries. That compares with 81% of enquiries at the last hearing. At the last hearing JP queried why the time recorded by you did not add up to the time available and this was the case again. Every week you have not accounted for all the hours available to you on cases leaving a considerable amount of time unaccounted for. Had you spent all the time available to you on writing up cases it would be reasonable to assume you might not have had such

a backlog. However, you are unable to explain why the hours were not recorded. You did state that 1 to 2 hours per week was spent with JP reviewing your cases and this had not been taken into account. I am happy to make this adjustment but there is still a considerable amount of time unaccounted for. This might either be due to you not recording accurately time spent on cases and they're actually taking you much longer than you are recording. Alternatively, you are accurately recording all time spent on client work, but you have not demonstrated how the remaining time was spent. In any event, the performance standard (which has been confirmed as reasonable at two previous appeal hearings) was still not being met.

4. <u>Independent working and appropriate accessing of support</u>

The improvement plan stipulated that you should research independently and record work, only requesting support when required. JP reported that you have been working much more independently since 2 June 2016, interviewing clients and writing up enquiries without seeking support. Whilst this is an improvement you have continued to fail to meet the target number of clients, pace of work and QAA standards.

… You chose to call as witnesses five of your colleagues, Cecilia Ford-Jones, Kulsum Miah, James Friel, Jas Matharu and Andrew Hipwell.… Your colleague Kulsum had been achieving some lower scores when her work was checked and therefore JP had arranged for more of Kulsum's cases to be checked… And this had revealed a problem with benefits cases. JP is working with Kulsum to improve her performance on this type of case.

JP did not express any concern that other members of the team, but she did point out that in November last year all team members, except for Andrew Hipwell and Cecilia Ford-Jones who were achieving the standard consistently were called back to the office because they all needed some intensive support to achieve QAA standards. Managers including SC and JP gave well-being advises additional support and training… Once [the prescribed] standard was reached each individual was able to return to their GP practices without the need to return to the office in the afternoon. James Friel was last to return to his GP practices in January 2016. To date you have consistently failed to achieve this standard and have not been able to work in a way where you can realistically return to GP practices…

JP also said that some new well-being advises had joined the team over the last few months and following their training over a month or so, some observed interviews and QAA checks, were able to go out to their GP practices unsupervised and were seeing the target of 12 clients per week…

One of your questions to all of your colleagues was to ask whether they were able to achieve the target of seeing 12 clients per week. They all said they did, but perhaps not every week. Some saw more than 12 some weeks and one, James Friel has been regularly seeing more than 12.… I compared this with your performance of seeing an average 4.4 cases per week; your colleagues see almost 3 times as many clients as you do.

……..

…….

I have considered all the evidence you and Sittu put before me, and the evidence given by your witnesses as well as that produced by JP and I have concluded that Citizens Advice Birmingham can no longer reasonably accept the level of performance you are working with. Sittu asked me to consider a further extension to your support but I can see no merit in doing this as you have barely improved over the 11 months you have formally been in this process, and there are no reasonable grounds to believe that any longer would make any difference to your performance.

Sittu also asked that I give consideration to any other employment here at Citizens Advice Birmingham; we do not have any suitable vacancies - the only current vacancy is for a business development manager and I do not regard this as suitable.

You are entitled to 8 weeks of notice under your contract of employment, your notice will begin on Thursday, 1 December and you will be paid eight weeks salary in lieu of notice, plus or minus any annual leave owing to…. If you feel that a decision about your dismissal for poor performance under this procedure is wrong or unjust you can appeal in writing, stating the full grounds for your appeal to me within one week of the date on this letter…"

15.3 She appealed the decision to dismiss her. Her appeal was heard by the respondent's trustees. It was not successful. (1227 – 1233). The appeal hearing was held on 19 December 2016. The claimant was again represented by Sittu Ahmed. The appeal hearing was chaired by Linden Thomas, a member of the respondent's Board of Trustees. She heard the case along with the chair of the respondent's trustees, Neil Warner, a Birmingham solicitor. Steve Gulati, an independent HR consultant, was in attendance to provide support to the panel but played no part in considering the appeal.

15.4 We cite what we consider to be the pertinent sections of the appeal decision letter, dated 10 January 2017.

"<u>Findings</u>

Quality of advice:

The appeal panel was not presented with and could not find, a comparator whose performance regularly falls below QAA level 2 and who does not then have their performance managed. It is evident that your colleagues, when falling below an acceptable standard, receive remedial support from JP and if that level of performance does not improve, they too would be treated consistently and subject to the same proceedings that you have experienced. It is also apparent that, unlike your colleagues, your work was never signed off as being at the requisite standard, and that this standard (at first write-up) has never been achieved…

Number of clients:

You argued that you had not been informed of the weekly target of 12 when the performance management process had started, and that there was inequity running through the process that culminated in the Stage 3 dismissal. To support this argument, you stated that it was not until June 2016 that the target of 12 was communicated to your team colleagues and that this was done as part of the unfair performance management process that was targeting you. As set out in your letter of appeal you also argued that you were disadvantaged by not being placed in GP surgeries, and that your employer had prevented you from seeing an average of 12 people who week, to your detriment…

… The panel did not feel that being placed in the Birmingham bureau office acted as a detriment to the potential for you to be able to perform to the required level, rather, being in a supported and managed environment gave you the opportunity to demonstrate a on-target or over-performance in terms of throughput. Also, as explored in depth at Stage 2, it was evident that the target of 12 was achievable by other members of the team, if not all of the time then very close to that… The panel saw no evidence of a comparator whose work performance with respect to the number of clients seen was as low as the evidence presented by JP and considered by JN at the Stage 3 hearing. Furthermore, the panel found no evidence that the bureau prevented you from meeting our targets. On the contrary, a great deal of support was put in place to help you achieve them.

Place of work:

You stated that no explanation had been given as to how your working hours were calculated, taking into account rest breaks, meetings with your line manager etc. You also pointed out that at the Stage 3 hearing all of your colleagues stated that they had a backlog of work, and that this factor had not therefore been taken into account fairly by JN, culminating in what you argued was the unfair application of performance management proceedings against you only.

The panel… was not presented with evidence to rebut the report presented by JP at the Stage 3 hearing, illustrating that your completion of cases within the three hours' time frame had in fact fallen between Stage 2 and Stage 3.… Furthermore the panel consider that the requirement to take an average of no longer than three hours per case… sets a sufficiently clear and certain expectation as to what is required of you within that timeframe.…

In relation to the calculation of your working hours, the panel concluded that in many of the weeks monitored in JP's report of 17 November 2016, the difference between your total number of working hours and the number of hours recorded was so large that even if time is taken into account the rest breaks, management meetings etc there would still

be a significant number of hours unaccounted for, in some cases several days' worth of working time

The 7 bullet points of the claimant's appeal:

Whilst it is acknowledged that there is an overlap between some elements of your case and aspects of the collective grievance, your case relates to performance over an extended period of time (almost one year). Even if the collective grievance were to be upheld in full, it would make little or no material difference to the facts about your performance that have been examined and explained in full since January 2016. In short, your levels of performance of been so far from the targets that even if the targets were adjusted downwards as a result of the collective grievance, they would need to be almost halved in order for your performance to fall within that range…

The panel [found] that you have never declared a condition or illness that could be described as a "disability"… On your original application form you answered "no" to the question "would you consider yourself as having a disability?", Although it is acknowledged that on your new starter form in February 2008 where it asks about health issues, you did state "anxiety".…

… The panel felt that JN had dealt with the testimony (by your witnesses) in a reasonable manner, and that the conclusions that she drew from that testimony - that your performance had been consistently below the required standard for a prolonged period, and that where the performance of other well-being advises indicated problems they are also dealt with - were also logical and reasonable.

There was no evidence that "inaccurate information had been given in response to what the witnesses said" had been shown by the claimant.

The panel was satisfied that when JP was preparing her reports, she excluded periods of leave or sickness absence, and that you did not therefore suffer any detriment or unfairness from that process… The use of percentages was intended to illustrate the performance issues as clearly as possible…

With regard to the dismissal having career threatening implications for your job prospects, it is of course distressing to be dismissed on the grounds of performance (capability). However, the panel accepted the comments made by JN in her statement of case in full.

The panel could not accept your argument that the dismissal was "a route to avoid redundancy pay". Firstly, the contract funding settlement for the service for 2017/2018 is not yet agreed and it is thus impossible to be certain about staffing levels; secondly, the performance management process commenced in January 2016, well before contract issues for 2017/2018 could even have been a consideration. Furthermore, for the reasons set out elsewhere in this letter, the panel concluded that the decision to

dismiss you on the grounds of poor performance was reasonable and justified in the circumstances. The panel therefore feels that this ground of appeal has no merit"

The Tribunal's Conclusions

Introductory

16.1 The claimant has brought claims of unfair dismissal and disability discrimination. But, the tribunal during this lengthy hearing, and deliberation, has come to the conclusion as the respondent's lawyers did; that this case is predominantly an unfair dismissal claim. In respect of the disability claim we have concluded in any event that the claimant has not engaged s.6 EqA as a disabled person, and her disability claim therefore cannot engage the tribunal's jurisdiction.

16.2 The claimant was represented throughout the capability and disciplinary process by Mrs. Sittu Ahmed, of UNISON; a very experienced trade union representative. The claimant declared that because of anxiety she couldn't deal with information about her capability issues and it was always given directly to her union representative. The claimant said that "it had been years" since she had looked at such information herself. She did not fully or confidently engage in the issues arising from her performance management, as she did not engage competently with her duties as a well-being adviser and the expectations the respondent reasonably had of her in that role.

16.3 We also conclude elsewhere in this judgment that the claimant was not a confident person. We find that general lack of confidence permeated her abilities in the well-being adviser role. She was not fitted for the demands of that role in our conclusion. Stuart Knowles, the respondent's IT co-ordinator made, we think, a relevant observation about the claimant in the context of her assessment in the use of Office 365. He assessed the claimant is "not confident". In truth, he probably meant "not-competent" but may have been reticent to make a blunt (yet realistic) judgment. But, an innate lack of confidence is we consider a likely underlying factor in the lack of capabilities that the claimant displayed when her role changed to the generalist advice requirement of well-being adviser.

16.4 Mr Brockley asked SC during cross examination, whether the claimant might have been perceived as generally a nice person but not having the necessary level of ability effectively to discharge the duties of her role. Indeed, we think that was much the position. We think SC agreed on the whole with the proposition. The claimant was not as such a difficult employee in demeanour, but she was not a competent employee in her assigned job role. In such circumstances, an employer is entitled to say "enough is enough"; where the contractual duties of employment are persistently not being carried out to the standard fairly required. She is not as such performing her contract as reasonably required by her employer; namely the respondent.

Disability

16.5 The respondent's case is that any disability to which the claimant was subject played no part in her inability to cope with her workload; but rather such inability was by reason

of pure lack of competence. As we have recorded in the preceding paragraph, SC agreed that the claimant was a nice person but was simply lacked the necessary ability.

16.6 Having considered all of the evidence, the tribunal agrees with the respondent's submission that the claimant's case is not really about disability at all. Indeed, we firmly conclude that the claimant has failed to prove any engagement at all of s.6 EqA as a disabled person.

16.7 The tribunal was referred at p.240 to a letter, dated March 2014 to the claimant's GP, Dr. Hussain at the Warley Medical Centre, from Professor C E Clarke, Professor of Clinical Neurology.

16.8 The professor described the claimant's history and management at p.240/241;

> *"History; 41-year-old lady with a 14-year history of an anxiety state for which she has received a lot of treatment who now presents with a 12-month history of poor short-term memory. She describes relatively minor forgetfulness with things eventually coming back to her…neurological examination: abbreviated mental test score 10/10…Diagnosis: Mild anxiety state…Management: this lady has a long-standing anxiety problem which is the reason for her poor short-term memory. I appreciate she has had a lot of input from from CPNs and even cognitive behavioural therapy in the past, but I would suggest further treatment along these lines rather than pharmacotherapy."*

16.9 In short, although the claimant maintains her anxiety condition is a severe one, the medical evidence to her own GP is that she had a mild condition. More particularly, the evidence that anxiety affected her ability to manage her workload is minimal. There is nothing in any of the medical evidence, (including the GP report) to suggest a link between anxiety and not being able to manage her workload. When questioned about the effects of her disability, the claimant's primary reference was to her inability to deal with correspondence from her employer about her job and her performance in it. This is not part of the pleaded case, however.

17.1 We refer to paragraphs 3.2 to 4.2 of this judgment. The claimant relies on anxiety and depression (p.13). The respondent conceded that the claimant suffers from a mental impairment, namely anxiety, the effect of which is long-term (160). However, the respondent's concession was based, largely on the medical information disclosed by the claimant herself. The claimant has suffered from anxiety for several years. The GP records showed complaints made to her GP over a period between 2013 – 2015 concerning an anxiety state. She has had periods of counselling and she was referred for CBT in 2014 to manage anxiety symptoms. The respondent's counsel acknowledged that the medical references were generally ones dealing with a mild anxiety, state. But there was a fit note which referred to stress of work - and work-related stress alike. There were very limited entries relating to the claimant's feeling work pressure.

17.2 The fundamental issue in her disability case, however, is whether the impairment had a "substantial adverse effect" at the material time. The material time in this case is the

whole of 2016. The claimant has described her condition as severe. Yet, the medical diagnosis by her doctors is mild anxiety state (p.240). Moreover, in her own evidence to this tribunal, both verbal and documentary, the claimant has conceded that her health including the anxiety symptoms, did not impact upon her ability to carry out her job for the respondent. But, she does maintain that anxiety issues affected her at work when she was under extreme pressure.

17.3 The claimant acknowledged in cross examination that during her employment she did not categorise herself as being disabled and she was not taking medication for depression or anxiety during 2016. The claimant did not take anti-depressants until after her dismissal. We noted paragraph 14 of her statement.

17.4 Of course at the same time the respondent has not accepted that it had knowledge, constructive or actual, of the impairment having a substantial adverse effect. Indeed, in the claimant's own evidence to the tribunal she said that she is fine most of the time and is able to perform her normal day to day tasks quite normally. Only when she is under particular pressures, does she - and has she - become anxious. That manifests itself in, *inter alia*, tension headaches and feelings of isolation. Except for painkillers, she does not require medication to deal with these symptoms.

17.5 Therefore, for completeness, we have canvassed the issue of the respondent's knowledge. However, let us be clear, that we are firmly drawn to the conclusion on the evidence overall that the claimant has not shown EqA disability. With reference once again to section 3 of this judgment, above, the respondent's case is that it had actual or constructive knowledge of an anxiety impairment, but it did not have knowledge that the adverse effect was substantial. Knowledge of the impairment was therefore admitted. There was reference in the documents to JP having been told that the claimant suffered from anxiety. The claimant had disclosed that she suffered from anxiety on her job application form in 2008. She sent an email to JP on 29 July 2011 referring to her anxiety condition, and she raised a grievance against JP in 2011 which referenced anxiety. JP also witnessed the claimant having a panic attack in a supervision.

17.6 The claimant was absent through sickness in 2012 for a period of 10 weeks, and there had been correspondence relating to an occupational health referral for the claimant. We refer to documents 68-69. Additionally, the condition was discussed at the grievance hearing with Flo Betts (the financial inclusion manager) at the hearing on 5 January 2012 (documents 63/64) and anxiety is mentioned on the return to work records in September 2016.

17.7 The claimant's anxiety about driving was known, particularly to JP, who took her to each of the GP surgery locations to test the travel routes the claimant would be required to undertake.

17.8 We accept that JN did not review the claimant's personnel file during the capability process and would not have had direct knowledge of the claimant's anxiety. Had we found the claimant to be a disabled person under s.6 EqA, we consider there would be

sufficient on which we could find JN to have had constructive knowledge of the same. We have not so found.

17.9 Having regard to the totality of our findings in relation to the claimant's anxiety, we have concluded that the mental impairment upon which she relies to engage s.6 EqA does not manifest a substantial adverse effect at the relevant times during 2016.

18.1 We find that the claimant is not a disabled person for the purposes of the EqA and therefore her disability claim to this tribunal cannot succeed and shall be dismissed.

18.2 Having drawn these conclusions, we do not propose, therefore, to proceed to consider the issues or make findings in relation to the claims which the claimant advanced under the EqA, s.15 (discrimination arising from disability) and s.20/21 (failure to make reasonable adjustments). In the presentation of her case to the tribunal, there has been in any event we think little or no engagement from the claimant's side, of the matters relating to the s15 EqA and s20/21 EqA issues. The case has presented and been fought before this Tribunal primarily as an unfair dismissal case; as we think it was relevant to do.

Dismissal

18.3 The claimant's performance warnings arose under the capability procedure, to which the claimant was required to submit as an employee of the respondent. The decision to subject the claimant to formal capability procedure was made on a broader basis than simply QAA scores or client targets as JP's report shows (728 – 734).

18.4 On any objective view, the claimant's performance failings went beyond being able to quality score 2 or above or see 12 clients per week; as SC's statement, JP's report and the various outcome letters show. The claimant's problems were much more fundamental and went to the heart of whether she had the skills to do the role. The examples cited in the evidence have illustrated that. The claimant struggled to research, understand and apply the information she obtained to the clients' needs (p.730 and SC's evidence generally). Even after coaching and re-working cases, her reports did not meet the required quality standards. The claimant was sent learning exercises that she did not do (731). She did not complete her learning activities within a reasonable period (732).

18.5 We find that the respondent has discharged its burden of proof to show a potentially fair reason for dismissal under s.98(2) Employment Rights Act 1996 ("ERA"). In this case the reason shown is that of capability (s.98(2)(a)). Aside from the claimant's uncorroborated accusation that JP was "out to get her" and further, having dismissed the claimant's disability claim, there is nothing to lead to a conclusion other than that capability was the reason why the respondent ended the claimant's employment on 1 December 2016.

18.6 We have proceeded to examine the evidence going to the general principles of fairness, under s.98(4) ERA.

18.7 There are inevitably some disputes of fact across the totality of the evidence from the respondent and the claimant.

18.8 We find that the respondent's witnesses gave their evidence in a straightforward and honest manner. They made concessions where it was appropriate to do so. However, we have had some reservations about the overall veracity of the claimant's evidence; and that of the witnesses whom she has called in support of her case. We are not able to conclude that the claimant's own evidence to this tribunal is reliable. She has certainly been prone to exaggeration we find. In his submissions, Mr Hignett, respondent's counsel, cited three examples of exaggeration in the claimant's evidence; and we think it is appropriate to refer to them in our own findings.

18.8.1 Firstly, paragraph 47 of the claimant's witness statement. The claimant stated that at about 1:15 PM on Thursday 12 May 2016, a man jumped to his death from the NCP car park; seemingly from a position facing the window where the claimant was sat. The claimant described how she had noticed something black flying through the air and hearing a loud bang below the CAB offices. She had seen a man lying on the floor bleeding. She says that she and other members of staff were traumatised by what they had seen and were in panic. A member of staff who viewed the incident asked to be allowed to go home; a request which was granted. The claimant referred to JN coming from her office and meeting the claimant in the corridor. The claimant accuses JN of exhibiting a very unsympathetic manner with the words "don't look out of the window and carry on working… There is nothing to see". The claimant described JN's reaction as cold and insensitive in comparison to the reasonable concession afforded to her colleagues who would be allowed to leave work early and go home. The claimant said that for the hours she remained at work she felt extremely distressed and traumatised from what had happened. We agreed with the respondent's counsel that there was no obvious reason for that passage to have been included in the claimant's statement. There was no relevant issue on which that account rested. We tend to agree that it was an attempt by the claimant to present JN in a bad light – or at the very least as someone who was unsympathetic. Under questioning, however, it seemed to us that the claimant failed to show that JN's remarks were targeted at the her. Indeed, the claimant accepted upon further questioning that JN's remarks and encouragement to come away from the windows were aimed at everybody.

18.8.2 The second illustration took us to the claimant's witness statement at paragraph 35 and the account of the national insurance calculation. There was a significant contrast between what the claimant said in her statement and the account as it emerged from the claimant in giving her evidence to the tribunal.

18.8.3 The third example was the claimant's suggestion in her evidence that she had not had proper training to be a generalist advisor. She suggested that the training that she was given was no more than online training journals. However, that is not borne out on the evidence. The Claimant had done the pilot Wellbeing Advisor Scheme in late 2014. She acknowledged she was equipped for the role. She had on the job training. Moreover, in contrast to the evidence the Claimant gave, that she wasn't in work until 1 September 2015, there is documentary evidence of her attending training in August

2015 (pp.639, 640 and 645). Her evidence on those matters was not reliable in our conclusion. We think she used an outward show of confusion to the tribunal in an attempt to disguise the real truth. There was no credibility in her assertion that she had not been trained.

18.9 Far from being honest about her mistakes and weaknesses she has attempted to create a façade. Despite strong evidence to the contrary, she does not accept that she was struggling in her role.

19.1 It has also become apparent during her evidence that she hasn't read most of the documents and correspondence. That is unusual and also somewhat disturbing to this tribunal; given that her evidence and her perception of the claims she pursues, is necessarily a centrepiece of the case. There was no evidence of any reading difficulty on her part. There is certainly nothing on the face of the medical evidence to suggest that. Quite simply, it was the Claimant's preference not to read these letters; and she preferred to have her union representative read the letters and explain the contents.

19.2 A capability plan with the object of performance improvement requires commitment. The Claimant wasn't engaging with what her employer was telling her in writing. She did not commit to the level of responsibility needed. That, and her lack of capability in generalist advice giving, was at the root of her failure to achieve the standards of performance reasonably expected by the respondent.

19.3 There were alarming differences between the substance of the claimant's statements and the narrative which unfolded in live evidence.

19.4 The claimant called two live witnesses, Andrew Hipwell and Jasbir Matharu. Mr Hipwell resigned from his position with the respondent in November 2017. Ms Matharu's employment we were told was ended by her dismissal by the respondent. Mr Hipwell acknowledged that large parts of his evidence were hearsay. However, we agreed that his evidence was on the whole quite measured and he was receptive to concession where it was clearly called for. Both witnesses acknowledge that there was a "soft target" in place in June 2015 until June 2016. The target of 12 clients per week remained in place. It was not being enforced for the reasons explained by SC and JP in their evidence. The GP surgeries all had to get up to speed. There had to be sufficient footfall to produce enough referrals. Once all that was in place targets could begin to be enforced. That was perfectly fair and proper in our finding. The Claimant had a steady stream of referrals well established at the Respondent's HQ in the city centre.

19.5 The Claimant's problems were much more fundamental than not meeting quality targets or not seeing enough clients. Given JP's report, and the concerns of SC, the issues that were coming up repeatedly at the various hearings, were much more fundamental.

19.6 Having regard to Ms. Matharu 's evidence, what the claimant says about QAA training was at best a mistake and at worst a lie. We have considered the document at p.1395z; an email from SC which shows that the claimant and others of her cohort were required to attend a course.

19.7 One of the central planks of the claimant's case is that JP was out to get her. But there has been no corroboration for that claim, we conclude. Mr Brockley, counsel for the claimant, suggests in submissions that JP was set against her for reasons going to their history as co-workers in the respondent's employment. However, there was no evidence of acrimony in the relations between the Claimant and JP as a result of the two grievances. JP, we found to present in evidence as a good manager doing her very best. There were two key pieces of evidence. When the Claimant came back into JP's team in 2015, she (the claimant) said she was happy to be back in the team. Secondly, at the conclusion of the capability process, the Claimant went out of her way to say that JP had been very supportive. There was a suggestion at paragraph 38 of Mr Brockley's written submissions, that JP was picking out cases so that the Claimant would perform badly. However, we do not find such an allegation to be supported by the evidence.

19.8 Mr Brockley suggests that the decision to put the Claimant on the capability plan was fundamentally flawed. Such contention does not stand up on the evidence in our view. The respondent was seeking to implement the plan to support the claimant through her difficulties in adjusting to the generalist role. Moreover, there was no significant departure from the capability procedure as the claimant and counsel would allege.

19.9 It was further argued for the claimant that the marking was inconsistent as between JP and SC. The respondent has a system of moderation in place to check the scoring on QAA standards. But there was an internal check with monthly meetings for everyone doing the assessment. There was an external checking regime whereby a random selection of cases was sent out and checked against national standards. There were proper systems in place. We do not detect an inconsistency in scoring. Looking at the evidence overall, it is shown that JP was marking the multi-stranded cases and the more difficult ones and SC was marking the single-stranded cases. That may be one explanation for any perceived differences in marking. It was not prejudicial to the claimant.

20.1 The Claimant was one of a group of people required to make the transition from specialist advisor and caseworker to generalist advisor. On the evidence it was apparent that a number of the people in the team struggled to make that transition to different degrees. Some were successful, but others needed more help. As Mr Hignett argues, it is that transition that goes to the core of this case. It is a new way of working, with a required broader knowledge of subject matter. Despite the help and support provided to her, the claimant was not able to make the transition. The problems for the Claimant were so much more fundamental than those faced by the other members of the team. The tribunal has been presented with evidence of the most basic errors across a whole period of time. Notably, but by no means exhaustively;

20.1.1 The case of NS in late 2015 (p.781); the claimant ignored a priority debt. She displayed a real confusion in her evidence in explaining what a priority debt was.

20.1.2 The case of MH in early 2016 (p.814-815); the client simply wanted to know if he was getting all the benefits to which he was entitled to. The Claimant cut and pasted without proper explanation a section on Employment Support Allowance (ESA) which

she had found on the internet. The claimant failed to prepare and commit to writing proper advice tailored to the client's particular circumstances and enquiry, and which could be handed to him with explanation.

20.1.3 The case of RY in March 2016 (p.R61-R67); the Claimant had not understood the rules on applying for backdated Housing Benefit.

20.1.4 The case of NC in May 2016; the Claimant had three attempts before a letter of advice could be signed off, (pages R146-R166).

20.1.5 The case of JD in August 2016 (pages R361-R368); JD was to challenge a benefits decision and was applying out of time. The Claimant delayed for over three weeks.

20.2 The respondent is a charity supplying an important service to vulnerable people. As an organisation it strives to ensure that their advisors are providing timely, appropriate and correct advice. We think that such expectation is precisely what underlies the real context of this case and the serious issue of the claimant's capability.

20.3 With that conclusion we turn to examine the procedural dimension of this case. Having regard to the evidence of the claimant's performance issues, the respondent could properly and fairly institute its performance improvement process through the medium of its capability procedure. The key issue in that respect becomes whether the procedure as it was applied to the claimant, was applied fairly We conclude that it was.

20.4 In scrutinising the procedural fitness and propriety of the process ultimately ending the claimant's employment we have reflected on the claimant's case that conflicts of interest rendered the dismissal intrinsically unfair.

20.5 The tribunal has considered with careful scrutiny of the evidence, whether as the claimant contends there was a conflict of interest in the manner in which the capability procedure and its disciplinary consequences was handled by the respondent. We have concluded there was not.

20.6 Counsel for the claimant has argued that JP should not have placed the clamant on the capability procedure in the first place. Moreover, JP should not have been responsible for the reports submitted to the meetings, because two grievances had previously been raised against her. However, we make the following findings which we say are significant in this context.

20.6.1 JP was undertaking the investigation (at p.773) and there was no objection from either the Claimant or her union representative. However, even if it was not wholly appropriate for JP to have done the reports, it was still inevitable that the Claimant was placed on a capability plan in our finding.

20.6.2 If someone else had looked at the evidence, it is probable that the same determination would have been made.

20.6.3 JP was supporting the Claimant on a daily basis. The reports state the position objectively, with reference to the number of clients she had seen and the scores that

she had attained, with information about what happened. There is no obvious unfairness.

20.6.4 Moreover, another argument advanced by the claimant was that JN should not have heard the capability proceedings and made the dismissal decision. That argument was put on the ground that JN had previously determined the Claimant's grievance by the claimant against JP in 2015. However, we think there is no sustainable basis for such an argument by the claimant.

20.6.5 We have reminded ourselves that there are only three managers comprising the senior management team at the respondent. We do not believe that, more especially in a small unit, managers need be or should be, excluded from dealing with disciplinary and grievance procedures because they have dealt with historic matters. That is, so long as natural justice is visibly maintained – as we think it was in this instance.

20.7 *The collective grievance:*

20.8 Mr Brockley described the collective grievance as a "smoking gun". He says, that the collective grievance should have been determined before the Claimant's Stage 3 Hearing. We acknowledge that there are common issues between some of the matters in the Claimant's personal capability matter and the collective grievance.

20.9 There are no prescribed rules in the respondent's employee relations policies to deal with such a situation, as far as we can gather from the evidence. The respondent had an underlying duty to act fairly and reasonably of course; and in the circumstances we find that it did. But there were no rules on this. There is nothing in the respondent's policy that is prescriptive in this regard. In these circumstances an employer has a choice which it must of course exercise reasonably; but it can either decide to continue with the individual capability plan, or postpone it pending the outcome of the collective grievance. It's not bound to act one way or the other; what it is bound to do is to consider the point and make a decision. That decision must be reasonable however.

21.1 It seems to us on the evidence before this tribunal that they acted reasonably in all the circumstances. The Trustees, in the appeal on this very point, considered it wouldn't have helped the Claimant. Even if the targets were adjusted downwards as a result of the collective grievance, they would need to be almost halved; her levels of performance being so far from the targets. There wasn't any different treatment. The evidence demonstrated that even over the duration of the capability process and despite intensive support, the claimant was able to achieve an average of only 4.4 clients per week. The three new well-being advisers who had only been in post since April were able to meet the targets (p.1043 & JP w/s para 57). The requirement of 12 clients per week was the same number that advisors in the open-door service were expected to achieve.

21.2 We have concluded that the target of 12 clients per week was reasonable.

21.3 Further, the quality target is part of a national standard. It is not within the respondent's discretion to disapply it or vary it. The evidence demonstrates that the claimant was not able consistently to achieve the required quality target, even after coaching and

feedback.

21.4 The further issue was whether Mr Warner (NW) should have heard the appeal at all. The claimant says he should not have. His previous involvement with the claimant it is argued compromised the procedural integrity of the dismissal procedure. The claimant maintains that NW could not act impartially because of the written warning in the disciplinary in 2012, and his involvement in the First Stage capability appeal and his involvement in the collective grievance appeal.

21.5 However, this tribunal does not lose sight of the fact that the respondent is a small organisation with limited resources; financial and managerial. We find that the respondent did what it reasonably could to achieve procedural fairness for the claimant against that background. In an ideal world, and with greater resources the respondent might have thought further about the involvement of NW and whether his involvement might create a perception of a conflict of interest; whether imagined or real. Someone at a longer arm's length might have been identified it might be contended. But we think that would have made no material difference. An external appointee would have taken no different view of the case in our conclusion. Moreover, it must be said that NW had not had any very recent involvement with the claimant's case. The written warning in 2012, should not in our finding preclude him from dealing with the appeal. His involvement in an earlier Stage of the capability process need not and should not have meant that somebody else should have heard the appeal.

21.6 Again, the collective grievance appeal was determined after the appeal against dismissal. That cannot be relied upon as a ground for the exclusion of NW from the appeal; in his position as the chair of the Trustees. Moreover, NW had not made the original decision to dismiss, and it cannot be overlooked that he sat not alone but with LT, a co-trustee. LT has given what we find to be very open and balanced evidence to the tribunal about their decision-making process on appeal. It was we find a process which she and NW were at pains to execute with utter fairness. LT had no prior involvement in the capability process at all. Therefore, on that level alone there was an appropriate safeguard; if indeed there was any risk of bias at all. For complete clarity on the tribunal's part, we say there was no such risk in any event. More especially, neither the claimant nor her representative objected to NW hearing the matter.

21.7 The claimant's counsel made reference during his submissions to a disciplinary warning for a data breach, However, we are not persuaded that anything turns on that at all. As Chief Executive it was entirely in order for JN to issue that warning.

21.8 Some controversy arose during submissions as to whether the tribunal had heard either evidence or submission during this hearing, which would provide sufficient basis on which in the event of a finding of procedural flaw by this tribunal, we could proceed to make a finding of Polkey apportionment. That is say, on the basis that had the procedure been correct in substance and execution, the claimant would have been dismissed in any event. Such controversy can however now be brought to an end in this particular case. We do not in the event find a procedural failing in the process leading to the claimant's dismissal, pursuant to the capability procedure.

21.9 What we do say, however, is that in our view the respondent cannot necessarily rest on its laurels in this respect. The manner in which they handled the issues surrounding the claimant's performance issues – which we accept were real and pressing for them – was entirely satisfactory, but it was not pristine. At times the respondent conducted its management of the claimant's failings in a slightly clumsy and occasionally insensitive manner. The claimant was basically a decent colleague, but one who was unable to resolve her skill and competence shortcomings in the work for which she was now responsible as a well-being adviser. The respondent may not at all times have fully appreciated that. We remain firmly of the conclusion however, that the respondent though not perfection was still procedurally complaint. We do not find that the general principles of fairness were impugned by the respondent's overall conduct in the capability process or that the procedure itself was inherently faulty.

21.10 On our analysis of the whole evidence, this was a fair dismissal by the respondent in all the circumstances, substantively and procedurally.

Summary and postscript

22.1 The claimant is not a disabled person under s.6 EqA. Her claim of disability discrimination does not survive that first test. The claim of disability discrimination is dismissed.

22.2 The claimant had formerly been assigned by the respondent to specialist work in a particular area. When her role changed, she was despite much help and support unable to make the switch to doing generalist work across number of areas.

22.3 Much of the presentation of the claimant's case has focused on points of process. In assessing fairness, we have been mindful of these facts:

22.3.1 The respondent is a charity and provides a vital service to vulnerable people in the community. The claimant in her role as well-being adviser was carrying out a role funded by the Clinical Commissioning Group. Following the introduction of the role and a period of training the claimant unlike her colleagues did not reach the required standard and the claimant did not go on to reach the required standard; even after intensive coaching in November and December under the direction of SC.

22.3.2 In January 2016, we find that the claimant was rightly assessed by JP as requiring referral to a formal capability plan (p.728-733). We consider that good reason for such referral was demonstrated. Those reasons included:

(a) That the claimant struggled to research, understand and apply the information she obtained and apply it to the clients' needs. Even after coaching and re-working cases her reports did not meet the required quality standards.

(b) The number of clients the claimant was able to see was significantly below the target of 12 clients per week

(c) The claimant was provided with learning exercises that she did not do, or she did not complete her learning activities within a reasonable period.

22.3.3 The decision to put the claimant on a formal capability plan was based on fair and reasonable considerations of the claimant's visible performance difficulties in the well-being role. The respondent embarked upon, almost a year of performance monitoring. During that time the claimant was set specific and measurable, targets which were on any analysis reasonable; and which she was unable to meet consistently. The capability process had inbuilt, a great deal of support and supervision during which the claimant was given a lengthy period in which to improve. However, the claimant failed to achieve a sustained improvement.

22.3.4 Albeit we have offered a mild criticism to the respondent (at 21.9 above), the claimant's case was by no means handled lightly in any respect; it was a serious matter for the respondent and it was approached accordingly. There were not only three capability hearings, but three appeals within the procedure; as well as the dismissal appeal. During the period of performance monitoring the claimant was either not performing or significantly under-performing important elements of the role.

22.3.5 We accept the respondent's evidence, including that of the claimant's manager JP, that the claimant's poor performance had a negative impact on the team and the well-being service. Moreover, the failings in the claimant's performance were not confined to the quality of advice and how many clients were being seen. Arguments were raised by the claimant in relation to the reasonableness of some of the targets set. However, we conclude that the target of 12 clients per week was reasonable in all the circumstances. The original target was 20 clients per week, but that was reduced to 12 following feedback from advisors. Moreover, 12 clients per week was the same number of clients that advisors in the open-door service were required to achieve. There was evidence that three new well-being advisers who had only been in post since the previous April were able to meet the targets. There was indeed evidence that most of the claimant's colleagues were able to achieve that approximate number. Some were achieving more than 12. Further, the question of the reasonableness of the client target was examined in the collective grievance appeal; it was found to be reasonable. The appeal panel examined the question of the reasonableness of this target and it also found it to be reasonable.

22.3.6 The evidence before the tribunal has, in our conclusion, shown that over time and despite intensive support the claimant could not get close to the required number of clients per week. By the end of the process the claimant was dealing with an average of 4.4 clients per week. Mr Hipwell, the claimant's witness suggested that a figure of 8 clients per week would have been achievable for the claimant. But, she got nowhere near that. Accordingly, even if the target had been dropped to 8, as Mr Hipwell suggested, the claimant would still have been underperforming.

22.3.7 The claimant suggested that the new well-being advisers had not been given specific training in generalist advice work. Everything had happened in quick succession from

when she started the role in September to her being placed on the capability procedure after the following Christmas. We did not find that to be the case, on the evidence before us. The claimant was unable to show the requisite skills, in identifying issues, properly researching them and giving adequate advice to clients.

22.3.8 The claimant did not agree that she had been given a reasonable period of time in which to improve; over a period of 11 months. She did accept however, that she had been given a capability process comprising three Stages, together with three appeals related to each of those Stages. In short, she had the benefit of six hearings in which all of her arguments were considered. The respondent had issued the prescribed written and final warnings prior to her dismissal. JN and the trustees Mr Warner, Mr Ball and Ms. Thomas had considered all her arguments set out in her defence.

22.3.9 The outcome letters were lengthy, and all her submissions were ruled upon in detail.

22.4.1 The tribunal were surprised by the claimant's admission that she didn't read the respondent's letters in the process. She said everything that the respondent sent her was negative. She was supported by her union representative Mrs Sittu Ahmed and everything was passed to her to read. That had been her practice throughout. The respondent, she said, had been instructed to send all correspondence to Mrs Ahmed. The claimant could not bring herself to read the letters herself because of her anxiety. Such a practice was not indicative of any determined engagement by the claimant with a process that was precipitated by the clear shortcomings in her competence.

22.5 We make these further summary points in the light of our findings and conclusions:

22.5.1 It is clear that each of the outcome letters were received by Mrs Ahmed and she would explain them to the claimant. Mrs Ahmed had formulated the grounds of appeal for the claimant in each case. If Mrs Ahmed was not available, the claimant would ask a friend to help her. Neither did the claimant read the dismissal letter herself. She immediately gave it to Mrs Ahmed to read and deal with after it had been hand delivered to the claimant. We have to conclude that was overall, a very unusual – and indeed unsatisfactory - position to be adopted by someone whose own job it was to offer front line advice to vulnerable clients. We think that the claimant had become utterly over-dependant on Mrs Ahmed. We think that of itself was indicative of the inability of the claimant properly to engage her duties as a well-being adviser for others.

22.5.2 The claimant was not confident in her evidence given to this tribunal. It appeared to the tribunal that she had under cross examination - as she had during the capability process - "buried her head in the sand" when it came to the respondent's criticisms of her performance in her job. During her evidence she gave the impression of desperately searching for responses to justify her position. Fundamentally however, her evidential case was little more than that she did not agree with what the respondent had said about her; namely that she didn't do her job competently and to the respondent's required standard. That position was one of denial; and it was not corroborated by her evidence we found.

22.5.3 The claimant could not cope with the reality of what her post of generalist adviser fairly demanded of her. The respondent fairly concluded that there was a continuing under-performance on her part despite the formal support of the respondent as part of the capability procedure. At the same time, the claimant's instinctive mindset is to reject negative assessments of her competence, as unfair or ill-informed; or as some sort of vendetta against her. She has not moved from her contention of JP "having it in for her…". That is patently unproven we find.

22.6 We find that the claimant is not an emotionally strong person. She was not well suited to the job she did in terms of the intellectual and emotional demands it made upon her. But that was the nature of the well-being adviser role and she had been given training and ongoing support in an attempt to equip her for the duties. She had been provided with more direct support than her colleagues appointed to the same roles and who were able to take up their duties at the surgeries as was envisaged.

22.7 The claimant's temperament and abilities simply were not suited to the requirements of the job. She presents to this tribunal as someone lacking in confidence and without the level of ability to adapt to the different set of demands and skills requirements of the generalist advice role. She had felt safe in her former specialist area. The well-being adviser role took her outside her "comfort zone" and although the respondent supported her - and indeed had historically supported her generally as an employee - she neither possessed the temperament nor the ability to adapt to the demands of the generalist advice role.

22.8 We find that during the claimant's overall employment with the respondent, since 2008, she had been treated with empathy. She had been given the opportunity in a redundancy situation of a new role as part of the well-being advice team. We remind ourselves that the respondent as an organisation deals with very difficult social problems. We think that the respondent's philosophy of support and fair treatment of its users is carried over to their support of and engagement with their own staff.

22.9 The decision to subject the claimant to formal capability procedure was made on a broad and justifiable basis; not simply QAA scores or client targets as JP's report shows (p.728 – 734). The claimant's capability problems were so much more fundamental and went to the heart of whether she had the skills to do the role at all; as the examples of her handling of particular cases has shown.

23.1 Although the document at p.1267 was not before appeal panel, it has been explained by JP in her supplemental statement. Namely, in the case of Cecelia Ford-Jones, she was not performing for reasons which were beyond her control. We have agreed with JP's evidence that it would have been unfair to discipline Cecelia in such circumstances.

23.2 The claimant was, despite intensive coaching, increased support and performance management, unable to work independently. No other advisor was in that position. The cases of Hipwell and Matharu are not 'truly similar' to that of the Claimant.

23.3 Sadly, we think, the claimant has been naively persistent in her position of not accepting that at any Stage during the process she was performing poorly. Rather her case is that the reports against her are all exaggerated. Further, when confronted with the issues about her performance during the capability process, the claimant did not advance a case that depression/ anxiety was the reason for poor performance. A number of the capability Stage outcome letters made the point, either expressly or by implication; that there was no apparent reason for the claimant's poor performance.

23.4 The claimant did not appeal on grounds that the employer was wrong and that a medical condition was the reason for her poor performance.

23.5 As part of her unsuccessful disability claim, the claimant had pleaded s15 EqA asserting that what arose in consequence of anxiety was, firstly an inability to cope with the workload and secondly the need for time off to attend medical appointments (p.110). The claimant did require time off for medical appointments but there is no evidence that such time off caused her to perform poorly. Indeed, when asked about this in evidence she made no such claim.

23.6 There is very little cogent evidence that any anxiety she was subject to, affected her ability to manage her workload. There is nothing in the medical evidence, including the GP report, to suggest a link between anxiety and not being able to manage her workload. When questioned about the effects of her contended disability, the claimant's primary claim was about the inability to deal with correspondence from her employer about her own position. That was not part of her pleaded case.

23.7 In view of the findings the tribunal makes about the claimant's disability claim, with respect to the application of s.6 EqA, we do not intend to take our findings on the claims under s.15 and 21/22 EqA any further by way of finding.

23.8 The claimant's disability claim fails at the first hurdle. Notably, the claimant has conceded in her evidence to the tribunal that she did not even regard herself as having a disability.

23.9 We acknowledge that much of the evidence of the respondent's efforts to support the claimant which has been examined as part of the claimant's disability claim are relevant to the unfair dismissal claim and the conduct of the capability procedure, in any event.

24.1 To implement even further training of the claimant would not have been reasonable in all the circumstances. She was assigned to the city centre office, so placing her in an environment where she had support readily and continually available to her. The claimant had two hours of formal supervision per week with JP. This is compared to the other advisers who received just one hour per month. And, the trigger targets were adjusted for the claimant where possible.

24.2 The claimant's explanation in evidence around why she found the support provided by the city centre office unsatisfactory for her, is we think a desperate attempt by her to

justify her lack of performance in a very supportive working environment. She stated under cross examination that she was struggling with being in a room full of staff and having to get up out of her chair to go to JP and ask for support. She said she would struggle to capture the information and process it. Sadly, in her own words, she has in those words captured the reality; she had difficulty in understanding the information and the processes needed to do her job effectively. That became progressively apparent to the respondent's managers.

24.3 She suggested she went along with the dynamic at the head office, because she was afraid "to upset the applecart".

24.4 It was more fundamental that that we conclude. The claimant had during her time as a well-being adviser, demonstrated a clear lack of ability, which no reasonable employer could permit to continue. Utilising its formal procedures, the respondent we find had done it's best to redeem the claimant's position. In the end, there was no further steps other than the claimant's dismissal which a reasonable employer could take.

24.5 The claimant was fairly dismissed. The claimant was not at any relevant time a disabled person within the meaning of the EqA.

24.6 We dismiss all her claims in their entirety.

Employment Judge Lloyd
Signed and Dated: 29 May 2019