

Case number: 260377⁹⁴8/2011



EMPLOYMENT TRIBUNALS

	And	
Ms C Thompson		(1) Bombardier Transportation UK Limited
		(2) Ms Marion Morgan
		(3) Mr Jon Shaw
Claimant		Respondent

At a Reserved Hearing

Held at: **Nottingham**

Before: **Employment Judge Threlfell**

Members Miss C D Munton

Mr T Southerd

On: 21 and 22 May 2012 and 10 July 2012

The tribunal gave Reserved Judgment and Reasons as follows.

Representation

For the Claimant: Ms K Eady - Counsel

For the Respondent: Ms S Cowen - Counsel

JUDGMENT

1. The Claimant was unfairly dismissed by the first Respondent.
2. The first and third Respondents discriminated against the Claimant because of her age.
3. The complaint of age discrimination against the second Respondent fails and is dismissed.
4. The complaint of harassment in relation to the Claimant's age fails and is dismissed.

REASONS

INTRODUCTION

1. The Claimant presented a complaint to the Tribunal alleging unfair dismissal and that her dismissal was an act of age discrimination. She said that the second and third Respondents were responsible for that age discrimination and that in addition a number of actions by them against her amounted to harassment for reasons relating to her age. The Claimant relied on 6 specific acts as harassment, which were set out in paragraph 43 of her additional information.
2. We heard evidence from the Claimant and from the second and third Respondent. We considered an extensive bundle of documents. Most of the facts necessary for our decision are not in dispute. Where there is dispute, which is relevant to the decision, we set out in our reasons why we have preferred one version to another.
3. The Claimant was a personal assistant at the first Respondent. At the date of her dismissal she was aged 59. She started working for the Respondent on 1 July 1996. She worked for a number of different senior executives of the Respondent as a personal assistant. Mr Shaw started working for the Respondent on 1 November 2010 as Senior Director Engineering for the RS1 Passengers Division of the first Respondent. The Claimant did personal assistant work for him from when he started and was officially made his personal assistant from the beginning of January 2011. The Respondent is a UK subsidiary company of an international company involved in the manufacture of trains and planes. In early 2011 a number of projects in which the first Respondent was involved were coming to an end. The Respondent then lost the

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important Thames Link contract. As a result it was facing a major redundancy situation. There was anticipated to be likely to be a total reduction of staff of 1,400 and even after temporary workers were removed about a further 440 redundancies of permanent staff. On 5 July 2011 notification of the proposed redundancies was given. Initially it was anticipated that there would be substantial redundancies of engineers in Mr Shaw's division (he believed that his job was also at risk), although eventually as new work was found none of them were made redundant. However a decision was made that there was a need to reduce the administrative staff including personal assistants.

4. The Respondent has an information and consultation committee, which includes redundancy exercises in its remit. Employee representatives were elected and there was then extensive consultation on the processes to be followed, including the criteria to be applied and the pools to be used. In relation to this particular redundancy exercise there were at least 14 meetings of the information and consultation forum. We have noted that Mr Malboeuf, the HR Director, led for the first Respondent in ten of those meetings and Dawn Roberts, who like Ms Morgan was an HR business partner, led on 4 of them. The processes to be followed were discussed and agreed. This included the 5 criteria to be used in each redundancy exercise, how the criteria were to be considered and the weighting involved. There were 4 criteria which involved subjective assessments, which were competency, delivering results, working together and customer service. The fifth criterion was attendance, which was a matter of calculation.

5. Early in the procedure Mr Malboeuf had said that PAs could do administrative work, but not the other way round. However after the individual assessments had been carried out and it was seen that the PAs scored well above the other administrative staff, it was decided to create separate pools of PAs and administrative staff. Although it was accepted by the Respondent that PAs could do the administrative work, they were not included in the administration pool.

6. Although the division in which the Claimant worked was removed from the redundancy process for operatives the Respondent decided to still reduce the number of PAs across the business down to 8. It had not decided where the PAs who remained would be slotted in. At the beginning of the process there were 13 PA's. Two of them resigned before the assessment, one took voluntary redundancy and one, employee H, decided to take voluntary redundancy once she was given details of her assessment and put at risk of redundancy. As a result eventually there was only a need to make one PA compulsorily redundant.

7. Each of the criteria was marked on a scale of 1 to 4 and then a weighting of 6 was applied for the first two categories, 5 to the second two categories and 3 to the attendance category. For the subjective elements, other than competency, 4 was for "exceeds criteria", 3 "fully meets criteria", 2 "partially meets criteria" and 1 "does not meet criteria". For competency the test for a 4 was "individual demonstrates an outstanding range of competencies and exceeds those required in their current role. They also may coach, train or mentor others", 3 was "the individual demonstrates a range of additional competencies, knowledge, skills and/or qualifications above those

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required to perform current role", and 2 was "the individual has the necessary competency knowledge, skills and qualifications to perform current role".

8. Each employee was to be assessed over the 12 months to 5 July 2011 by 2 managers, who had worked with them for at least 3 months. As the Claimant had only worked for Mr Shaw since January she was asked who else could assess her and she suggested Sean Turner. Although the Claimant had not worked closely with Mr Turner, he had knowledge of her role as a team leader in the administration section before she became the PA for Mr Shaw. The senior executive for whom she had previously been the PA had left the respondent's employment. Each assessor was to make an independent assessment, then they would meet to discuss the assessments in order to be satisfied with their scores. A verifier, who was independent of the assessment process, would then confirm the logic of the scores, ensure the comments made by the assessors supported the scores and validate the assessment. If there was a difference between the scores the verifier's role was to find a fair balance. Although the Respondent had a system of performance appraisals called PMPs, these were not to be decisive in the assessment, but should be considered. The Claimant had always had very high scores and had been rated on a number of occasions in the highest category of "role model". The last PMP for the Claimant was in February 2011. This again showed a high performance from the Claimant, although Mr Shaw says that because he had not been the Claimant's boss for very long he decided simply to accept her assessment. That was in line with her previous assessments. The only area where he appears to have raised issues with the Claimant about her performance before July 2011 was in the way she kept his diary.

9. Mr Shaw and Mr Turner gave identical scores for the Claimant giving her a 3 for competency, 2 for delivering results, 2 for working together and 3 for customer service. Mr Shaw says that these were completed separately. The Claimant had a maximum score for attendance. No other PA, apart from J, was given a score of less than 3 in any category and many 4s were awarded.

10. Employee J worked as a PA in the Human Resources Department. She was aged 25. She was assessed by Mr Malboeuf and Ms Roberts. They gave her identical scores of 2 for 3 of the categories with a 3 for working together. They wrote comments justifying their scoring. J therefore had a total score of 37. The Claimant was the next lowest with 67. However Ms Morgan considered that the scoring was harsh. Like the assessors she knew of J's work and that in addition to being a PA, J worked in a development role in HR. She had discussions with the assessors who, Ms Morgan says, agreed that they had marked J down for failings in the HR tasks rather than the PA tasks. As a result all of their scores of 2 were increased to 3 and her score went up to 78.

11. We note that the comments by the assessors about J included that there was a failure to be a proactive, a lack of shorthand, a failure to use bring forward systems, that she was not able to always prioritise her workload, but that she completed tasks when prompted. No record of any of the discussions between Ms Morgan and the assessors has been produced to us. Although J was pregnant at the time Ms Morgan

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confirmed to us that neither her pregnancy nor the fact that she was paid significantly less than the Claimant was a factor that was taken into account.

12. On verification 2 other employees had a reduction of one score, as a result of Ms Morgan's input, but both were still on 83. The scores therefore after verification were 67 for the Claimant, 72 for H (who took voluntary redundancy after she was given this score), 75 for G, 78 for J and everyone else had at least 83. The only employees over 50 were the Claimant, H and employee F, who was 54. Employee F was given the highest score of anyone, getting 95 out of 100, so only missing a perfect score in one category. The Respondent had a system of red for employees at risk of redundancy, amber for those who might become at risk if other scores were changed and green for those not at risk. During consultation Ms Morgan said that for the PAs the at risk red level was 78 and the green level at least 84. Only the Claimant and H were sent at risk letters, even though G was below the 78 level.

13. On 19 September both the Claimant and H were sent a letter with their scores and told they were at risk of redundancy.

14. On 26 September 2011 the Claimant had her first redundancy consultation meeting with Mr Shaw and Ms Morgan. The Claimant was represented by Mr Rickitts, who was an elected employee representative. She challenged her scoring of 3 for competency pointing out that she had long experience and extensive qualifications including a degree in business studies and a HND in business management which other PAs did not. Although Mr Shaw accepted that the Claimant had a range of skills above and beyond what would be expected for a PA he said that in order to get a 4 he required a demonstration of an outstanding range of competencies or coaching, training or mentoring others. He said he hadn't seen that the Claimant had been an outstanding coach. This was in relation to the time when the Claimant was in a line management role in the administration department. She was told that she had been marked down as not proactive, because she only worked for one executive and had more time to spare than other PAs. There was discussion about Mr Turner's comments that the administration team had lacked cohesiveness when the Claimant was their manager and discussion about the Claimant's role as manager in the administration team.

15. There was then a second consultation meeting on 3 September 2011 at which the Claimant brought more details of why her scoring was wrong. On the basis of what the Claimant has said in the first meeting and his further enquiries Mr Shaw agreed to increase the score for delivering results to 3. The Claimant argued that that should go to 4, but he was not prepared to change it further. There was then a discussion about the working together issue for which the Claimant had produced examples of when she was managing the administration department and Mr Shaw said he accepted that. He also said that he took into account work she had recently done as a PA on helping others out with travel and then said "I know I am not supposed to say at the meeting, but I am prepared to change that one to a 3". However, Ms Morgan then commented that when the process was completed it had to go back through the pooling and verification process and that in order to make any changes Mr Shaw would have to provide evidence and comments as to why he had made the changes, which would

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have to be signed off by him and Mr Turner and then back to her for verification. Despite what he had said in the meeting Mr Shaw did not increase the score for working together. Although Mr Shaw subsequently signed the change of score for delivering results to a 3 on 3 October, we have not been shown any document where Mr Turner signed to agree it. The meeting went on with considerable discussion about the Claimant's role in administration. It was made clear to the Claimant that she was still likely to be made redundant. She was specifically told by Ms Morgan that in order to be safe she had to have more than a one point of increase. Ms Morgan accepted in cross examination that that was not correct. If the Claimant had been given a 3 for working together or if any other of the subjective categories had increased by one point, with the weighting, the Claimant would have been above G and level with J's amended scoring. As there was an agreed tie break of length of service the Claimant would have been retained rather than J or G.

16. At the meeting the Claimant complains that Ms Morgan was eating an apple. Ms Morgan explained that she was involved in long meetings and needed some food.

17. The Claimant decided not to have a third meeting that she was offered because as a result of the comments that had been made she saw no point. She later changed her mind and the third meeting took place on 18 October. The Claimant produced supporting e-mails about her competencies. She became upset as it was clear that the Respondent was not going to change the assessment.

18. The Claimant in her claim form said that Mr Shaw had changed his password in August, which prevented her accessing his e-mails, but she accepted that the passwords were changed automatically. She also suggested that Mr Shaw had been ignoring her from an early period. However, under questioning the Claimant accepted that she was doing the diary at least up to the end of September and it seems to us that any change in the relationship occurred at least after the second consultation meeting, when the Claimant had indicated she did not want a further meeting and therefore was very likely to be made redundant. There was also an incident at some time in October when the Claimant read out a letter from her solicitor, which indicated that she intended to take further action. Mr Shaw said the Claimant said she was going to a Tribunal. We think it is more likely that she said she was going to take further action, which he interpreted to be that. He also suggested to us that the Claimant had said that she was tape recording the meetings. We think it unlikely that she would have made that comment prior to the employment ending. However we can see that once it was likely that she was going to be dismissed and the relationship was breaking down, it would have been very difficult for the Claimant to carry out a proper PA role for a senior executive and that any difference in the attitude of Mr Shaw to her was for that reason.

19. By letter of 28 October the Claimant was told that her employment would terminate on 28 October and she would be paid in lieu of notice. She was escorted off the premises. Under the Claimant's contract the Respondent was not entitled to dismiss her with pay in lieu of notice.

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20. The Claimant decided not to appeal. She felt the Respondent did not listen to her, had disparaged her and by that stage she had been treated by her doctor for depression. We fully understand why the Claimant felt that she had been badly treated and particularly taking into account her medical condition accept that it was reasonable for her to decide not to appeal.

21. Those are the essential facts in the case. Because of time constraints at the end of the evidence the parties agreed to produce written submissions together with a comment on the other's submission. As those documents are available in full there is no benefit in our trying to precis them.

22. Both representatives set out the legal position in relation both to unfair dismissal and age discrimination. There is no significant difference in their comments on the applicable law and we consider we can deal with the legal provisions quite briefly.

23. Direct discrimination is dealt with in the Equality Act 2010 Section 13(1) "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". This requires a comparison of the Claimant with either a real or hypothetical comparator whose circumstances are not materially different.

24. The question of harassment under the Equality Act 2010 is in Section 26(1):-

"A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and

(b) the conduct has the purpose or effect of:-

(i) violating B's dignity or;

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B".

Age is a relevant protected characteristic.

25. The question of the burden of proof in discrimination claims is dealt with in Section 136 of the Equality Act 2010:-

"(1) This Section applies to any proceedings relating to contravention of this Act.

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

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

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Although the case of Igen Limited v Wong (2005) ICR 931 was decided before the Equality Act came into force, its guidance still applies.

26. We deal firstly with the complaint of direct age discrimination relating to the decision to dismiss. The Claimant does not dispute the Respondent's need to have a redundancy process nor the reduction of employees involved, but she says that the process the Respondent applied acted as direct age discrimination against her. She particularly compares herself with employee J, but also with the other PAs who were younger than her and, if necessary, a hypothetical younger comparator. The comparison between the Claimant and others is in relation to the scoring given which resulted in the Claimant being the lowest scoring PA and as a result made redundant.

27. There is nothing in the system adopted by the Respondent which would indicate that, if properly applied, it was discriminatory on the grounds of age. It seems to us that there are 2 aspects to the application of the process, which we have to consider, which are the initial assessment by Mr Shaw and Mr Turner followed then by the consultation and verification process, including the increase for J. Although we have not heard from Mr Turner, Mr Shaw was the primary assessor who was also involved in the changes in consultation. Having heard him, on balance, we accept that his assessment of the Claimant against the criteria was how he believed he should do it. We take account of the fact that he had not known the Claimant for very long, in comparison with the assessors for many of the other PAs. We accept that he did consider that his diary was not kept in the way he would have preferred. What is striking is that he has taken a very strict way of assessing the scoring against the criteria, which is at odds with the way other people have assessed their PAs. It is particularly unusual, although perhaps not surprising in view of the close personal relationship involved in being a PA, how many top scores were given and that no one else scored below a 3, which for most categories is fully meets the criteria. That is despite comments made on a number of other assessments, which would indicate that the person perhaps hadn't fully met the criteria. Although we consider that he was incorrect in his assessment of the Claimant under competency, by taking into account mentoring and coaching from her administration role, which was not appropriate for a PA, that does not seem to have anything to do with the Claimant's age. We consider it also relevant that when the Claimant challenged the scoring, he was prepared to make the change which he did make and also indicated that he was prepared to make a further change, which ultimately he did not do. Mr Shaw was not involved in the assessment of any of the other PAs, indeed as most of the PAs were assessed by completely different people, the role of verification became more important. Our conclusion therefore is that, whilst Mr Shaw appears to have been a very harsh marker, there is no reason to suppose that had he been marking anyone else, he would have been more generous. We are not satisfied that there was in his case a difference in treatment relating to the Claimant's age.

28. Ms Morgan's position is quite different. There are a number of areas where her actions cause concern. Most importantly is the treatment of J, which was quite different from the way the Claimant was treated. Ms Morgan went beyond her role as a verifier by using her knowledge of J. It is quite extraordinary that J's scoring increased so dramatically from being marked 2 out of 4 in 3 categories to 3 out of 4 in all of those

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categories, as a result of Ms Morgan's intervention. That is particularly so when we consider the original assessors. J was the PA to the HR department. She was assessed by the director of HR and another HR business partner. Both of them were chosen because of their knowledge of J's work. Both of them were extensively involved in the whole redundancy exercise. Although we haven't heard from either of them, it is quite unbelievable that they did not know how to properly carry out the assessment process. We have been given no documentary notes to show how those changes took place. They were by any standards very substantial changes.

29. The explanation from Ms Morgan is that the other people were assessing J on factors other than her work as a PA. Whilst we can understand that it might have been relevant to limit the assessment to her work as a PA, as we have already recorded the comments about her work show that, in areas where you would expect a PA to be proficient, those comments indicated that she was not. Moreover, if J's work in any function other than a PA was to be excluded, then there is a clear difference between the way J was treated and the way the Claimant was treated. There was considerable discussion in the Claimant's case about her work as a team leader and her management functions in her role in the administration section. Ms Morgan as the verifier was involved in all of those discussions, but never suggested that that was an inappropriate area for Mr Shaw to assess the Claimant upon. He particularly referred to her role in line management in training and mentoring others as his reason not to give her a grade of 4 for competency. Bearing in mind the Claimant's experience and other qualifications in comparison with other PAs, who were given a level 4 and Mr Shaw's comments, it is difficult to believe that the Claimant would not have been given a 4 for competency had her PA function alone been considered. Similarly Mr Shaw did not increase the Claimant under the working together category, principally because of the comments from Mr Turner and others about her performance in administration. We accept that Mr Shaw did not know how J had been treated, but Ms Morgan knew that they were being treated quite differently in the assessment and did nothing to equalise the position. It was her specific job as a verifier to do so.

30. We also take into account that she exceeded her role as verifier in increasing J's score in the face of clear agreed scores by the original assessors. There is no dispute that she took into account her own knowledge of J, which was outside the verification process.

31. We were also concerned that Ms Morgan's actions in the assessment were not straightforward. It is odd that she said that 78 was the level at which an at risk letter would be sent and yet no such letter was sent to G, who was below 78 and was not dismissed. It is suggested in the Respondents submissions that she did not know of the difference in age between the Claimant and J. We do not accept that in her position in the HR function she would not have been aware of the ages of each of them. The age and length of service of each member of staff would of course be relevant to the redundancy process and we don't accept that a senior member of the HR team would not have been aware of those differences. She also knew both of them and it would be odd that she was not aware of the difference when J is half the claimant's age.

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32. What particularly concerns us about Ms Morgan's actions in relation to the Claimant in the assessment process is that at the second consultation meeting, after the claimant's score had been increased and Mr Shaw had said he was prepared to make a further increase, she said that the Claimant had to increase by more than one score in order to be safe. That was not true as she had to accept when challenged in cross-examination. Had the Claimant moved up by one further score both G and J (even after the inflation of J's figures) would have been liable to be dismissed before the Claimant. Whilst we accept that Mr Shaw may not have known that was untrue, we are quite satisfied that Ms Morgan knew that that was false. It of course meant that the Claimant believed that she had no chance of changing the figures and did not significantly push further, particularly at the score of working together where Mr Shaw had already indicated he was prepared to increase by the one point that would have saved the Claimant.

33. We also take account of the fact that of the 3 employees over 50, one took voluntary redundancy because she had already been assessed as at risk of redundancy, the other was the Claimant and we do accept that the highest scoring person was also 54. However, the highest scoring person was considered to be so exceptional as to get 95 out of 100. The people who assessed her were not involved in the assessments of anyone else and it would surely have been impossible for any verifier to reduce such a score to put her at risk.

34. Taking into account the machinations by Ms Morgan over the difference between the Claimant and J and the significant difference between their ages, the Claimant has satisfied us that this is a case where the difference in treatment between the Claimant and J could be inferred to be by reason of the difference of age. That calls then for an explanation from the Respondent. Ms Morgan specifically denied that J was favoured because she was pregnant or because she was on a much lower salary than the Claimant. The only explanation given by the Respondent is the fact that the initial assessment of J took into account extraneous matters. We have already said we simply don't accept that explanation. In addition extraneous factors were used in marking the claimant down. Accordingly we find that the dismissal of the Claimant was an act of age discrimination by the first and third respondent.

35. Turning to the complaints of harassment, whilst we appreciate the submission on behalf of the claimant that the actions only need to be related to the Claimant's age and, if we find that the dismissal was an act of age discrimination, then the other actions by the Respondent, of which the Claimant complains, are related to her age, but we do not accept that it can be taken in that simple way. It seems to us that the specific actions must themselves have some connection with the Claimant's age, otherwise even such matters as the letter inviting the Claimant to a consultation meeting could be argued as being an act of harassment. We have considered the acts of harassment in turn.

36. The Claimant alleges that it was harassment to say that other Pas that Mr Shaw had had in the past were better at managing his diary. The issue of management of the diary had arisen before the redundancy process and we accept that he genuinely believed that that was the case. Similarly we cannot see any reason why Mr Shaw's

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comment that his mother did shorthand was anything to do with the Claimant's age. As he explained, he was able to recognise a character the Claimant had written and said that he knew about this because of the fact that his mother did shorthand. Early in the process Mr Shaw indicated to the Claimant that he was likely to move job and wouldn't be replaced. At the time that was factually the case. We accept that he was simply explaining to the Claimant what may happen, giving her advance warning and her age was irrelevant to that.

37. We have already dealt with the question of the change of passwords, which was done automatically and also that any change in their relationship was as a result of the likelihood of her being dismissed, coupled with her reaction to it and again was nothing to do with her age.

38. In relation to the allegations against Ms Morgan there is no dispute that she said the Claimant was not as good as she thought she was. That was a comment during a consultation meeting at which Mr Shaw was giving his opinion that the Claimant would not get the highest category. It was a very lengthy meeting, at which the parties clearly were becoming frustrated and even the Claimant's representative felt it had gone on long enough. We cannot see that it has any connection with the Claimant's age. The suggestion that by Ms Morgan eating an apple that amounted to harassment is one we reject. It was a long meeting and the Claimant herself accepted that she has eaten during meetings in the past. Similarly the suggestion that in the meeting Ms Morgan was ignoring the Claimant by sitting sideways we reject as anything to do with the claimant's age. Mr Shaw was the principal person from the management side involved in that discussion.

39. Overall we are not satisfied that the various acts, which the Claimant has claimed amount to harassment are made out and reject that contention.

40. Turning to the question of unfair dismissal our findings in relation to the age discrimination are also relevant in considering the dismissal is unfair. The Respondent has satisfied us under Section 98 of the Employment Rights Act that the reason for dismissal was redundancy. We accept that overall the procedure envisaged was a fair procedure. There was clearly a problem for the Claimant that she only had one manager for whom she worked as a PA, who could comment on her and therefore the other manager had limited knowledge of her work as a PA. However that is a problem that arose because of the factual situation and, of course, it was the Claimant who suggested Mr Turner as her assessor. It is very striking that the Claimant appears to have been dealt with more harshly than other employees. It is strange that bearing in mind her history with the Respondent, which is exemplary, and her previous assessments that she should be marked as the lowest of the PA's. We appreciate that is what can happen when different people are applying criteria and may apply them in a different way. Some will be hard and some generous. That is why it is so important that there is a genuine and fair verification process. The principal area in which the dismissal of the Claimant fell down is on the verification process, which was not carried out fairly and denied the Claimant particularly the treatment that J received. If J had been assessed, as she should have been under the process, then she would have been dismissed before the Claimant. Similarly, if the verification had been carried out

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properly, we are quite satisfied that, if Mr Shaw had been advised how other people were applying the criteria, the Claimant would have gone up by at least one mark either in relation to working together or competency or both.

41. We find therefore that the Claimant's dismissal was unfair and that had a fair process been carried out the Claimant would not have been dismissed.



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Employment Judge

Date: 30th July 2012

JUDGMENT SENT TO THE PARTIES ON

01/08/12
.....
AND ENTERED IN THE REGISTER

.....
FOR SECRETARY OF THE TRIBUNALS