



EMPLOYMENT TRIBUNALS

Claimant: Mr D Hearn
Respondent: Knights Lowe Limited
HEARD AT: Bury St Edmunds **ON:** 9th & 10th January 2017
BEFORE: Employment Judge Warren

REPRESENTATION

For the Claimant: Miss Ismail (Counsel)
For the Respondents: Mr T Sheppard (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim that he was unfairly dismissed fails and is dismissed.

REASONS

Background

2. Mr Hearn brings a claim of unfair dismissal following his dismissal from the Respondent's employment after nearly seventeen years service, on 10th July 2016.

Issues

3. At the outset of the Hearing I identified the issues with the representatives as set out below.
4. Mr Hearn claims unfair dismissal.
5. The Respondent says that it dismissed Mr Hearn by reason of the potentially fair reason of capability, after a series of warnings and opportunities to improve through performance management.
6. Mr Hearn says that the real reason he was dismissed was because he had annoyed the Chairman, (Mr Paul Knights) and because he did not fit in, following the Respondent's take over of the business, (Stacey and Partners) that he had previously been employed by.
7. If I find that the real reason for dismissal was in fact Mr Hearn's capability, he will say that in any event, the dismissal was procedurally unfair for the following reasons:
 - 7.1 The Respondent relied upon a warning that he had not received, in February 2015.
 - 7.2 The Respondent failed to take into account positive feedback Mr Hearn had from his clients.
 - 7.3 The Respondent brought forward a meeting scheduled 26th May 2016 to 26th April 2016, in order to speed up the process of dismissal.
 - 7.4 The appeal was unfair as the appeal officer has not familiarised himself with Mr Hearn's personnel file.
8. In his pleaded case, Mr Hearn had complained of a retrospectively amended appraisal. Miss Ismail confirmed that he no longer relies upon that allegation.
9. Mr Hearn further says that the decision to dismiss lay outside the range of reasonable responses in that the Respondent:
 - 9.1 Failed to take into account his length of service and his previously good service.
 - 9.2 Had insufficient evidence to support its conclusion that he was not capable of carrying out his duties.
 - 9.3 Did not consider the possibility of alternative employment, (demotion).
 - 9.4 Did not genuinely believe in Mr Hearn's lack of competence.

Evidence

10. I had before me witness statements from Mr Hearn and from the Respondents, witness statements from Mr Paul Knights, (Chairman), Mr James Knights, (Managing Director and son of Mr Paul Knights) and Mrs Sarah Healey-Pearce, (Director).
11. I had before me a paginated and indexed bundle of documents running to page number 215.
12. During the course of the Hearing and without objection, I was provided with a screen print which demonstrated that the written warning dated 13th February 2015 had been created at that time and a lever arch file containing redacted employee appraisal forms in respect of Mr Hearn's colleague managers, for 2014 and 2015.
13. During an adjournment, I read the witness statements and the documents referred to therein.
14. I heard oral evidence from each of the individuals who had presented witness statements.

The Law

15. The right not to be unfairly dismissed is contained in Section 94 of the Employment Rights Act 1996, (ERA).
16. Section 98(1) and (2) of the ERA set out five potentially fair reasons for dismissal, which include the capability or qualifications of the employee for performing work of the kind which he was employed to do.
17. If the employer is able to show the reason for dismissal was one of the potentially fair reasons set out in Section 98(1) and (2), the Tribunal must then go on to apply the test of fairness set out at Section 98(4) which reads as follows:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) shall be determined in accordance with equity and the substantial merits of the case."*

18. In applying the test of fairness set out in s98(4) the tribunal must not substitute its decision as to what was the right course to adopt and in considering the reasonableness of the employer's conduct, there will usually be a band of reasonable responses the reasonable employer could adopt and it is to that, one should have regard; a decision inside that band is fair, a decision outside that band is unfair, (Iceland Frozen Foods Limited v Jones [1983] IRLR 439).
19. The basic tenets for a fair dismissal based upon an employee's lack of ability are that there has to be a genuine belief in the individual's lack of ability based upon reasonable grounds, (Taylor v Alidair Ltd 1978 IRLR 82 CA) and the employee must have been given fair warning and an opportunity to improve, (Polkey v A E Dayton Services Ltd 1987 IRLR 503 HL).
20. Section 207(2) of the Trade Union & Labour Relations Act 1992 provides that any Code of Practice produced by ACAS under that Act which appears to an Employment Tribunal to be relevant shall be admissible in evidence and shall be taken into account.
21. One such code of practice is the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) which includes the following in respect of disciplinary proceedings relating to misconduct:

"INTRODUCTION

1.

This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.

- *Disciplinary situations include misconduct and/or **poor performance**. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted."*

I have regard to that ACAS code in considering the fairness of the dismissal in this case, in terms of the basic principles of fairness illustrated therein.

The Facts

22. Mr Hearn is a qualified Chartered Accountant. Early in his career, he worked in Cambridge for the well known firm of accountants KPMG. Since 6th September 1999, he had worked for a firm of accountants in Newmarket known as Stacey and Partners.

23. Stacey and Partners were taken over by the Respondent on 1st February 2014. The two firms were of similar size, with approximately twenty five employees each. Stacey and Partners had three offices, in Thetford, Newmarket and Bury St Edmunds. The Respondent had an office in Bury St Edmunds only. Initially after the takeover, the Respondent continued to operate the offices at Thetford and Newmarket.
24. Throughout his employment with Stacey and Partners, no capability or conduct issues were raised with Mr Hearn.
25. There was a significant difference in culture between the two firms; the Respondent having clearly defined targets, key performance indicators, file management and time recording systems in place. The Respondent had higher expectations in respect of the advice to be given to clients and an expectation that those at manager level would delegate work to junior fee owners, (a practice which ensures clients are billed at an appropriate hourly rate for work done, where failure to delegate would mean that the client was either charged too much, or that not enough is charged for the time spent on the client's file by the manager).
26. The management structure of the Respondent is that it is headed by a Board of Directors. Each client has an allocated Director. Below that, there are Managers who are responsible for managing a portfolio of clients. The Manager either undertakes work for the client personally or delegates it, as appropriate, to junior colleagues. The levels below that of Manager is Accounts Senior, (usually referred to as a "Senior") and an Accounts Junior, (usually referred to as a "Junior"). In a Manager's portfolio of clients, the allocated director will vary from client to client. Client's files are called on for review by the assigned Director, from time to time.
27. At the time of Mr Hearn's dismissal, the Respondent had forty nine employees and no specialist HR advice. The HR function was carried out by Mrs Sarah Healey-Pearce, who has had no formal training, but has attended courses on human resources and employment law.
28. The Respondent acquired six Managers from Stacey and Co, including Mr Hearn. The Respondent had performance issues with two of those Managers, one was Mr Hearn. With regard to the other, that individual chose to leave of her own accord.
29. In May 2014, the Respondent closed its Newmarket office. Mr Hearn transferred to the Respondent's Bury St Edmunds office and was paid an additional allowance in respect of the additional travelling costs that entailed.
30. In February 2014, the Respondent held a team day so that employees of the two firms could meet with each other and so that the Respondent Directors could explain how the new firm would operate. The

Managers were provided with a document entitled, "Manager's Role & Responsibilities" setting out a list of expectations on the part of the Managers. For example, that post to be dealt with within four to five working days, telephone calls to be returned within two to three hours, chargeable time should be at least 75%, to delegate as much as possible. Mr Hearn received this document on that occasion and knew of its content.

31. The Respondent has a system of annual appraisals. On 4th September 2014, Mrs Healey-Pearce conducted an appraisal of Mr Hearn. The appraisal form completed is in the bundle at page 64. The appraisal was based upon Mrs Healey-Pearce's knowledge of Mr Hearn's work, as the Director responsible for a number of the clients in Mr Hearn's client portfolio.
32. The appraisal system adopted includes, as set out in the appraisal form, a method of scoring performance in which a score of one is poor and a score of ten is excellent.
33. The following appears on Mr Hearn's appraisal form:
 - 33.1 A score of 7.5 for technical competence, with the comment that he deals with jobs well on the whole and that he needs to work on producing a file and completing a job "the new KL" way.
 - 33.2 A score of 8 for relations with clients.
 - 33.3 A score of 7.5 for communication skills, with the comment that he does not communicate much about WIP, (work in progress) his verbal communication skills with clients seemed to be good.
 - 33.4 For commitment and drive, he is attributed a score of 8 because he has a long journey to work.
 - 33.5 Under the heading, "working in teams" he has a score of 7, with the comment that he tends to work on his own and he needs to get used to managing staff and delegating work.
 - 33.6 Under the heading, "commercial management" he is attributed a score of 7 with the comment that this needs to be improved, that he needs to stick to KPIs and budgets. Here, Mrs Healey-Pearce commented that she appreciated that he had only so far had five months to get used to the new way of working. He is also given advice to bill as soon as he can, to control jobs, to try to plan so as not to make large losses, to make use of the staff planner and to delegate work.
 - 33.7 For the assessment as to whether he produced constructive ideas, he scored 7.5 and a comment was annotated that it was, "a bit too early to tell".

- 33.8 He was given a score of 8.5 for being able to originate action without guidance, with a comment that he deals with his workload with little involvement from the department.
- 33.9 On effective communication, he was given a score of 7.5 for oral communications and a score of 8 for written communication.
- 33.10 He was given a score of 7.5 for being self-assured and confident and a score of 7.5 for being able to adjust behaviour to the needs of others.
- 33.11 Under the heading of, "enjoys and seeks responsibility" he is given the score of 7, with the comment that this has not been noticed yet, "but probably too early to tell".
- 33.12 Under a category of maintaining professional standards and personal appearance and manner, he is given a score of 7.5 with the comment that his personal appearance and manner is fine but he is asked to use an audit case or briefcase when visiting clients.
- 33.13 The overall assessment is a score of 7.5.
34. The appraisal included provision for a note of performance against key performance indicators, three of which Mr Hearn was failing to meet:
- 34.1 Turnover was £14,861 whereas it should have been £47,000;
- 34.2 He was down 7.3% on his profit target, and
- 34.3 In respect of work in progress as a percentage of target turnover, the target was 22% and his attainment 189%.
35. Mrs Healey-Pearce also completed a document listing the Manager's roles and responsibilities as referred to above. Against each item were three columns with headings, "good", "needs improvement" and, "poor". Two items in the list were scored as "good", namely taking on new clients and maintaining the high professional standards expected of a quality firm. Five items were scored as, "poor" including choosing the right staff for the right jobs, providing feedback to staff, helping to train staff and delegating as much as possible. Fifteen items were scored as, "needing improvement" including the provision of innovative advice to clients, defining and advising on the commercial/business issues facing clients, dealing with all of the client's tax issues, that chargeable time should be at least 75%, to minimise losses and maximise profits, attracting own referrals and communications with managers.

36. As part of the appraisal process, there was an employee self-assessment form. On this form, in answer to the question, "What career aspirations do you have?" Mr Hearne wrote:

"That my stock market investments continue to be successful."

37. For the avoidance of doubt, this was a reference to Mr Hearn's own private stock market investments, nothing to do with the Respondent.
38. In respect of the appraisal scores for Mr Hearn's colleague managers carried out at about the same time in 2014, of eight others only one other was attributed a score overall of 7.5, which was the lowest score.
39. Shortly after the appraisal, Mr Hearne received a letter informing him that he was to receive a pay rise. The pay rise was in line with inflation.
40. Mr Hearn received a Christmas bonus in December 2014.
41. All of the Respondent's staff received the inflationary increase in salary and a Christmas bonus. Neither was related to performance.
42. Following the September 2014 appraisal, Mrs Healey-Pearce reviewed a number of account files from time to time and was concerned about the quality of work that Mr Hearn was producing.
43. On 12th February 2015, Mrs Healey-Pearce reviewed a file and tax return which gave rise to a number of concerns and which prompted her to meet with Mr Hearn and discuss the same. In summary, her concerns were:
- 36.1 There were estimates of key balance sheet figures without evidence or explanation recorded on the file.
 - 36.2 The file was difficult to follow and contained a number of errors and omissions, including an absence of VAT reconciliation, bank account working, schedule of drawings or profit and loss.
 - 36.3 There was no evidence that figures had been discussed with the client.
 - 36.4 There was no evidence that issues had been discussed with the client.
 - 36.5 Assumptions had been made, reference to which had been made in a letter to the client which did not state what those assumptions were nor asked the client to approve the same.
 - 36.6 There was no record of the client's comment or approval prior to the tax return being submitted.

44. Mrs Healey-Pearce discussed these issues with the Claimant, who in her perception did not appear to appreciate the seriousness of the matters that she was pointing out. The Claimant proffered as an explanation for his errors and omissions, that he had been short of time. This was not perceived by Mrs Healey-Pearce as a sufficient explanation. Mr Hearn said to Mrs Healey-Pearce that he wanted her to tell him what further work needed doing on the file, a remark that she found surprising and of concern given Mr Hearn's seniority and experience. She explained at the conclusion of the meeting that in the circumstances, she was going to issue him with a written warning.
45. Mrs Healey-Pearce prepared the written warning dated 13th February 2015. She set out the matters that had been discussed. She explained that she was concerned that Mr Hearn had a fundamental lack of understanding of what was needed on the file. She referred to the firm's professional standards having been compromised, stating that this must never happen again and warning him that any further incidents might result in a final written warning, which could lead to dismissal. Specifically Mr Hearn was instructed to:
 - 45.1 Not estimate assets or liabilities.
 - 45.2 Ensure that estimates are discussed and agreed with the client, such discussions noted on the file.
 - 45.3 Show all workings.
 - 45.4 Tax returns not to be submitted without written approval from the client.
 - 45.5 Issues encountered such as time constraints or clients not providing sufficient information, should be discussed with the relevant Director.
46. Mrs Healey-Pearce put this letter in an envelope addressed to Mr Hearn and left the envelope on his desk. Mr Hearn's desk was very untidy. He says that he never received the written warning. It is not the Respondent's case that Mr Hearn is lying about that. I accept and find that the written warning was prepared at the time and was placed on Mr Hearn's desk by Mrs Healey-Pearce. The warning became lost amidst the untidiness of Mr Hearn's desk. Mr Hearn acknowledged in evidence that he had been told in the meeting with Mrs Healey-Pearce on 12th February 2015 that she was going to give him a written warning.
47. Subsequently, Mr Hearn did further work on that particular file and re-presented it to Mrs Healey-Pearce. There remained errors as noted by Mrs Healey-Pearce in the document at page 85 in the bundle.

48. Mrs Healey-Pearce continued to encounter unsatisfactory performance on the part of Mr Hearn, when reviewing his files. She found numerous mistakes. He was failing to delegate work to junior staff and the work on his files was frequently over budget.
49. On 1st May 2015, Mr Hearn's hours were reduced to four days a week, at his request.
50. Other Directors were encountering problems with Mr Hearn's work when carrying out file reviews. On 19th July 2015, Mr Daniel Mead reported by email to Mrs Healey-Pearce that in three out of the last four files that he had reviewed, Mr Hearn had undertaken all of the work without delegating. As a consequence, those files were over budget. He also noted that on those files, Mr Hearn had not met with the client. This is not information that was shared with Mr Hearn at the time; I make reference to it because it corroborates the Respondent's case that there were genuine issues with Mr Hearn's performance.
51. Mrs Healey-Pearce conducted a further annual appraisal with Mr Hearn on 23rd July 2015, the appraisal form is at page 98. Mr Hearn's overall rating had been reduced to a score of 7. Comments on the areas of performance included the following:
 - 51.1 On technical competence, Mrs Healey-Pearce noted that there were errors on accounts files which were not always to the standard expected, she rarely heard Mr Hearn give advice to clients, he does not always consider the wider picture.
 - 51.2 She noted that Mr Hearn seemed to have a reasonably good relationship with clients, although he had lost a few in the past year.
 - 51.3 In respect of communication skills, it was suggested that in order to save time, he dictate letters rather than type them himself.
 - 51.4 It was suggested that he should manage staff and delegate work wherever possible.
 - 51.5 Against the overall rating of 7, Mrs Healey-Pearce acknowledged that it had been a difficult year, there had been a lot to get used to.
 - 51.6 She suggested that he should be more proactive in giving advice to clients and that his letters should be more precise and informative.
 - 51.7 It was noted that he does not ask for extra work when he is quiet and it is suggested that his personal appearance could be sharper, his neck tie should be neatly tied with both ends the same length and his desk area should be kept tidy.

- 51.8 Suggested action for the future was that Mr Hearn needed to be able to control £150,000 worth of files and meet his KPIs.
52. KPI information provided show Mr Hearn slightly exceeding his client's turnover target but hw was showing a loss to date of £35,477.
53. On his self assessment form on this occasion, Mr Hearn wrote the following comment in response to the question posed, "what changes could be made to the firm in order to improve his job or the service provided to the client?":
- "To stop being obsessed by minor matters – i.e. whether £60.00 of clothing is allowable, to treat clients individually on their own particular needs rather than what Knights Lowe think is good for them. To be less defensive towards HMRC."*
54. In response to the question as to what career aspirations he had, he wrote:
- "Careers are for people who have yet to work out there are easier ways to make your fortune".*
55. He further commented:
- "List of achievements: doing and getting probate on my mother's 1.5 million pound will..."*
56. Subsequent to that appraisal, on 25th September 2015, Mr Hearn received written notification that his annual salary was to be increased. The increase was in accordance with inflation, although the letter did not say that. The letter does refer to the salary notification being, "as per your recent performance review". I do not however, think that Mr Hearn could have possibly have received a salary increase because his performance was thought to have warranted a pay rise. At the same time, other managers received discretionary bonuses, Mr Hearn did not. Mr Hearn was not aware that the other managers had received bonuses.
57. I note that in the appraisal, Ms Healey-Pearce made no reference to the earlier written warning. One would have expected her to have done so, on the basis that this is an annual review to appraise performance and clearly the fact that the individual had received a written warning about his performance during the course of that year, is relevant to the appraisal. However, I accept her explanation that she did not think it appropriate to make reference to the warning as it would not be constructive to her discussions. I accept that as her explanation. That is not the same as finding it an acceptable explanation.

58. There continued to be concerns about Mr Hearn's work. Written file reviews by Directors recording these concerns, are copied in the bundle at pages 106 – 112. They corroborate that there were further ongoing concerns.
59. On 4th November 2015, Mr Paul Knights asked Mr Hearn to produce to him for review, a file on one of his clients. The books had been brought in by the client in early August and on 4th November, the client had contacted Mr Knights wanting to know the position. Mr Knights asked Mr Hearn to have the file ready for him to review on 13th November. Mr Hearn complains now, (he did not complain to Mr Knights at the time) that he did not give him enough time, as he only worked a four day week and he had one day's leave during that period. He'd had the client's books since early August. He complains now that the client had been tardy in producing further information but again, he did not explain that to Mr Knights.
60. Mr Knights saw the file on 13th November. He was appalled at what he saw. He met with Mr Hearn to discuss the file review on 17th November 2015. His note of this meeting is at pages 113 – 114. He recorded that Mr Hearn had known that the firm was anxious to give this client a good service, because of issues they had in the past and yet, in Mr Knights' view, he had failed to do this. He wrote that he had never seen such an appalling file in all of his career. He said that Mr Hearn had failed to meet the firm's required standards by:
 - 60.1 Not dealing with the work in a timely manner;
 - 60.2 Not delegating junior work to Juniors;
 - 60.3 The work is untidy;
 - 60.4 He had not referenced and cross referenced using the Respondent's standards;
 - 60.5 There would have to be a major write off, projected by Mr Knights' time at £9,000, and
 - 60.6 He had failed to carry out proper audit tests.
61. Mr Knights' referred to the errors as basic and wrote on his note of the meeting that Mr Hearn should consider that note as a written warning of possible dismissal if the situation were to continue.
62. The latter note, of course, is entirely inappropriate, as no doubt Mr Knights' was subsequently advised, in view of subsequent action taken by the firm.
63. Mr Hearn defended himself during this meeting, stating that there had been major book-keeping issues, to which Mr Knights' point in

response was that if that is so, it should be recorded in writing on the file.

64. Mr Hearn said to Mr Knights' that he had worked at KPMG for 10 years, he satisfied their extremely high standards and they were a superior firm to the Respondent.
65. On 19th November 2015, Mr Daniel Mead sent an email to Mr Hearn to explain that he'd had a difficult meeting with a client the previous night. That was a client that Mr Hearn dealt with. Mr Mead had been informed by the client that they would be looking for new auditors next year. They had not been happy with the way that Mr Hearn had dealt with their affairs, had not felt at ease with him and had felt that he was trying to catch them out. Mr Mead observed that past experience of this client was that they were not unreasonable. Mr Hearn's response to this now, is that during the audit he had exposed some fraud. Mrs Healey-Pearce's point in reply to that, was that one comes across these situations as auditors and the skill lies in dealing with those situations in such a way that the client does not become upset with the auditors and, "blames the messenger".
66. On 30th November 2015, Mrs Healey-Pearce emailed Mr Hearn, inviting him to a meeting on the 3rd December, in order to discuss issues that had been raised in the recent meeting with Mr Paul Knights, issues which were common to other files that had been reviewed by other Directors in the previous few months. In particular, she said that at the meeting, they would discuss issues raised by Paul Knights' on his failure to utilise junior staff and the fact that the files he prepares are repeatedly below standard. A further copy of the Managers Roles and Responsibilities document was attached to that email. She stated that issues of concern were potential persistent breach of firm's procedures which could amount to serious misconduct and could lead to a final written warning. She made reference to the written warning of 13th February 2015. In response to that, Mr Hearn replied saying that whilst Mrs Healey-Pearce said she would send him a written warning, he never received one. Mrs Healey-Pearce followed that with a further email attaching a copy of the 13th February 2015 written warning.
67. A disciplinary hearing then took place between Mrs Healey-Pearce, Mr P Knights and the Claimant on 30th November. Mrs Healey-Pearce was alert to the dichotomy of whether the issue was one of capability or misconduct. The Respondent's concerns were discussed in detail. Mr Hearn's explanation with regard to the file reviewed by Mr Knight as mentioned above, was one of time scale. During the course of the discussions, Mr Hearn criticised the Respondent's standards, saying that they were too picky and they were too defensive with regard to HMRC.

68. The outcome of the disciplinary hearing was that Mrs Healey-Pearce decided to issue Mr Hearn with a final written warning. This was dated 3rd December 2015 and handed to him direct on that day.
69. The written warning is expressed to be for, “serious and persistent breaches of Knights Lowe’s working practices and procedures”, listed as including:
 - 69.1 Poor standards of files, (an explanation given of what way in particular);
 - 69.2 Notes often not detailing advice given or problems encountered on the file;
 - 69.3 Insufficient delegation of junior work;
 - 69.4 Significant losses on jobs, and
 - 69.5 Not using the staff planner to delegate work to appropriate staff members.
70. The letter goes on to set out the areas of expected improvement over the following four weeks, with a further review to take place on the 7th January. The areas of improvement were listed to include:
 - 70.1 Files to be finished to a sufficient standard, (with an explanation of what that means);
 - 70.2 Staff planner to be used for delegating work;
 - 70.3 Fewer account files to be prepared for Mr Hearn personally;
 - 70.4 Budget to be set at the beginning of a job and to be adhered to, and
 - 70.5 Improved communications (with examples given of what that means).
71. At the disciplinary hearing, Mr Hearn had been asked if there was anything that the Respondent could do to assist him and he had replied asking for, (rather surprisingly for a manager of his experience) a list of what the Respondent would expect to see on a standard file and a photocopy of what would be regarded as a good accounts file. Mrs Healey-Pearce provided this further information subsequently. It is noteworthy that the model file provided to Mr Hearn as an example of what the Respondent would expect to see, had been prepared by a Junior.
72. Mr Hearn appealed against the final written warning in a letter dated 7th December, which failed to set out the grounds of his appeal. Mrs

Healey-Pearce pointed this out and Mr Hearn then emailed grounds for appeal, to the effect that his entire work record had not been considered, that with regard to the file inspected by Mr Knights, imposed time limits had led to the file produced not being at the high standard it would have been if he had had sufficient time.

73. The appeal was considered by a Director, Mr Daniel Mead, on 7th December 2015. Mr Mead upheld the decision to issue a final written warning. He was satisfied that Mrs Healey-Pearce had taken into account Mr Hearn's entire work record and he was unconvinced by Mr Hearn's argument that he had not had sufficient time to prepare files to the required standard, in respect of those for which he was criticised.
74. Mrs Healey-Pearce then set up a series of monthly meetings at which Mr Hearn's progress would be reviewed. The first such meeting took place on 7th January 2016, notes of which are at page 159. In the period leading up to that meeting, Mrs Healey-Pearce received feedback from her fellow Directors on file reviews that they were conducting. At the meeting on 7th January, she told Mr Hearn that she felt that there had been some improvement in his basic work, but that there continued to be significant issues, in particular failing to follow procedure. On one matter, he had submitted accounts to Companies House without the file having first been tax reviewed by a Partner, which was unacceptable. Once again, Mr Hearn's excuse had been tight deadlines, but Mrs Healey-Pearce pointed out that she had been present in the office during the period of preparation and could have been spoken to at any time.
75. Mrs Healey-Pearce also explained that she continued to be concerned about the Claimant failing to provide constructive advice to clients, being more proactive, giving an example of her concern.
76. The next review meeting took place on 4th February 2016. On this occasion, Mrs Healey-Pearce confirmed that there had been an improvement in the files that Mr Hearn was presenting to Directors. There had not been significant improvement in his performance in his role as a Manager.
77. In preparation for this meeting, using the Manager's Role and Responsibilities form which she had completed in February 2015, Mrs Healey-Pearce annotated in red Mr Hearn's scores as at February 2016. The result was that it could be seen there were many more assessments of "poor" which had previously been attributed assessments of "needs improvement", including:
 - 77.1 Planning work 3 to 6 months ahead;
 - 77.2 Completing accounts within 4 months of year end;
 - 77.3 Choosing the right staff for the right jobs;

- 77.4 Providing new innovative advice to clients;
 - 77.5 Identifying and advising on commercial/business issues;
 - 77.6 Dealing with all tax issues for the client;
 - 77.7 Dealing with all issues in the life cycle of a business;
 - 77.8 Using material in the client services manual and proactive tax planning;
 - 77.9 Ensure the client receives value;
 - 77.10 Minimise losses and maximise profits;
 - 77.11 Attract own referrals, and
 - 77.12 Provide leadership and innovative ideas.
78. Additionally, previous scores of, “good” for, “taking on new clients”, and, “maintaining high professional standard” had now dropped down to “poor”.
79. It should be noted that the Claimant’s pleaded case had been that Mrs Healey-Pearce had retrospectively reduced the scoring for February 2015 in this exercise. He has rightly conceded in this hearing that this is not the case at all and that what Mrs Healey-Pearce had done was to demonstrate to him how standards that he was achieving in February 2016 were perceived by the Respondent to be less or lower than they had been in February 2015.
80. On 4th February 2016, Mr Mead informed Mrs Healey-Pearce that the client mentioned above who had indicated that they would no longer instruct the Respondent for audits, had decided that they would now do so, but only on the basis that Mr Hearn was not the appointed fee earner.
81. On 9th February 2016 a Director, Mr Sandry, emailed Mrs Healey-Pearce to say that he was not comfortable passing to Mr Hearn new work or new clients, because of the impression that he gives, in particular his general appearance and demeanour. He wrote that he did not consider Mr Hearn to be of true manager capacity; he gives little proactive advice and appears to confuse giving advice and what Mr Hearn was heard to describe as, “telling clients how to run their businesses”.
82. A third monthly review meeting took place on 3rd March 2016. That was at a point in the year when Mr Hearn had a very light workload and so Mrs Healey-Pearce explained that there had not been enough

practical work for her to review. A further meeting was set for 31st March 2016.

83. On 31st March, the situation remained that there was little work for Mrs Healey-Pearce to review. She and Mr Hearn met and she explained that there was a perceived improvement in the files that he was producing, but there was still concern about his poor performance as a Manager. They discussed at length a significant client which Mr Hearn had lost from his portfolio, (not his fault) and the fact that the estimated value of his portfolio was not as it should be. She pointed out that there was an expectation that a Manager would attract work for himself, which was not happening. She explained that the Directors were reluctant to provide him with new work because they did not have confidence in his ability as a Manager. She told him that he needed to improve his performance and improve that confidence. Mr Hearn indicated that he would be prepared to consider working at the lower level of Accounts Senior rather than Manager and also that he was prepared to consider reducing to three days a week.
84. The 31st March meeting concluded with agreement that they would meet again on 26th May 2016. However, a further issue cropped up in the meantime.
85. On 12th April 2016, a trainee member of staff went to Mrs Healey-Pearce with a problem he was encountering with work that he was doing for Mr Hearn. She discovered that Mr Hearn was adopting an inefficient procedure in breach of the Respondent's own procedure, in respect of information passing between the client and the Respondent derived from Sage software. This is book-keeping software used by clients, which can produce accounts the Respondent would review and finalise. To prepare a set of accounts, standard procedure would be for the client to send a copy of their accounts in accordance with their sage software, as at its year end, (in effect a "back-up" copy). The Respondent is then able to use that data to prepare the client's accounts to the year end, whilst the client is able to continue using its Sage software in the usual way. When the accounts are finalised, the client is provided with opening balance adjustments, so that the data on the Sage software is accurate going forward. Significantly, this approach enables the client to continue using Sage in the usual way for its day to day management purposes. Mr Hearn was not doing this. Instead, Mr Hearn asked the client for a trial balance, which he would review and he would then ask the client to send him further additional reports so that he could complete the accounts. Further, he had not provided the clients with opening balance adjustments, which meant that their accounts going forward were not correct and the reports the software produced for them, were inaccurate. This approach would create issues for the Respondent in preparing accounts in the future and meant the client could not use the Sage software for day to day management purposes as it should be able to.

86. When Mrs Healey-Pearce spoke to Mr Hearn about this on 12th April, he said it had not occurred to him to ask the client to ask for a back-up at the year end.
87. Her conversation with Mr Hearn regarding this particular matter reiterated further previous concerns that she had with regard to Mr Hearn, in particular:
 - 87.1 He was not keeping a record of relevant information on the file and he said to Mrs Healey-Pearce that he kept a lot of information in his head.
 - 87.2 Failing to provide proactive advice; he had said he believed the client was happy with the way they were using Sage, but as Mrs Healey-Pearce pointed out, they would be far happier if they could use their Sage software to its full extent.
 - 87.3 Work was not being carried out efficiently and within budget because Mr Hearn was using an unnecessarily complicated system; Mr Hearn acknowledged where he had made a loss on that file each year.
 - 87.4 Although this time he had delegated the work to a junior member of staff, he had not thought through whether he was delegating to an appropriate member of staff with the required experience.
88. As a result of this development, Mr Hearn was invited to attend a further disciplinary hearing. The invitation was by letter dated 21st April 2016. The meeting was to take place on 26th April 2016. He was informed that the subjects for discussion were his request to work a 3 day week and also, his performance as a manager and on going issues. He was told one possible outcome would be his dismissal. He was informed of his entitlement to be accompanied to the meeting.
89. The meeting took place on 26th April, chaired by Mrs Healey-Pearce. She and Mr Hearn discussed the issues of 12th April again, Mrs Healey-Pearce remained concerned that Mr Hearn apparently failed to appreciate that much of his work on the file in question was unsatisfactory, as was his use of Sage.
90. Mrs Healey-Pearce also discussed a file she had recently reviewed, on which aspects of work had not been completed and that its tax review and, "senior check" should not have been undertaken until after there had been a final meeting with the client.
91. Mrs Healey-Pearce reviewed the roles and responsibilities checklist with Mr Hearn. Once again in particular, she noted that he was still not choosing the right staff for the right jobs, still not using the checklists,

not ensuring the clients could perceive value, still making losses on his jobs, still not advising appropriately on a commercial/business basis.

92. After an hour's adjournment, Mrs Healey-Pearce decided to dismiss Mr Hearn. In reaching that decision, I am satisfied that she had regard to his length of service and his previous good record. That is, his good record before the merger. She considered the possibility of demotion, Mr Hearn having indicated that he was prepared to work at an Accounts Senior level. She dismissed this as she did not feel that others would wish to delegate work to him. She considered and dismissed the possibility of reducing the Claimant to a three day week; this would not overcome the fundamental issue that he was unable or unwilling, to work to the Respondent's required standards.
93. Mrs Healey-Pearce also did have in mind that there was positive feedback from some of the Claimant's clients, but she felt that had to be contrasted with negative feedback which had also been received. She acknowledged that the Respondent's standards were higher than those required by Stacey and Partners. Her view was that transferring employees had been made well aware of what those higher standards were and Mr Hearn had two years in which to adapt.
94. Mr Hearn's dismissal was confirmed by a letter dated 26th April 2016. The performance issues listed, in respect of which there seemed to be no significant improvement were:
 - 94.1 Not being proactive and advising clients on commercial business issues;
 - 94.2 Not providing proactive advice to clients unless prompted by Directors;
 - 94.3 Not always delegating efficiently;
 - 94.4 Difficulties in managing jobs efficiently and within budget, and
 - 94.5 Consistently disregarding the Respondent's standards.
95. Mr Hearn was provided with twelve week's notice.
96. Mr Hearn appealed against his dismissal by letter dated 27th April 2016. His grounds of appeal were that:
 - 96.1 His performance was satisfactory, which he says was evidenced by his appraisal scores of 7 out of 10 in 2015 and his appraisal in August 2014. Also by reference to positive feedback from his clients. He made the point that the final written warning of 13th February 2015 had not been given to him until November 2015.

- 96.2 He believed that the real reason for his dismissal was that he had annoyed Mr Paul Knights and because the firm wished to re-hire former staff and provide promotion opportunities for those that had been trained within the firm, making reference to two recent dismissals, as he thought them to be.
97. The appeal was dealt with in somewhat indecent haste, by Mr James Knights. Mr Hearn had handed the letter of appeal to Mr Knights on the morning of 27th April. Mr J Knights thought that the Claimant's appeal was straight forward and brief in nature. He was concerned about Mr Hearn's conduct after his dismissal; comments to various members of staff to the effect that he had been sacked, asking who would be next? Saying that he wasn't bothered, that it would be going to Tribunal, that he doesn't need the money he could live off his investments. Mr J Knights felt that Mr Hearn was being disruptive. In order to avoid delay and bad feeling, he suggested to Mr Hearn that the appeal could be dealt with that day and Mr Hearn agreed.
98. Notes of the appeal hearing are at page 194. At this hearing, Mr J Knights:
- 98.1 On the point regarding the first warning, noted that Mr Hearn had received the warning on 30th November 2015;
- 98.2 Commented that he had experienced problems with Mr Hearn's files for himself, which he described as messy and untidy, with poor timekeeping and work being rushed.
- 98.3 Repeated that it was Mr Hearn's job as a Manager to allocate and organise time and get work done efficiently and at the right time;
- 98.4 Noted that Directors felt unable to refer work to him after a period of improvement and performance management;
- 98.5 Made the point that issues with his performance had begun long before Mr Hearn's argument with Mr Paul Knights;
- 98.6 Refuted the suggestion that the firm wished to provide promotion opportunities that favour those who had been trained within the firm, explaining in respect of the people recently dismissed that Mr Hearn had mentioned, one had been dismissed for a non-work related matter and the other was performance related.
99. The outcome of the appeal hearing was that the decision to dismiss was upheld. This was communicated to Mr Hearn in a letter dated 28th April, in which Mr J Knights stated that Mr Hearn's performance as a Manager had not been satisfactory, performance issues had started before the argument with Mr P Knights and that the people recently

leaving the firm had nothing to do with a desire to favour Knights' trained people.

100. The people referred to in Mr Hearn's dismissal letter were a Mr Mark Jones who had worked for the Respondent for just six months, there were issues with his work which were discussed with him and he decided to leave. The other person was a Mr Michael Cardon, who was dismissed for lying about attending clients visits and consuming alcohol when he should have been working. The people referred to by Mr Hearn as being recruited by the Respondent, as former employees of the Respondent, were people who were tax experts and their recruitment had nothing to do with the Respondent preferring its own trained staff.

Conclusions

101. I am satisfied that the reason for dismissal was Mr Hearn's capability. Mrs Healey-Pearce genuinely believed, on the basis of copious evidence, that Mr Hearn was not capable of carrying out his duties to the Respondent's required standards.
102. Mr Hearn suggests that the real reason for his dismissal was that he had annoyed Mr P Knights and because he did not fit in. It is certainly true that he did not fit in; that was because his standards of work were not those that were required by the Respondent. In closing submissions, Mr Sheppard referred me to the case of Fletcher v St Leonards School EAT 25/87 as authority for the proposition that an employer can insist on its own levels of performance, even though those may be higher than the standards of others. That must be right, an employer providing a service to customers or clients must be entitled to set standards that may be higher than those of their competitors.
103. I certainly accept that it is the case that Mr Hearn annoyed Mr P Knights. However, it is abundantly clear that the performance issue had arisen and was being addressed by the Respondent, long before he annoyed Mr P Knights. I accept the evidence of Mr P Knights that his concerns about the standard of Mr Hearn's work on the file which he had reviewed, were entirely genuine. I can also understand why it would be that Mr P Knights would be annoyed when, during the course of the meeting when challenging Mr Hearn about his poor workmanship, Mr Hearn's response was to say or imply that he used to work for a bigger and better firm and that if his standards were good enough for that bigger and better firm, it should be good enough for Mr Knights.

104. Having found that the reason for dismissal was the potentially fair reason of capability, I must now consider Mr Hearn's case that the dismissal was procedurally unfair.
105. His first point is that the Respondent relied upon a warning that he had not received in February 2015. It was certainly poor practice to simply place the warning on Mr Hearn's untidy desk. Such a warning should certainly either be handed personally to the individual or sent through the ordinary course of post. On a different set of facts, such an error could certainly be fatal to a Respondent's case. However, in this instance, Mr Hearn accepts that he was told in a disciplinary hearing that he would receive a written warning and such a written warning was prepared. Mr Hearn was very much aware that the Respondent was unsatisfied with his performance and that he was at risk of dismissal if he did not improve. I am therefore satisfied that when looked at overall and in the round, bearing in mind the subsequent warning and Mr Hearn's continuing failure to adhere to the Respondent's standards, failure to ensure with certainty that he received that first warning does not render the dismissal unfair.
106. The second procedural ground relied upon is that Mr Hearn asserts Mrs Healey-Pearce failed to take into account positive feedback from his clients. I accept her evidence that she did so. It is entirely credible that the Respondent would have in mind the potential effect of dismissing a fee earner such as Mr Hearn, in terms of the clients they may potentially lose in circumstances where those clients hold the fee earner in high regard. Clearly, some of them did. There is evidence to that effect in the bundle.
107. The third point relied upon as procedural unfairness is the Respondent bringing forward the meeting on 26th May to 26th April. This was a step which appeared to be entirely warranted, given the information that came to light on 12th April. Mr Hearn's approach to Sage is quite remarkable and one can understand why the Respondent would be anxious to address the issue as soon as possible. Moving that meeting forward is not evidence of bad faith, nor of speeding up the process in some indecent haste to get rid of Mr Hearn.
108. The final procedural unfairness relied upon is that the appeal officer had not familiarised himself with Mr Hearn's personal file. I would observe (although note that this was not identified as an issue relied upon by Mr Hearn) that it was unsatisfactory and naive for the appeal to have been dealt with in such haste on the very day the letter of appeal was delivered. I would normally expect an appeal officer to take the time to gather documentary evidence, such as notes of the dismissal hearing and to make enquiries in respect of points made by the appellant. In this case, one might have expected the appeal officer to go to Mr P Knights and ask him about the altercation. It is also very obviously highly unsatisfactory, for the appeal to be considered by the son of the person the appellant alleges unfairly caused the dismissal to

take place. That is about as obvious a case of potential bias as there can be.

109. Having said that, one has to recognise that this is a small firm. The Directors were regularly communicating with each other. They were all very much aware of the performance issues relating to Mr Hearn. They were all experiencing those performance issues. Mr J Knights was entitled to and genuinely did reach the conclusion that Mr Hearn's performance had been unsatisfactory, that he had been given adequate opportunity to improve, that the reason for dismissal was performance, not his altercation with Mr P Knights and that there was no motive on the Respondent's part to favour those who had been employees before the merger.
110. Even if someone else had dealt with the appeal and had done so a few days later, I am certain the outcome would have been the same.
111. The Respondent applied a disciplinary procedure set out in the Stacey and Partners handbook, which includes within its disciplinary policy, a procedure for managing capability and performance which anticipates as good practice, issues being addressed informally in the first instance. A coaching action plan is anticipated in a case of poor performance, followed by a verbal warning, a written warning and a final written warning. The procedure makes it clear that the firm may commence its disciplinary procedure at any of the various levels set out therein. Although not identified as an issue at the outset, Miss Ismail did argue that the Respondent failed to act fairly by proceeding directly to a written warning. I do not accept that. The policy anticipates as I have indicated, that it may commence at any level. The failings identified warranted the warnings issued. The process in fact followed was, in my view, a fair one.
112. Stepping back and looking at the process overall and in the round, Mr Hearn was warned about unsatisfactory performance, a number of times. What was required of him was made clear, a number of times. Where he had made improvement, that had been acknowledged. Events continued to occur which showed that Mr Hearn was not able to adhere to the Respondent's standards on a consistent basis. I therefore conclude that, looked at in the round, the process followed by the Respondent was a fair one.
113. Lastly, Mr Hearn argues that the decision to dismiss was outside the range of reasonable responses. Contrary to Mr Hearn's assertions, I find that Mrs Healey-Pearce did take into account his length of service, his previously good service and the possibility of providing him with alternative employment. I find that Mrs Healey-Pearce had more than sufficient evidence to support her conclusion as to his lack of capability and that she did genuinely believe that to be the case. In the circumstances, I find that the decision to dismiss lay within the range of reasonable responses of the reasonable employer.

114. For these reasons, the Claimant's claim of unfair dismissal fails and is dismissed.

Employment Judge Warren, Bury St Edmunds
8 March 2017

JUDGMENT SENT TO THE PARTIES ON

.....

.....

FOR THE SECRETARY TO THE TRIBUNALS