



EMPLOYMENT TRIBUNALS

Claimant: Mrs G Radley
Respondent: Yorkshire Building Society
Heard at: Leeds **On:** 9 and 10 March 2017
Before: Employment Judge Lancaster

Representation

Claimant: Mrs J Brook, solicitor
Respondent: Miss L Amartey, counsel

JUDGMENT having been sent to the parties on 13 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided derived from the transcript of the oral decision delivered at the conclusion of the hearing:

REASONS

1. This is a claim of unfair dismissal.
2. Mrs Radley was dismissed after 19 years service with the Yorkshire Building Society on what is accepted to be a potentially fair ground of capability. She had been promoted to branch manager at Wetherby. As part of her training in that role she was required to take a test. That is an "Open Book Test" where she was to be assessed on her knowledge of three management policies. It was a 20 question multiple choice test and the pass mark was 90%. That is she had to score at least 18 and that was a pre-condition of her then attending the supervisors course which was the next step in her training.
3. The Claimant took that test on three separate occasions and failed it each time. In accordance with the Respondent's policies she was then invited to a concern meeting which she was told in terms, and which she well understand, could potentially lead her dismissal. That was when she was dismissed on notice.
4. It is common ground therefore that the reason for her dismissal was the three times failure to pass this open book assessment. That relates to capability.

The Respondent has accordingly shown that to be the reason: section 98 (1) Employment Rights Act 1996.

5. The sole issues therefore whether or not in all the circumstances it was fair or unfair for the Respondent to treat that as a sufficient reason for dismissal of this particular Claimant: section 98 (4). In essence on the facts the issue boils down to this: under the policies in relation to a concern meeting there would have been the option, at the discretion of the manager, to allow a fourth attempt at taking the test and the Claimant's argument is that it falls outside the band of reasonable responses in her circumstances to have dismissed her without giving her that further option. It is conceded that of course there would be no guarantee that had she been given the opportunity of re-taking the test she would have passed it on this occasion but is said to have been unfair not to have given her the opportunity. That is essentially the sole legal and factual issue.
6. The background is that Mrs Radley had worked for the Building Society for 19 years. She became assistant branch manager at Castleford. In 2015 she accepted a secondment to work at Beverley as the branch manager and she undertook that role for nine months. In the course of that nine months she went on the supervisors course, which as I understand it is a five day training course, and she passed that. Not everybody does. Despite Miss Amartey's expressed concerns that I should not accept this without further evidence I am quite prepared on the facts to accept, on her own evidence, that for those nine months at Beverley Mrs Radley in practice managed that branch effectively. There is no evidence whatsoever of any criticism of her performance in the role.
7. However it is right to say that at that time the procedures within the Building Society were that once a prospective manager had passed the assessment at the training course, that would then have to be confirmed by their passing the Open Book Test. Mrs Radley took that test once at Beverley and she failed it. She did not seek to re-sit as she herself then took the decision that in any event she wished to be returned to her substantive role at Castleford. She lived in Selby. It was a considerable commute to Beverley and she decided she did not wish to undertake that seconded role anymore. So she returned to be the assistant branch manager at Castleford in February 2015.
8. At that point there had been a change in the structure of the Respondent and apart from the larger branches there was no normal role of assistant branch manager. However those like the Claimant who were already in post at smaller branches maintained their salary and their title. The Claimant accepts that some parts of the role that she had undertaken before she went on secondment to Beverley were no longer open to her. There had been regulatory changes and as ABM she no longer had any supervisory role either in conducting one to ones or training of the representative who worked on the counter.
9. However I find that her role was not simply to be equated with that of customer relations officer but with salary protection. That is because I have seen a supervision note from that period when she returned to Castleford which quite clearly showed that she was not limited to that customer advice role but also had additional managerial responsibilities albeit of a largely administrative nature.

10. The Claimant then in March of 2016 was appointed to be the branch manager at Wetherby. I accept her evidence that she was effectively “headhunted”. She is that she was encouraged and moved into that role by the management that she did not consciously apply for it or was not interviewed formally for it. That would have been consistent with the Respondent’s position that the ABM at Castleford was essentially supernumerary so that if they had a role that was more fitting for the Claimant’s salary range, and indeed her competencies, it would be sensible, if she was agreeable, to move her to it. So she commenced the role from 5 April 2016.
11. I pause to observe that from this point onwards and throughout I consider there is an unfortunate lack of precision and lack of careful attention to detail on the part of the Respondents particularly in the nomenclature of documents which they consider to be hugely significant in the context of this case.
12. I have seen the Claimant’s offer letter for the new post at Wetherby. That is said to be by way of addendum to her existing terms and conditions of employment. In particular it states, under the sub heading “Training and Competency Policy”: “your role is bound by the society’s training and competence policy and scheme which form part of your contract of employment”. There is no clearly precise identification of which document, or documents are intended to be referred to. If this is said to be a document that is included expressly as part of her written terms and conditions of employment it is unfortunate that it is not more specific. There are a large number of potential documents all under a general heading of “training and competency” which may or may not be intended to form part of that contract.
13. However be that as it may it is not disputed that the Claimant understood that in accepting a new role of branch manager she would be subject to a similar regime to that which she had undertaken at Beverley. That would involve the passing of the Open Book assessment and also the passing of the supervisor’s course for a second time.
14. By this stage the Respondents had changed the order in which those took place. That may well be entirely sensible. The Open Book Test is designed simply to ascertain that there has been a degree of study and acquaintance with the formal policies and it is perfectly sensible to ask that a putative manager show that level of competency before they then go on to the more practical training on the course where that knowledge is applied.
15. However if that is of such significance it is again extremely unfortunate that there is no documented evidence as to what the syllabus for that test is, which specific documents are to be tested and which the employee is therefore entitled to take into the exam. It is common ground that the documents that were tested at the time the Claimant last took that assessment in Beverley had, at least in part, been changed in the interim.
16. There is no single document that identifies what is to be the subject of that test. However when the Claimant started in post she was provided with a personal development plan (PDP) by her line manager Mr Dean Alsop. I also observe that at around April 2016 there was a change in the Respondent’s practices where as previously the responsibility for management of putative supervisors had fallen within the BDM (business development manager’s) role and HR function. That was now transferred to the line management. So that

meant that Mr Alsop had no previous experience of actively managing a supervisor through this first stage and to an extent that lack of experience shows. He is not to be necessarily criticised personally for that. He was in liaison with HR and therefore provided a template PDP to the Claimant. Within the format of that template it does identify the three documents which as I understand it are now agreed to be those which are subject to the Open Book Test: it is has been surprisingly difficult to get clear answers from either side as to what the 3 documents in fact were that the understood the Claimant was to be tested on. Nowhere within the PDP is the position explicitly stated. Although those documents are identified they are not the only documents mentioned which are required to be studied by the trainee manager and it does not say in terms “these are the three documents upon which you will be assessed at the test”.

17. On balance I am satisfied that Mr Alsop did not expressly direct the Claimant’s attention to the fact that that part of the PDP that he had prepared in accordance with the HR template was intended to deal directly with this assessment that she was to take on 20 June. The PDP had been supplied on 6 May.
18. Absent any such conversations specifically as to what was to be tested upon there was, perhaps understandably, some confusion in the mind of the Claimant. She initially assumed that she would be tested on the same documents she had been tested on at Beverley. That was an incorrect assumption. I am satisfied that nothing expressly was said to give her that impression and although there have been numerous references in the course of the papers, and of course during this hearing as well, to the Claimant having been told to study the wrong documents that cannot be correct. The three appropriate documents were identified on her PDP and they were specifically the “competence management policy”, the “trainee and competency scheme (branch retail)” and the “training and competency supervisor handbook”.
19. Although there was some discussion about the Claimant’s revision and preparation for the assessment on 20 June I am satisfied that there was no substantive conversation about what was to be the content of that exam between the Claimant and her supervisor Mr Alsop. And certainly had Mr Alsop ever actually identified to the Claimant and confirmed what the three documents she was to be assessed upon were she would not, as she did, have arrived at the test on the 20th with the uncertainty in her mind. However the Claimant must assume a large measure of responsibility for not having checked this matter. It was clearly important. She did not seem to have considered it was necessary to clarify the situation until the morning of the exam itself. And she accepts that although the “competence management policy” and the “supervisor handbook” have been clearly identified as documents she needed to study and indeed were identified - as I noted in the course of the hearing - as documents she should have studied in conjunction with the filling out the workbook which is another part of her training, she did not ever print those off.
20. Equally however Mr Alsop was told what documents the Claimant had printed off specifically. That is recorded in a note on her PDP that he made on 3 June. He, however, did not advert to the fact that she had not told him she had printed off the “competence management policy” nor the “supervisor

handbook". If he had realised those were missing and realised those were an important part of the test he should have brought that to her attention.

21. However on the morning of the 20th the Claimant did realise that she should have printed off the "supervisor handbook" certainly and that she did not yet have it. There is then a record of a conversation she had with Laura Hudson at HR. There are apparently two conversations the first of those I do not have a record of but it is possible to deduce from the later conversation what was said. As I have explained in the course of the evidence my understanding of that second conversation is perfectly clear. The Claimant had earlier telephoned Laura Hudson trying to identify which was the "supervisor's handbook" that she now understood she needed to have in front of her for the exam. Laura Hudson then returned a call later and the course of that conversation it was firstly established that the Claimant had been revising from the "training and competence scheme (branch retail)" document and Ms Hudson confirmed that that was perfectly proper and that was an essential item that she needed to have with her. The rest of the telephone conversation was about identifying what was in fact meant by the "supervisor's handbook". It appears that the Claimant had potentially identified another document, the generic group training competence policy, and believed that may have been the "supervisor's handbook" referred to. I can see from the phone conversation on the morning of the 20th that Ms Hudson was able to disillusion her of that misconception, identifying that it was not that document but another document specifically entitled "supervisor's handbook".
22. In so far as the Claimant may still have thought that she was to be tested on the generic T&C policy I do not therefore understand where that comes from. There has even been a suggestion in the evidence, as indeed it is borne out in the Claimant's witness statement, that she still believed that that was the correct document and that may therefore be the document she took into the exams with her. If she did and she went into those tests with the wrong document that is entirely her own fault. On the morning of the 20th she had been told that she did need not that document but the T&C "supervisor handbook" and the one she had already revised from, the branch retail training and competency scheme. It appears there has also been an omission on the Claimant's part to print off the "competence management policy" and that too was therefore printed off on the morning of the 20th either by the Claimant herself or by Mr Alsop.
23. She had been due to sit that test at 9 o'clock. It was put back to the afternoon. That gave her the full morning to revise additional documents. The Claimant complains that she was not in fact given the option of putting the test back. On balance I consider that she was given that option but clearly, as recorded in the conversation with Ms Hudson, there was equally a genuine understanding that if she was broadly familiar with the policies -and I say she had already managed a branch in Beverley under similar policies for nine months and she had been in post for several months at Wetherby - it ought not to have been unfeasible for her to have looked through the new documents and confirmed where it accorded with her existing understanding of policies and therefore she should still be able to take the multiple choice test. I therefore find that the Claimant would still have had the option of postponement but in the circumstances did not exercise it.

24. The Claimant did take the test. She failed it. She scored 17 out of 20 whereas she needed 18 to pass. Under the training competency policy in relation to tests there are two further attempts ordinarily allowed. The policy required that she would, if requested, have at least two weeks to prepare for the re-test and she had to sign an express waiver if she wished to take it within that period. She did sign that waiver. The Claimant said she felt pressurised. However I am satisfied that she was not told explicitly that she had to take the test again immediately. There was however pressure of time. If the Claimant were to still go on the supervisor's course booked for the 25 July then if she did not waive her right to the further two weeks that may put that course in jeopardy. Although the Claimant was well aware there was a further course in September there was an incentive, if she wished to progress as quickly as had been intended for her, that she waive that right. Of course that meant she only in the event had two days before re-sitting. But she had gone in to the test as of 20 June to all intents and purposes already fully prepared to take the test. This was a re-sit giving her a further chance to see if she could gain that extra mark. Unfortunately she failed again, this time more significantly; she only scored 15 (75%) as opposed to the pass mark of 90.
25. At that point the Claimant had to be afforded at least two weeks before the final third attempt. There was no further permitted waiver. I have seen the transcripts of telephone conversations then between the Claimant and Mr Alsop from 23 June and 24 June. On 25 June the Claimant went on holiday for two weeks for a substantial part of which she was on the Greek island of Xante. Therefore it was arranged that the test would be re-sat when she had at least a fortnight back at work. That was to be on 21 July.
26. I have read those two transcripts of conversations on 23 and 24th. The 23rd is effectively entirely about the arrangements for the re-sitting but they are also mentioned again on the 24th. I do observe that those conversations appear to be entirely amicable and Mr Alsop is emphatic in his assertion that he wants the Claimant to pass this test. He insists that she block out time from her diary when she has returned to work of an hour a day to assist her in further study. That I am satisfied on the evidence of the Respondent was exceptional. Ordinarily managers are expected to revise for this test within their own time or within such time as becomes available in the course of a working day. The Claimant exceptionally was told she had authority to block out an hour. The Claimant not unreasonably makes the point that unless support is put in place to provide additional staffing then the manager blocking out her time may not always lead to fruitful uninterrupted study. But nonetheless she accepts that on all-bar-one day, when she was prevented from studying at all because she had to deal with another employee from Ripon, she was able on each of the working days once she returned from her holiday to set aside probably half an hour to refresh her knowledge of the documents. It was of course still open to her to study further in her own time. She conceded in cross-examination from Miss Amartey that to read the entirety of the documentation on which she wished to be assessed would probably take some three hours. She also was able to and did take the documents away with her on holiday so, although not ideal, it meant she had some opportunity then to continue to refresh her memory of their content.

27. The Claimant does however recall that notwithstanding the additional time afforded to her and although she does not ever complain direct to Mr Alsop that she had had insufficient uninterrupted study time, she was nonetheless nervous. She re-sat the test on the 21st but again she failed. The potential consequence of that must have been clear to the Claimant. She should have been familiar with the policy in any event. She had been expressly referred to its import when she signed the waiver in relation to the second test and the net result was that she was required to be called to a T&C concern meeting. That therefore happened. Again there is again an unfortunate lack of precision in the invitation letter drafted to send to her. It refers to a failure to pass the SMAP qualifications. As I understand it SMAP is specifically a regulatory requirement of those who offer mortgage advice. That phraseology is used in accurately in reference to the Claimant. As I see it none of the tests on this Open Book Test come within that definition which is more significant and relates to knowledge of financial products and the regulatory regime. Indeed the Claimant had successfully obtained relevant SMAP qualifications when previously undertaking a mortgage adviser's role.
28. Nonetheless it is conceded that under the policies a concern meeting would be called after a third failure to pass any relevant test. Within the policies there are a number of options – one is at the discretion of the manager that there may be a further attempt at the T&C activity. It is also stated to be mandatory that the Society will discuss with the colleague any available alternative roles options which they wish to consider. It is not as Mr Alsop incorrectly stated in his witness statement that they “could” consider matters. It is a mandatory requirement. But it is provided that if there is no such alternative role available and no capacity to increase head count the Society may have no alternative but to consider termination. The Claimant was warned that she was at risk of losing her job.
29. Mr Alsop carried out a meeting on 3 August. He concentrated upon whether there were any particular points in mitigation to explain why the Claimant had failed the exam. I see nothing wrong in approaching the matter in that way. The ordinary regime appears to be a three strikes and you are out with limited discretion to depart from that norm. It is appropriate for him to consider whether she should exercise that discretion and to do that via the avenue of considering where there is any mitigating circumstances seems entirely appropriate.
30. Much of the Claimant's concerns at this stage, as indeed subsequently, have been regarding parallel alleged failings on the part of Mr Alsop to provide adequate supervision and support. But because it is the proven reason for the capability dismissal, I am only concerned for these purposes with the reason why she failed the assessment on the three occasions. Primarily it is the responsibility of the individual manager to arrange their time so that they have undertaken sufficient revision and to ensure they have a sufficient understanding of the content that they have to revise. There is provision for a supervising manager if appropriate on any test or exam to arrange informal testing or quizzing in advance. That was never a matter that was actually addressed by either side. Mr Alsop did not consider whether it was appropriate that he should provide this additional support. Nor did the Claimant ask for it from him. She was told in terms in the two conversations of 23 and 24 June that if she had any questions she could approach Mr Alsop

or indeed Laura Hudson. She did not choose to do so. I repeat that primarily it is a matter of the individual manager making sure they are sufficiently familiar with the documents which then refer to on the Open Book Test.

31. As a result of that meeting having asked the generic questions as to whether the Claimant was prepared to consider alternative roles and been told that she would not Mr Alsop informed her that she was being dismissed. However effectively there was then some leeway afforded because, although as clearly recorded in the notes it was only at the very end of the meeting, he did go on to make specific reference to a possible alternative role which was a customer relations job in Morley. That was at a significant reduction in salary. I accept that there were no now assistant branch manager roles available. If the Claimant had not passed the assessment she could not function as a branch manager and therefore the only level at which the Respondent could consider a further role was the lower grade of customer relations officer. This was therefore not only a significant reduction in salary but also a diminution in status. That was only specifically referred to at the very end of the meeting and the Claimant was then given a very short time, two days, to consider whether she wished to consider that position. It is never expressly stated that she has been in fact offered that position: she was asked if she would consider a reduced role and Morley was specifically mentioned but it was not expressed as a firm offer.
32. On the basis that the Claimant had in any event already indicated in the main part of the meeting that she that she was not prepared to consider a reduction in role the only issue arising at that stage is whether Mr Alsop should have exercised his discretion to allow her a fourth attempt. Given that she had failed on three occasions and that it was unusual for any manager to fail, most pass on the first occasion, and that she had also similarly failed a comparable test, though on different documents, at Beverley not long before the short answer ultimately is therefore that I am not prepared to substitute my view for that of what I consider to be a reasonable management response.
33. In those circumstances it is within the range of responses not to allow the Claimant the opportunity of a fourth attempt. Having said that I consider that to have treated the Claimant with 19 years experience and who had effectively managed a branch with the Respondent for a total of 13 months, in this way is to have treated her somewhat shabbily. In these circumstances where it was expected that all potential managers would in fact be able to get over this hurdle of passing the exam and where the real sifting process appears to have been anticipated to take place at the supervisors' course, the decision not to have allowed her at least another few weeks is not easy to understand. The Claimant was dismissed because of events which happened only over a period of some 4 weeks. But although that is my view I am not able in law to substitute that for that of the Respondents. They took a different view. I consider it to be a harsh decision but one that was within their right to take.
34. The Claimant had had the opportunity but she had failed a competency exam, albeit not one which called into question her technical financial knowledge. Ordinarily three attempts would be enough. I also say that if I had found the other way and I confess for a time I did consider I might determine this differently, I am by no means persuaded that it was guaranteed the Claimant would have successfully taken the test again. On the evidence

of four failures already of a similar test it must be arguable that there was less than a 50% chance that she would have passed had she taken it again even with more time to prepare. Also had I found in the Claimant's favour I observe that, extraordinarily, I would have invited submissions on whether her conduct which contributed to this dismissal was in fact such that I might, justly and equitably reduce not only the compensatory award but also the basic award that would otherwise have fallen due to her. This has been a finely balanced decision on the facts particularly because as I say any claimant who comes before this Tribunal with an otherwise unblemished record of 19 years service has that very much weighing in the scales in their favour. But ultimately I have decided that Mr Alsop's decision fell, perhaps only just, within the band of reasonable responses open to a reasonable employer. In these circumstances I do not interfere with it so the claim is dismissed.

Employment Judge Lancaster

Date: 24 March 2017

Sent on: 28 March 2017