

## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4105741/2016

5 Held in Glasgow on 10, 11 & 12 April 2017 & 16 May 2017

Employment Judge Shona MacLean

10 Mr David Torrance

Claimant  
Represented by:  
Mr J Lee  
Solicitor

15 PSSB Limited

Respondent  
Represented by:  
Mr D Burnside  
Consultant

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the application is dismissed.

### **REASONS**

#### **Background**

- 25 1. In the claim form sent to the Tribunal's office the claimant complains that he was unfairly dismissed when the respondent terminated his employment on 7 October 2016. The dismissal was unfair because the respondent set unreasonable and unrealistic targets. It failed to consider counter proposals. It failed to give fair notice of "formal meetings".
- 30 2. The respondent sent a response admitting that it dismissed the claimant. The reason was capability (performance) which is a potentially fair reason for dismissal. The dismissal was fair and reasonable in all the circumstances.
3. The issues for the Tribunal to determine were:
- 35 a. What was the reason for dismissal?

**E.T. Z4 (WR)**

- b. Was it a potentially fair reason?
  - c. Did the respondent act reasonably in treating this reason as a sufficient reason for dismissing the claimant?
  - d. If not, what remedy should be awarded?
- 5 4. At the Hearing the respondent's witnesses were Anne Quinn, Director; Joseph Quinn, Director; and Eileen Moore, family friend. The claimant gave evidence on his own account, Andrew McGeachie, gave evidence on his behalf. The parties produced a joint set of productions. The claimant also produced supplementary productions.
- 10 5. The Tribunal found the following essential facts to have been established or agreed.

### **Findings in Fact**

6. The respondent is a limited company providing a voluntary staff benefits programme for NHS Greater Glasgow and Clyde, NHS Lothian, NHS  
15 Lanarkshire, NHS Forth Valley and NHS Ayrshire and Arran. It has a place of business in Paisley.
7. Anne Quinn and Joseph Quinn are Directors of the respondent. They are not employees of the respondent. They are also directors of other companies.
- 20 8. Before employing the claimant, the respondent subcontracted sales. On 7 May 2009, the respondent employed the claimant as Account Manager. He was recommended to the respondent and had an established sales background. The claimant had no administrative backup. In the first year all the business was new business. His average monthly sales were £3,500.
- 25 9. In 2010 the respondent recruited an administration officer, Chantel Manners. While it was initially intended that Ms Manners would do telesales, her strengths were in dealing with incoming calls, setting up appointments and administration. This allowed the claimant to focus on sales.

10. To develop the business the respondent started employing Business Development Managers (BDM) whom the claimant supervised. They had less sale experience than the claimant. The claimant's job title became Senior Business Development Manager.
- 5 11. Around 2013/14 the respondent introduced an electronic salesforce diary (production 39/108-114). The claimant was trained on this by Mrs Quinn and attended an external training day.
12. Around 2014 to late 2015 Mrs Quinn was caring for elderly parents. Accordingly, Mr Quinn was involved in the day to day of the business.
- 10 13. Around April 2014 the claimant was issued with a mileage log to assist him recording personal and business mileage. On 20 June 2014 Mr Quinn wrote to the claimant expressing concern about the claimant's mileage record keeping. To further assist the claimant, it was proposed that he claim business mileage weekly in arrears (production 8/62).
- 15 14. On 23 June 2014 Mr Quinn wrote to the claimant giving notice of changes to the claimant's terms and conditions of employment with effect from 1 August 2014 unless there was any objection before then (production 9/64). The claimant did not object changes included:
- 20 a. A minimum sales level of £6,000 each calendar month and the introduction of a sales activity target of ten new business appointments per week.
- b. Commission structure (i) when duties included a BDM supervisory role - calculated on local discounts clear sales the claimant generated over £6,000 within each calendar month period; and (ii) when no BDM
- 25 supervisory role - calculated on local discounts clear sales the claimant generated over £7,000 within each calendar month period
15. On 12 February 2015, the claimant was given notice of the respondent's intention to replace his leased car with a monthly car allowance of £250 gross from 1 July 2015 (production 6/59).

16. The claimant was issued terms and conditions of employment updated on 12 February 2015 (the T&Cs) (production 4/49). The T&Cs provided for a salary of £30,000 per annum. In addition, the claimant was eligible to earn commission under an agreed commission structure. The respondent had the right to amend, vary or suspend the commission payment if it deemed it appropriate. Any changes to the commission structure had to be notified to the claimant in writing at least one month prior to any changes being implemented.
17. The T&Cs said that from 1 January 2015 the commission structure:
- a. For a BDM supervisory role was calculated on Local Discount cleared sales generated by the claimant over £6,000.00 within each calendar month period. It was payable when monthly cleared funds generated from the claimant's sales exceed £6,000.00 excluding VAT at the rate of 25% on all cleared sales generated by you exceeding £6,000.00 (excluding VAT) in each calendar month.
  - b. For sales generated by any BDM under the claimant's supervision was calculated on Local Discount cleared sales generated by each BDM over £6,000.00 within each calendar month period. It was payable when monthly cleared funds generated from the BDMs exceed £6,000.00 excluding VAT at the rate of 5% on all cleared sales generated by BDMs exceeding £6,000.00 (excluding VAT) in each calendar month.
  - c. Commission payment was paid a month in arrears.
18. In early 2015, Emma Quinn the daughter of Anne Quinn and Joseph Quinn was recruited as a Marketing Manager. Her focus was to promote sales to NHS staff. Miss Quinn was involved in preparing a new website, newsletter and roadshows. Her income was charged to another part of the business, the Staff Travel Club.
19. Around February 2015 until late September 2015 the respondent employed Andrew McGeachie as a BDM. The claimant and Mr McGeachie had a good

working relationship. Mr McGeachie found it challenging to generate sales. He considered that a factor in this was tactics employed by a competitor.

20. Around August 2015 the respondent introduced a mileage tracker system to assist the BDMs tracking mileage accurately. The claimant and Mr McGeachie required to submit the “track my drive report” with mileage expense claims.
21. Mr McGeachie was no longer employed by the respondent from the end of September 2015.
22. On the afternoon of Friday 6 November 2015 Mrs Quinn telephoned he office and spoke to Miss Quinn who was also employed by the respondent. Mrs Quinn was informed the claimant left the office earlier that afternoon and had not returned. Mrs Quinn checked the Salesforce diary. There was no record of the claimant having an appointment and had no appointments in his diary for the following week. This prompted Mrs Quinn to undertake a financial review.
23. Mrs Quinn was concerned that the claimant was only attending around six appointments per week despite being contracted to work 40 hours per week. She also calculated most his business related to renewals rather than new business. Mrs Quinn considered that the claimant was not meeting the required standard. She considered that unless there was improvement the business would face financial difficulties as the claimant was the only BDM. Mrs Quinn believed that with her support the claimant could achieve and sustain the improvement. Mr Quinn was less certain. Nevertheless, he was content to allow Mrs Quinn to take the lead. From November 2015 Mr Quinn was less involved in the respondent’s business.
24. Mrs Quinn and Mr Quinn met the claimant on 11 November 2015 (the November Meeting). Notes were taken and provided to the claimant (production 10/65). Mrs Quinn reviewed the sales figures. It was explained that the current level of sales was insufficient to generate the level of sales revenue required. The claimant assured Mrs Quinn that his performance

would improve. The notes set out the actions required over the following six months. There was emphasis on time management and the used of Salesforce to record activity and ensure appropriate administrative support for appointments.

5     25.     The following week the claimant's performance improved. He provided a note of companies that he had called and he organised more appointments. The claimant was then on annual leave for a week. On his return to work Mrs Quinn considered that the claimant's performance began to deteriorate and his enthusiasm waned.

10    26.     Mrs Quinn decided that in the absence of a sustained improvement she had no option but to introduce specific sales targets. Mrs Quinn advised the claimant of this around 15 December 2015. She considered that the claimant needed a target to work towards, the target needed to be clearly defined. She also indicated that she would be revisiting the commission  
15     structure. The claimant was frustrated. He felt that he was being micromanaged. Afterwards the claimant said that he wanted to take his remain annual leave which he did.

27.     When the claimant started working for the respondent in 2007 he generated an income of £3,500 per month in new business without administrative or  
20     marketing support she noted that he generated. The claimant no longer had a supervisory role; he was the only BDM. Mrs Quinn concluded that a target of £5,000 per month in new business was a reasonable monthly target. She considered that as the BDM role was the only role to generated revenue for the business it needed to cost no more than 35% of the revenue to ensure  
25     that it was viable.

28.     Mr Quinn wrote to the claimant on 30 December 2015 giving notice of proposed changes to his T&Cs from 1 February 2016 to meet the need for the BDM to generate new business (a company that had not been part of the programme in the last 12 months) (production 11/68). The claimant was  
30     invited to discuss the proposed changes in more detail with Mrs Quinn.

29. The proposal introduced a new business target of £5,000 per month. In relation to the commission structure the proposal was:

- a. Commission will only become payable when New Business target of £5,000 (excluding VAT) has been achieved.
- 5 b. Commission will be calculated on the total Local Discount cleared sales (both repeat business and new business) the claimant generated over £9,500.00 within each calendar month period.
- c. Commission will only become payable when New Business target of £5,000 (excluding VAT) has been achieved and the monthly cleared  
10 funds generated from the claimant's total sales exceed £9,500.00 (excluding VAT).
- d. The commission is 25% on cleared sales generated by the claimant exceeding £9,500.00 (excluding VAT) in each calendar month.
- e. Commission is payable monthly in arrears.

15 30. During the week commencing 4 January 2016 Mrs Quinn and the claimant met to discuss the targets. The claimant expressed concerns regarding the levels of commission he had to generate under the proposed new structure. He did not specifically comment about the new business target.

31. Around 18 January 2016 the claimant provided Mrs Quinn with an  
20 alternative commission structure which considered. Mrs Quinn did not understand the claimant to challenge the figure for new business target. The claimant proposed that commission should be paid on all income over £8,000 rather than £9,500 as proposed by Mrs Quinn.

32. Mrs Quinn was prepared to accept a 1% variation giving a maximum cost at  
25 36%. Based on the claimant's figures it would require sales of £14,000 per month. She considered there was an agreement about the level of activity and the need to increase level of new business. Accordingly, she prepared a revised proposal which she sent to the claimant on 19 January 2016 (production 12/70). The proposal was:

- a. Commission will only become payable when New Business target of £5,000 (excluding VAT) has been achieved.
  - b. Commission will be calculated at 25% the total Local Discount cleared sales (both repeat business and new business) generated by the claimant over £9,000.00 within each calendar month period.
  - c. Commission will only become payable when New Business target of £5,000 (excluding VAT) has been achieved and the monthly cleared funds generated from the claimant's total sales exceed £9,000.00 (excluding VAT).
  - d. The commission is on cleared sales generated by the claimant exceeding £9,500.00 (excluding VAT) in each calendar month.
  - e. Commission is payable monthly in arrears.
33. Mrs Quinn stated that to achieve costings at 36% the claimant would need to achieve £11,000 minimum sales each month to ensure future viability of the role. The revised proposal was to be reviewed in six months.
34. Over the following months Mrs Quinn reviewed the claimant's new business and weekly appointments and regularly discussed this with him.
35. The claimant returned from annual leave on 16 June 2016. The following morning Mrs Quinn gave the claimant a document head "Feb-May (4 months Review)" detailing his sales and activity (appointments) for February to May (production 14/74). Mrs Quinn said to the claimant that she would like to meet with him to discuss his performance. A meeting was arranged for 20 June 2016 (the June Meeting). The claimant knew that the purpose of the June Meeting was to discuss the Feb-May (4 months Review).
36. At the June Meeting Mrs Quinn discussed the need for the claimant to deliver new business sales to the value of £5,000 per month. The claimant was asked if there were any reasons why he had failed to achieve this. The claimant referred to his confidence having fallen but gave no further explanation. There was discussion about increasing the number of new business appointments. Renewal and additional product sales were to be carried out by telephone to allow for an increase in new business face to



face appointments. Mrs Quinn advised that as the claimant's sales were approximately 32% below target she would formally review the claimant's performance against target on 2 September 2016. The weekly informal meetings would continue but by the end of the review period the claimant had to achieve the target of £5,000 new business sales per month, failing which his employment was at risk.

37. Mrs Quinn wrote to the claimant on 20 June 2016 confirming what had been discussed (production 15/75). The letter referred to there being a further review on 2 September 2016 *"giving you 2 full calendar months as you requested and agreed as an acceptable time frame"*.

38. The claimant failed to meet his new business target in June and July 2016. In August 2016, he had £5,500 new business sales.

39. On 1 September 2016 Mrs Quinn provided the claimant with his sales and activity figures for February to August 2016 (production 16/76).

40. The claimant and Mrs Quinn met on 2 September 2016 to discuss the claimant's performance (the September Meeting). The claimant was reminded of the need to achieve and maintain the new business sales target. Mrs Quinn commented that the figures provided show the number of new business appointments at an average of six per week and conversion rates remained at one in five. The claimant was urged to increase the number of new appointments to help achieve and maintain satisfactory performance. The claimant was told that Mrs Quinn would continue to review the claimant's new sales figures monthly. They would continue to have weekly catch up meeting so that Mrs Quinn could continue to support the claimant.

41. Mrs Quinn wrote to the claimant after the September Meeting confirming the discussion (production 17/77). The claimant signed the letter confirming that he understood it. He made the following handwritten comment: *"Anne, Thank you for this letter. On June 16 Target – I had 12 working days annual*

*leave in the beginning of the month returning on Thur the 16 June. I agree going forward if it is possible to try and split annual leave."*

42. On 27 September 2016 Mrs Quinn was not in the office and was unable to meet with the claimant. She sent him an email regarding his monthly figures; the number of appointments in Edinburgh on 28 September 2016; the number of outstanding tasks in Salesforce; and the failure to update Salesforce on the visits the previous week (production 19/82).
43. On 30 September 2016, the claimant left the office for an appointment in Kilmarnock. Mrs Quinn telephoned him and was surprised that he was still travelling. On his return to the office the claimant submitted his expenses form but not the "track my drive report". Mrs Quinn requested "the track my drive report" which showed the claimant driving around Darnley housing estate for about an hour before going to Kilmarnock. The claimant said that he was cold calling. Mrs Quinn queried this as there were no businesses in the housing estate. The claimant told Mrs Quinn to reduce the expenses claim by five miles. Later he said to Mrs Quinn that he had spilt tea on his shirt, purchased a new one at Sainsbury's, took it to a friend's house to iron it only to discover that it was a short-sleeved shirt. He returned to Sainsbury's to exchange it for a long sleeve shirt and then when to his friend's house to iron it. The claimant returned to Sainsbury's to buy a sandwich. Mrs Quinn accepted the explanation but felt that this incident reinforced her concerns about the claimant's poor time management and its impact on his performance.
44. In September 2016, the claimant generated £1,250 of new business. He attended an average of six appointments per week.
45. Mrs Quinn invited the claimant to attend a meeting on 7 October 2016 (the October Meeting) to discuss the claimant's performance. The claimant was advised that he had the right to be accompanied by a friend or colleague. He was told that following the meeting a decision would be made about the claimant's future employment including dismissal on the ground of capability (production 21/87).

46. The claimant requested his sales figures for previous years and the employment dates and revenue raised by former BDMs (production 22/88). Mrs Quinn refused to provide the information relating to the previous BDMs. She did however provide the claimant's own sales figures for previous years (production 23/89).
47. At the October Meeting Mark O'Dowd accompanied the claimant. Mr O'Dowd is a solicitor but was attending as the claimant's friend. Eileen Moore was also present. She is a friend of Mrs Quinn who has HR experience in the public sector.
48. Ms Moore said that the October Meeting was to review and discuss the claimant's performance: the new business target of £5,000 per month from February 2016. She then set out the chronology of events.
49. There was discussion about why the new business target was introduced. Mr O'Dowd said that the claimant had not been offered support or had not understood what was required. There was a short adjournment following which Mrs Quinn referred to the guidelines and changes discussed with the claimant at the November Meeting. Mr O'Dowd proposed that the claimant increase revenue for the respondent by concentrating on existing business. Mrs Quinn said that to develop new business was imperative to keep interest in the staff using the programme. The claimant said that it was a difficult market as competitors were offering some services for free. He had no complaints from and good working relationships with clients. He was good at cold calling. The claimant was willing to reduce his salary by £5,000 if his commission level was adjusted. Mrs Quinn said that the claimant normally cold called in Hillington and the programme had to cover the central belt. The claimant said that he was confident that he could secure the business that was required. The October Meeting was adjourned.
50. During the adjournment Mrs Quinn considered that points made by the claimant. The performance issue related to the claimant's performance since February 2016 therefore she considered that the performance of previous BDMs was irrelevant. The claimant said that he was not supported.

5 Mrs Quinn felt that the claimant had been given significant support to allow him to focus on new business: he had support on other duties and could focus on new business but he had failed to achieve the target that she considered was reasonable and the claimant said was achievable. Mrs Quinn felt that the claimant thought he was micro managed but he was reluctant to use the management tools that had been provided to help him. The claimant had only achieved the target once in the past eight months. Mrs Quinn concluded that the claimant was unlikely to achieve the target in future. She decided that the claimant's employment should be terminated on grounds of capability.

15 51. The October Meeting was reconvened. Mrs Quinn advised the claimant of her decision which was confirmed in writing (production 25/95). The claimant employment terminated on 7 October 2016. He was advised that he would be paid in lieu of notice. He was also told that he had a right of appeal to Mr Quinn.

52. The claimant did not exercise his right of appeal. He did not consider that his appeal would have reasonable prospects of succeeding given that it was to be considered by Mr Quinn.

20 53. At the date of termination, the claimant had been continuously employed by the respondent for seven years. He was 55 years of age. His gross monthly pay was £3,583.

25 54. The claimant was paid seven weeks' pay in lieu of notice, that is £3,161.69. He found alternative employment between 11 November 2016 and 23 December 2016 with Kits 4U earning £1,149.47. From 1 January 2017, the claimant has been employed by Integra Energy UK Limited earning £1,567.58 net per month.

30 55. Around mid-November 2016 the respondent advertised the post of BDM with a view to filling to it in January 2017. The post has not been filled. Mrs Quinn has been dealing with new business on a temporary basis. Ms Manners has been dealing with renewals.

56. Following the claimant's termination of employment discrepancies came to light about the claimant's journeys recorded on "track my drive" (production 36/107). Had these discrepancies come to Mrs Quinn's attention earlier there would have been an investigation.

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*Observations on Witnesses and Evidence*

57. The Tribunal considered that Mrs Quinn gave her evidence honestly and was a reliable witness. The Tribunal did not detect Mrs Quinn having animosity towards the claimant. To the contrary, the Tribunal's impression was that she had held him in high regard and believed that he was more than capable of achieving success for the business. It was with some frustration that her faith in him did not materialise.

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58. Ms Moore was a credible and reliable witness. While the Tribunal acknowledged that Ms Moore and Mrs Quinn were friends the Tribunal had no doubt that Ms Moore's role was to support Mrs Quinn and provide her with professional HR advice on procedure. The Tribunal was satisfied that Mrs Quinn took the decision to dismiss the claimant.

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59. Mr Quinn was in the Tribunal's view a candid witness. He acknowledged that he had reservations about Mrs Quinn's optimism in November 2015 that she could time manage the claimant and improve performance. He distanced himself from the day to day management. The Tribunal's impression was that he was not involved in the management of business in 2016 and he would have genuinely been prepared to listen any appeal the claimant made.

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60. The Tribunal considered that the claimant's evidence was at times evasive and incredible. In the Tribunal's view his position at the Hearing was different from that which he adopted while employed by the respondent.

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61. The claimant did not accept the accuracy of the respondent's contemporaneous correspondence and notes of meetings. He did not challenge them at the time or produce his own contemporaneous notes. He said that he did not read the correspondence. The Tribunal's impression

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from the evidence was that the claimant enjoyed the freedom of being out and about meeting people and making sales. He did not appear to have the same enthusiasm for administrative matters whether that related to relating to recording work done or in the pipeline and his personal expenses. The Tribunal thought that it was likely that he did not bother to read the correspondence or notes of the meetings. The Tribunal accepted that the correspondence was a record of Mrs Quinn perception of what happened. However, the Tribunal considered that had the claimant challenged the introduction of the new business target; questioned whether reasonableness or realistic Mrs Quinn would have recorded that in the same way that she acknowledged the claimant's concern about the commission structure.

62. The Tribunal considered that it was worthy of note that the claimant indicated during the Hearing that a sales person was unlikely to say to a line manager that a sales target could not be achieved. While the Tribunal appreciated that such an attitude was understandable in someone with a sales background it was unlikely to be the position if the salesperson was being performance reviewed and they genuinely believed the target was unattainable. The Tribunal therefore preferred Mrs Quinn's evidence in relation to the discussions at the November Meeting, in January 2016, the June Meeting, the September Meeting and the October Meeting.

63. The claimant said that he did not understand that the June Meeting was a formal meeting as he was not sent a letter inviting him to attend. He was given a letter following the June Meeting which he did not read until some days later. Mrs Quinn said that before arranging the June Meeting she provided the claimant with the document detailing his sales between February and May 2016. She asked the claimant if he wanted to meet that afternoon or the following Monday. The claimant said the Monday (20 June). Mrs Quinn accepted that she did not write to the claimant inviting him to the meeting but the June Meeting was unusual as the claimant was given the figures in advance and given an opportunity to consider them before the meeting took place.

64. The Tribunal considered that the June Meeting was formal in that the claimant was aware of the meeting taking place in advance; what was to be discuss; and it was followed by a letter confirming that discussion.

### Submissions

- 5 65. Included in the set of productions were the respondent's list of authorities: *Taylor v-Alidair Ltd [1972] IRLR 82; Cook v Thomas Linnell & Sons Ltd [1977] IRLR 132; Sutton & Gales (Luton) Ltd v Boxall [1978] IRLR.486; James v Waltham Holy Cross UDC [1973] IRLR 202; Hotson v Wisbech Conservative Club [1984] ICLR 859; Winterhalter Gastronom Ltd v Webb*  
10 *[1973] ICR 245; Williams v Leeds United Football Club [2015] EWCH 376; Cavanagh v Williams Evans Ltd [2012] EWCA Civ 697 and W Devis & Sons Ltd v Atkins [1977] ICR 662.*
66. The claimant provided comments on the authorities. *Cook* and *Sutton* were distinguished on the facts. *Hotson* was irrelevant as the respondent had not  
15 relabeled the case. The claimant also referred the Tribunal to *Hutchinson v Enfield Rolling Mills Ltd [1981] IRLR 328* and *Morrison v Amalgamated Transport and General Workers Union [1989] IRLR 361.*

### Submissions for the Respondent

67. The Tribunal was invited to prefer the evidence of Mrs Quinn over that of  
20 the claimant who it was suggested was evasive and compared unfavourably against the respondent's witnesses.
68. The claimant contends that he was unfairly dismissed but the respondent submitted that the dismissal was not unfair. The claimant was dismissed because of his capability which is a potentially fair reason for dismissal in  
25 terms of Section 98(2)(a) of the Employment Rights Act 1996 (the ERA).
69. The Tribunal was referred to section 98(2)(a), 98(3)(a) and 98(4).
70. Much has been made by the claimant, of the new business target. The claimant was aware that new business was the lifeblood and was required to sustain the business. It was suggested that the claimant was being set up

to fail. That was not the case. Mrs Quinn wanted him to succeed. She made clear that he would need to attend more than six appointments per week if he wanted to generate sufficient sales. The claimant initially indicated that he did not anticipate this being a problem but he now appears to dispute that was his position despite being provided with documents which indicated his agreement which he did not protest. The claimant is now suggesting that he either did not get the documents or did not read them. That beggars belief.

71. The claimant received documents following meetings. If he did not consider them to be accurate at the time, then it would be anticipated that he would have raised the issue or have written to clarify the position.

72. The Tribunal was reminded that Mr McGeachie was only employed for a short period of time and had left 13 months before the claimant's employment terminated.

73. The respondent said that it is sufficient that the respondent believed on reasonable grounds the claimant's incapacity (see *Taylor*). Also procedures are less important in capability dismissals (see *Cook*).

74. In this case the claimant was set a target which he accepted. He continuously failed to meet that target. While the claimant had a degree of autonomy he did not have carte blanche. The claimant's behaviour and explanation of events on 30 September 2016 were bizarre. If it was not misconduct it was certainly symptomatic of a failure of being able to manage his time.

75. Despite only meeting the target once the claimant failed to increase his activity level. The only mitigating factor that he suggested at the October Meeting was that the market had deteriorated. The claimant was the only BDM.

76. The respondent accepted that an employer must have reasonable grounds to believe the employee is incapable or incompetent. The claimant was



given a period to improve. He was a senior both in terms of age and sales experience and the length of time with the company.

- 5 77. The claimant contends that there were procedural defects and did not have fair notice of formal meetings. The Tribunal should consider that this was a small respondent with no formal HR. The claimant was told on his return from annual leave that there was to be a meeting to discuss performance. He was given the figures in advance of that meeting. He was also given notice of what was to be achieved and by when (see *James*). The claimant was given an opportunity to improve over months but he was unable to do so.
- 10 78. There was a failure by the claimant to meet the new business target. It was not sufficient that the claimant raised enough income to cover his own salary. There also had to be factored in that he would have to cover overheads and there would be an element of profit. If this could not be sustained, then his employment could not be continued. The suggestion that the claimant was being dismissed because the respondent had to meet the salary of Miss Quinn is not true. Her salary had no bearing on the claimant's termination. The claimant knew what he had to do. If the claimant chose not to read letters and he did not do so then that was an indication of further lack of time management on his part.
- 15 79. In relation to remedy the respondent's position was that there were no procedural flaws but in the event, that there was then this loss made no difference as the claimant would have been dismissed.
- 20 80. In relation to contributory fault the Tribunal was referred to *Sutton (above)* with regard to contributory fault.
- 25 81. If the Tribunal was not with the respondent it was reminded that the claimant did not exercise his right of appeal. It was not right to say that this appeal would have made no difference. Mr Quinn had stepped aside.

82. If dismissal was unfair then there should be a reduction to reflect the contributory contribution by the claimant failing to use the tools which he was provided with to assist him in meeting targets.

5 83. The Tribunal was also referred to the conduct issues which the respondent discovered following the claimant's termination of employment. If they had come to light while the claimant was still employed, then he would have been subject to investigation and possible disciplinary action

*Submissions for the Claimant*

10 84. The claimant's position was that view objectively the decision to dismiss was not fair. It was telling that Miss Quinn was recruited on costs of £24,000 per annum. The impact and timing of this could not be ignored. Recruitment put a strain on the business and this increasing strain drove the respondent to require more of the claimant. This was an unrealistic demand and even post dismissal the claimant's position has not been filled. The respondent's reasons and concerns were not viable.

15 85. The target was not reasonable, especially in a sales environment where there are peaks and troughs. There did not appear to be any allowance made for annual leave. The requirement to make appointments doubled from six to 12 in an increasingly tough market place. There was no training or real support as to how the claimant was expected to meet the target. Mrs Quinn was not willing to admit this. The claimant's evidence was that he raised issues. The correspondence that the respondents sent reiterates their views and do not record the claimant's position.

20 86. The respondent's attitude changed in 2015 because of Mrs Quinn running the business placing it under increased pressure.

25 87. The performance of other BDMS were not taken into consideration. Mrs Quinn disregarded this. Information was not provided to the claimant and it was relevant to his defence. It supported his position that the targets were too high. If the other BDMS were unable to reach the targets it was too tall an order for him to do so.

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88. Mrs Quinn evidence of what was considered was sketchy and she was unreliable on that matter. She said that she took all matters into account as set out in page 9 and that only issue that was discussed was the failure to meet targets and none of the other concerns were notified. She failed to discuss all these other points with him. Various issues have been raised about other events which the respondent says they have been aware of would have led to dismissal. There were no fraudulent claims and the claimant has done his best to explain the position without the benefit of documents which would have been available to him had matters been raised at the time. There was no evidence that any of the matters if properly investigated would have led to a dismissal.
89. The Tribunal was invited to uphold the claim of unfair dismissal and award compensation in line with the Schedule of Loss. There should be an uplift in the award because of the respondent's failure to notify the claimant of all the allegations that were made against him. here was no contributory fault and the claimant was justified in not appealing as Mr Quinn who had long reached the view that the claimant was at the end of the road. It would have made no difference to appeal if Mr Quinn's mind had already been made up.
90. As regards mitigation the claimant accepted the first offer of employment that came along. He had done all that could reasonably be expected of him.
91. In relation to time management only one example has been given and that for 27 September 2015. The claimant was not suggesting that he had carte blanche. He was in a position where he could arrange his own working time within reason. He had control over his own diary.

### **Deliberations**

92. The Tribunal had to decide firstly whether the claimant had been unfairly dismissed and secondly, if he was unfairly dismissed, what remedy to award.

93. In reaching a judgment in this case, the critical question for the Tribunal was whether the claimant's dismissal was fair in terms of Section 98 of the ERA.
94. At this point the Tribunal referred to Section 98 of the ERA which sets out how a Tribunal should assess the question of whether a dismissal is fair.  
5 The employer must show the reason for the dismissal and that it was for one of the potentially fair reasons set out in Section 98(2). At this stage the Tribunal noted that it was not considering the question of reasonableness.
95. The Tribunal asked whether the respondent had shown the reason for the claimant's dismissal. The respondent asserted that the reason for dismissal  
10 was capability under Section 98(2). While the respondent had to show that was the actual reason for dismissal that did not mean the respondent had to show that the claimant lacked capability.
96. In the claim form while the claimant said that he was unfairly dismissed he did not assert that his dismissal was for any other reason. During the  
15 Hearing the claimant made much of the timing of Miss Quinn's appointment although this was not foreshadowed in his claim form.
97. The Tribunal found that Mrs Quinn took the decision to dismiss the claimant. The Tribunal considered whether there was material before Mrs Quinn that satisfied her of the claimant's inadequacy and in which it was reasonable to  
20 dismiss.
98. Mrs Quinn said that in December 2015 a new business target was proposed from 1 February 2016. Mrs Quinn considered that this target was necessary and based on past performance was reasonable. In the Tribunal's view it was for the respondent to set the level of performance to be achieved.  
25 While in January 2016 the claimant raised concerns about the level of commission that he could generate he significantly did not challenge the need for or level of the new business target. At the June Meeting and September Meeting when the claimant's performance was discussed he did not challenge the level of the new business target.

99. The claimant did not dispute the sales figures that were provided to him. Between February and September 2016, the claimant reached his new business monthly target of £5,000 only in August 2016.

5 100. Around 27 September 2016 the claimant and Mrs Quinn discussed “the track my drive record” after leaving the office and before travelling to Kilmarnock. Mrs Quinn accepted the claimant’s second explanation even though it was strange. Mrs Quinn did however feel that it reinforced her view of the claimant’s poor time management and its impact on performance at a time when it was being reviewed.

10 101. The claimant invited to discuss his performance at the October Meeting. Mrs Quinn said that she dismissed the claimant for failing to meet his new business monthly target. Mrs Quinn candidly acknowledged that she took other factors into account when deciding to dismiss the claimant. At the October Meeting Mr O’Dowd raised issues about support in achieving the  
15 new business target. The claimant said that he could achieve the new business target. Mrs Quinn thought about what the claimant had said in mitigation and in that context when reaching her decision about whether the claimant could perform in the future she factored in the support that had already been put in place; the claimant’s failure to use the management  
20 tools that had been provided to help his time management; and his reluctance to take on board the need to improve activity levels. Mrs Quinn concluded that the claimant was not capable of sustaining the required new business targets.

25 102. The Tribunal was not satisfied that Miss Quinn’s appointment had a bearing on the claimant’s dismissal. He did not raise the issue at the time or in his claim form. Miss Quinn was recruited in early 2015 around the same time Mr McGeachie was recruited. When his employment terminated, he was not replaced. Miss Quinn provided support to the business but her salary was charged to the Staff Travel Club and was a cost covered by the income  
30 generated by the claimant.

103. The Tribunal was satisfied that the respondent had established that the reason for dismissal was capability. It then turned to consider whether the dismissal was fair in the circumstances of the case. This had to be judged according to the reasonableness set out in section 98(4) of the ERA. This involved the Tribunal considering was steps a reasonable employer would have taken in the circumstance not only in relation to dealing with the issue when it arose but also preventing it.
104. The Tribunal's impression was that the claimant was experienced in sales and during the early years of his employment with the respondent he grew the business. The claimant was left to his own devices and performed well. Administration relating to matters such as diary appointments, travel expenses and petrol receipts were of low priority to him. The respondent introduced computer systems designed to assist the claimant with his administrative tasks and enable others to provided him with additional support. The claimant did not embrace this technology which he appeared to consider being micro managed.
105. The business was coming under financial pressure in 2015 due to the increasing competition. This crystalised in November 2015 when Mr Quinn and Mrs Quinn carried out a review which coincided with Mrs Quinn's personal circumstances changing and her being able to devote more of her time to the business. She believed that the business could become profitable and viable; the claimant had sales skills and she was going to provide support to improve efficiency and convert the work into income.
106. The Tribunal considered that at the November Meeting Mrs Quinn believed that she and the claimant could turn the business around. There was no evidence to suggest that she was setting up the claimant to fail. To the contrary, she calculated the new business target in a reasoned manner. The claimant did not suggest at the time that it was unreasonable or unachievable. She proposed how the claimant would be supported. Mrs Quinn met with the claimant regularly. He was aware of his progress. At the June Meeting the claimant was encouraged to deal with renewals and

additional product sales by telephone to give more time for face to face new business renewals. At the September Meeting the claimant was encouraged to increase his new business appointment from his average of six per week.

5 107. The Tribunal then turned to consider the fairness of the procedure adopted by Mrs Quinn before dismissing the claimant.

108. The Tribunal considered that at the November Meeting Mrs Quinn set out what was required of the claimant in relation to new business. While the claimant had raised issues about the basis upon which commission would be generated he did indicated that the new business target was  
10 unachievable or unreasonable. Mrs Quinn had set out in the note of the November Meeting the action that was required over the following six months. This included her supporting the claimant on time management and use of Salesforce for administrative support. The new business target did not come into effect until 1 February 2016.

15 109. The T&Cs stated that the respondent would deal with disciplinary matters in accordance with its disciplinary procedures. None were produced.

110. When considering the procedure adopted in 2016 the Tribunal was mindful that the respondent was a small company with three employees all of whom reported to Mrs Quinn who was involved in the day to day running of the  
20 business. Mr Quinn had no direct involvement in the day to day running in 2016.

111. The Tribunal was satisfied that the claimant and Mrs Quinn met regularly on an informal basis. The claimant knew he was not achieving the monthly target set for new business. The claimant was provided with the Feb-May (4  
25 months Review) which he knew was to be discuss with Mrs Quinn at the June Meeting. The claimant had notice of the June Meeting. The Tribunal considered that Mrs Quinn sought to understand why the claimant had not achieved the target. She reiterated the need to increase the number of new business appointments. The claimant knew what was required of him; that  
30 there would be a formal review on 2 September 2016 and that failure to

achieve the required and agreed target might put his continued employment at risk. At the time the claimant appeared to have considered this to be a reasonable time frame.

5 112. The claimant only achieved target in August 2016. Mrs Quinn met with the claimant in September 2016 and warned him of the need to maintain the level achieved in August 2016 and that his performance would be reviewed monthly. She urged him to increase the new business appointment which still averaged six per week. The Tribunal considered that was a legitimate instruction; Mrs Quinn believed that if the claimant increased the number of  
10 new appointments each week he could achieve and maintain the required level of performance. The Tribunal's impression was that Mrs Quinn was genuinely trying to provide the claimant with support.

113. The claimant failed to achieve the new business target in September 2016. He was invited to the October Meeting and told of his right to be  
15 accompanied. The claimant knew that the purpose of the October Meeting was to discuss the new business performance levels from 1 February 2016. The claimant was provided with the figures. He was also provided with historical information that he had requested.

114. The claimant requested details of performance by ex-employees that Mrs  
20 Quinn declined to provide. The Tribunal considered that this was not unreasonable. It was made clear to the claimant in correspondence that the purpose of the October Meeting was to discuss the claimant's performance in relation to the new business performance levels from 1 February 2016. The ex-employees were not employed in this period. Other than the  
25 claimant Mr McGeachie was that last BDM to have been employed and he left in September 2015.

115. At the October Meeting the claimant was given an opportunity to respond to the performance issues. As explained above the Tribunal considered that the factors considered by Mrs Quinn arose out of matters raised by the  
30 claimant during the October Meeting: support and the claimant's confidence in meeting targets in the future. The Tribunal noted that at the Hearing Ms



5 Moore said that from an HR perspective previous performance was the best indicator of future performance. The Tribunal therefore felt that it was in this context that Mrs Quinn took account of the claimant's use of management tools; time management and levels of activity. It seemed to the Tribunal that the claimant had not indicated that he accepted the need to change his way of working or that he intended to do so.

10 116. The claimant was offered a right of appeal. In 2016 Mr Quinn had not been involved in the business day to day. The claimant did not say at the time that he had concerns about Mr Quinn hearing the appeal. Given the size of the organisation the Tribunal felt that it was not unreasonable for Mr Quinn to have heard the appeal.

15 117. The Tribunal concluded that the respondent acted reasonably in treating the claimant's performance was a sufficient reason for dismissing the claimant. Accordingly, the Tribunal did not consider the issue of remedy. The Tribunal dismissed the application.

20 Employment Judge: S MacLean  
Date of Judgment: 24 July 2017  
Entered in register: 25 July 2017  
and copied to parties