



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr N Chauhan

and

Respondent

Royal Mail Group Limited

Held at Reading on 21, 22 and 23 February 2018

Representation

Claimant: Mr N Toms, counsel
Respondent: Mr I Hartley, solicitor

Employment Judge Mr S G Vowles (sitting alone)

RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Unfair Dismissal - section 98 Employment Rights Act 1996

2. The Claimant was dismissed with notice and the effective date of termination was 6 January 2017. The dismissal was not unfair. The complaint is dismissed.

Reasons

3. This judgment was reserved and written reasons are attached.

REASONS

Submissions

1. Claimant On 25 May 2017 the Claimant presented a complaint to the Employment Tribunal alleging unfair dismissal.
2. Respondent On 24 July 2017 the Respondent presented a response. The claim was resisted.

Evidence

3. The Tribunal heard evidence on oath on behalf of the Claimant from Mr Naresh Chauhan ((Late Shift Letter Lead), Mr Joseph Bleach (Union CMA Divisional Secretary for SE England) and Mr Geoffrey Horlock (Unite the Union Section National Delivery Lead).
4. The Tribunal also heard evidence on oath on behalf of the Respondent from Mr Steve Stapleton (Performance Improvement Manager/Plant Manager) and Mr Stephen Phillips (Independent Casework Manager).
5. The Tribunal also read documents in a bundle provided by the parties.
6. From the evidence heard and read the Tribunal made the following findings of fact.

Findings of Fact

7. The Claimant was employed by the Respondent from 17 October 1987 until dismissal with notice on 14 October 2016. The effective date of termination of employment was 6 January 2017.
8. In 2011 the Claimant was appointed to an EL2 management position at Jubilee Mail Centre. In September 2014 he was moved under the Continued Efficiency Programme to the position of Late Shift Letter Lead post at grade ML3 which is one grade lower than EL2. The Claimant objected to the move and raised a grievance. The outcome of the grievance was that he would remain in the ML3 post but his pay and allowances would be protected at EL2 grade and he would also receive compensation for the loss of shift allowance.
9. In the Late Shift Letter Lead role the Claimant's line manager was Mr Uma Chelvan, Late Shift Manager at the Jubilee Mail Centre. Mr Chelvan's line manager was Mr Steve Stapleton, Performance Improvement Manager/Plant Manager at Jubilee Mail Centre.
10. The role of the Late Shift Letter Lead is to line manage the Intelligent Letter Sorting Machine (ILSM) operation and to line manage Work Area Managers (WAM) in the work areas. The Late Shift Letter Lead also has World Class Mail (WCM) responsibilities as the lead for the Autonomous Maintenance (AM) Pillar.
11. In December 2014 Mr Chelvan informed Mr Stapleton that he had concerns regarding the Claimant's performance.

12. Concerns were recorded by Mr Chelvan regarding the Claimant's performance in January 2015 and March 2015 following 1-2-1 meetings as follows:

Jan 15 – Line manager comments – *“Finally as discussed, til end of this finance year your main focus should be on improving your performance and achieving your objectives. We will review at the end of the year, whereby this should give us the opportunity to decide if you could be given more responsibilities taking over the CFCs, T2K and Letters.”*

March 15 – Line manager comments – *“Naresh needs to be consistent with the agreed his work area tasks [sic]. The focus should be at improving work area performance and with his AM activities before taking on more responsibilities.”*

13. Accordingly, on 29 April 2015 a meeting took place with the Claimant, Mr Chelvan and Mr Stapleton. The meeting was confirmed in an email to the Claimant dated 29 April 2015 which included the following:

“Naresh

Just wanted to confirm our discussion last week regarding why we have taken the decision to apply the Improved Performance Procedure with yourself.

The primary purpose of the procedure, in line with Royal Mail values, is to help you improve performance to meet the required standards of your job. It will provide a structured approach and support over 3 months with defined objectives for both yourself and your line manager to measure against.

We discussed a number of issues with your current performance and you highlighted several things that you felt were impacting. The main headings we discussed were –

- 1. You have fallen behind on your administration work.*
- 2. You are not currently performing your full role. This being the Line Manager responsible for ILSMs and line managing the remaining automation managers.*
- 3. The performance of the ILSMs and associated measures has fallen below its targets.*
- 4. As AM Pillar lead you have not achieved the expected results / progress through the pillar that is required.*
- 5. Your relationship with your team both frontline and shift management.*

To support you with these issues we have agreed to the following –

Chelvan will meet with you on a weekly basis. At this meeting you will provide him with an action plan for the next 3 months. This will include the following weeks activity with clear measurable targets to achieve points 1, 3 and 5 by the end of the 3 month review. The same will apply for point 4 which you will need to achieve 2 points in AM at the next audit scheduled for the beginning of July. Each week Chelvan will monitor progress against the 3 month plan and also completion against the weekly action plan.

We have agreed to provide you with 50% of your shift being allocated to these points and we will cover your hours from 1400-1600 hrs each day up to the next WCM audit. It is up to you how you use these hours to enable you to cover all the activity you will be required to do but this must form part of your plan you share with Chelvan each week.

Once we have reviewed your progress after 3 months or should you achieve these points before that period we will then discuss how to move forward with point 2.

I would urge you to consider all your activity and things you volunteer for during this time and if they do not help you achieve the 5 points above then to decline your involvement so you are totally focused on these as these will be the measures of success that we will review as part of the IPP process.

As always if at any time you require mine or others of the senior team advice or support please let us know.

The key is that you are driving, owning and totally involved in all the activity to achieve your objectives.”

14. Following the meeting, the Claimant met with Mr Chelvan regularly and the meetings were summarised in a Stage 1 plan. A further meeting took place on 23 September 2015 between the Claimant and Mr Chelvan and a performance improvement action plan was put in place with “*performance and development objectives in relation to administration, ILSM work area and associated measures and engagement with the Claimant’s team, both frontline and shift management.*” The plan’s start date was 23 September 2015 and the review date was 23 December 2015. During this period, the Claimant continued to meet with Mr Chelvan to discuss the objectives that had been set.
15. On 2 November 2015 the Respondent replaced the Improved Performance Procedure (IPP) policy with the Supporting Performance Improvement (SPI) policy.

16. On 5 February 2016 the Claimant, accompanied by his trade union representative, met again with Mr Chelvan. A record of the meeting was set out in an SPI action plan as follows:

<i>Employee's name:</i>	<i>Naresh Chauhan</i>	<i>Manager's name</i>	<i>Uma Chelvan</i>
<i>Role:</i>	<i>Late Shift Letter Lead</i>	<i>Role:</i>	<i>Late Shift Manager</i>
<i>Pay number:</i>	<i>10218364</i>	<i>Pay number:</i>	<i>10106751</i>
<i>Date of Meeting:</i>	<i>5th February 2016</i>		
<p><i>I set up this formal meeting to address some of the performance issues within the ILSM area. Naresh was made aware that the administration part of his job and the work area KPIs had fallen below expected standards in April 2015. In addition, Naresh was not fulfilling all his duties that his role required of him, namely managing automation and the letter manager. Naresh was placed on light touch IPP process and then placed on formal stage 1 of the old IPP in September 2015. Some of the actions that were agreed during the process have not been achieved over the last three months and he is still failing to performance his full role as a letter lead. I explained to Diana and Naresh that I am moving him from the old IPP process into the new SPI process where he will be placed on stage one of the SPI. I also informed them that I have sought advice from HR and the process has been adhered to correctly. The following actions were agreed during our meeting and Naresh has agreed to the time scales.</i></p>			
<p><i>Agreed actions that will address the performance issue below. The interventions should be developed using the (S)pecific M(measured) A(achievable) R(realistic) T(timetabled) principles.</i></p> <p><i>Safety:</i></p> <ol style="list-style-type: none"> <i>1. Stratify the losses from the SMATs completed within the ILSM area and produce an action plan to deal with the top 3 impactors. Completed 5th April 2016.</i> <i>2. Training and staff involvement to implement 5s and work area tidiness. Completed on 5th April 2016.</i> <i>3. Carry out daily 3G observation and actions to achieve Zero debris on the floor. Completed by 5th April 2016.</i> <i>4. All CSS work to be despatched at the end of the late shift. The agreed action is to release one person from each machine during the final clear down. Completed by 12th February 2016.</i> <p><i>Productivity:</i></p> <ol style="list-style-type: none"> <i>1. Work with logistic lead and establish the cycle time from all facing areas and place adequate portering based on demand. Completed by 11th March 2016.</i> <i>2. Understand the 1c arrival profile and device [sic] a plan to achieve work plan. Completed 29th February 2016.</i> <i>3. Review DSA forecast daily and work with Peter More to achieve work</i> 			

<p><i>plan. Email to be circulated daily between all shift managers and mech managers daily to confirm the plan. To start from W/C 8th February 2016.</i></p> <p>Quality:</p> <ol style="list-style-type: none"> 1. <i>Update the hazard box by using tools. Completed by 29th February 2016.</i> 2. <i>Stratify the in-process measurement to identify the top 3 impactors. Produce an action plan to resolve missorts. Completed by 29th February 2016.</i> 3. <i>Cease usage of kan-ban for inter-plans/Revenue and replace them with boxes to avoid mis-segregation. Completed by 29th February 2016 .</i> 			
<p><i>Make a note of what support options have been discussed and what the employee has said they would do to improve</i></p> <p><i>Involve John Wilson to produce a capacity plan to finish DSA to work plan. Involve shift managers to mediate any unresolved issues between mech managers.</i></p>			
<p><i>Timescale for improvement This will be six weeks from the date of the meeting</i></p> <p><i>Frequency of review – should have weekly reviews, these may be face to face or by another method, the final review must be face to face</i></p>			
<i>Employee signature</i>	<i>Refuse to sign</i>	<i>Manager signature</i>	<i>Uma Chelvan</i>
			<i>5th February 2016</i>

17. The Claimant refused to sign the plan.
18. On 9 February 2016 Mr Chelvan wrote to the Claimant to confirm that he was now on the first stage of the formal SPI process. The letter included:

“This is the first stage of the formal supporting performance improvement process and hopefully the actions that we have discussed will mean that your performance meets the expected standards. If your performance does not meet the expected standards, then I may have to consider placing you on the second stage of the formal supporting performance improvement process. Potentially, if your performance does not meet the expected standards, then this may lead to your dismissal.”
19. On 11 February 2016 the Claimant appealed against the decision to place him onto the formal SPI process. He said that he had been advised that his half year indicative marking was a “G” [good] marking and he believed that he

was being removed from the process. On 18 February 2016 Mr Chelvan informed the Claimant that he could not appeal at this stage and also confirmed that his half year marking was "I" [improvement required] and not "G".

20. On 29 March 2016 the National Appeals Panel (NAP), which had been set up to hear any disputes arising from transitional arrangements for employees migrating from the earlier IPP process to the new SPI process, produced a report on the Claimant's situation. The NAP consisted of the Respondent's Employment Policy Manager, Linda Cumberbatch and the Unite/CMA union National Committee Member, Martin Tucker. The report contained the following:

"The case of Mr Chauhan was reviewed by the supporting performance panel on 24 March 2016. Further to the review meeting, I write to inform that based on the information available and considering all the points made, it is concluded that Mr Chauhan be transitioned to stage one of the supporting performance process. Whilst the CMA has accepted the conclusion, there was a difference of opinion.

The objective for the panel was to acknowledge that the employee was previously on the old IPP process, if so what stage of the IPP process he was on, was there evidence to suggest that the business has support him whilst on IPP and under the new supporting performance process to what point would he transition to. For clarity I have dealt with each issue as individual points below:

- The employee was previously on the old IPP process – satisfied that there was evidence to suggest that Mr Chauhan was on the IPP process*
- If so what stage of the IPP process he was on – We are satisfied that he was on Stage 2 of the old process*
- Was there evidence to suggest that the business has support him whilst on IPP – I was comfortable that there was sufficient evidence to demonstrate he had been supported, for example, Mr Chauhan had been provided with an informal period under the old process between April to September to improve, there is also evidence to show the management team had provided Mr C with time to focus on his areas for improvement as one email mentioned an allocation of 50% of his shift and another where the office provided cover for his role for 2 hours each day for a period of time. I am aware however that the CMA felt the support offered could have been demonstrated better and the evidence could be stronger in this area*

- *Under the new supporting performance process to what point could he transition to. Given the remit of the panels role and the transitional arrangements agreed in the negotiations, stage 1 of the new process felt fair in this case.*

I accepted some of the points raised and recommend that:

- *Where possible managers should stay away from percentage targets unless there is context to this and realistically within the managers ability to change this*
- *All objectives should be specific measurable achievable realistic and timed 'SMART'*
- *Abbreviations should be kept to a minimum"*

21. There were several meetings between the Claimant and Mr Chelvan during April and May 2016. At the meeting on 23 May 2016 Mr Chelvan informed the Claimant that he was being placed on Stage 2 of the SPI process. The SPI action plan dated 23 May 2016 included the following:

"I set up this second stage formal meeting to address some of the performance issues within the ILSM area. Although Naresh made some improvement in safety but not able to provide any evidence/plan towards achieving zero debris on the floor and tacking 5s within the area. The performance for the area is on a downward trend with throughput and OEE, currently area throughput is at 6991 and the OEE is 67% which is lower than what Naresh achieved at the end of the year. Naresh is still not fulfilling all his duties that his role required of him, namely managing automation and the letter manager but we agreed till he only focus mainly on ILSMs till he resolve all the issues that is impacting the area performance.

Naresh is working closely with CWU and is about to deploy few countermeasures to tackle the work area KPIs. What I expect from Naresh is that he has clear plan to attack the following losses with WCM principles. He should identify the root cause and a clear action to deal with particular problems and then we should be able to provide evidence/results of improvement made. I have asked Naresh to place the completion dates for the following actions."

22. Again, the objectives were set in the areas of Safety, Productivity and Quality. Mr Chelvan wrote to the Claimant on 24 May 2016 to confirm that he had been placed on the second stage of the formal SPI process and again confirmed that if the Claimant's performance continued to not meet the expected standards of performance then this may lead to his dismissal.
23. Further review meetings then took place between the Claimant and Mr Chelvan. On 24 August 2016 Mr Chelvan wrote to the Claimant to inform him

that he continued to have concerns about his performance and he had referred the case to Mr Stapleton because he had not met the performance standards expected.

24. On 8 September 2016 the Claimant, accompanied by his trade union representative Mr Lee Harvey, attended a formal SPI review meeting with Mr Stapleton. The meeting took place over 4 hours and the Claimant gave a prepared presentation to Mr Stapleton covering his roles, area of work and his performance.
25. On 14 October 2016 Mr Stapleton wrote to the Claimant to inform him that his employment would be terminated on the grounds of performance. He attached full reasons for the outcome. The reasons included the following:

“Summary

I am satisfied that throughout the process Naresh has been afforded all the support and assistance available and that we have gone above and beyond to provide the environment for Naresh to deliver the standards expected. This is crucially evidenced by the decision to remove more than 50% of the roles and responsibilities of a ML3, Letter Lead during his time in the process.

I am also satisfied with the timeline of the process. This has been a result of refusal to engage, cancelled meetings due to no representation, time for the appeal against being placed on SPI and additional time given for A/L etc to ensure that Naresh had as long as required to deliver the required standards.

Naresh and the CMA have raised issues around how SMART the objectives were. Whilst, I accept that this could have been more detailed, I am satisfied that the level of information and direction that was given was enough that Naresh knew what was expected of him as he knows the KPIs, targets and objectives for his work area and the Plant. In addition he was fully aware of the drivers to achieve these KPIs or who to go to should he need help.

With the exception of the last few weeks of the SPI stage 2 where some signs of progress in performance within the ILSM area were being made, Naresh has failed to engage and accept any responsibility/take ownership of his performance around the issues, instead he constantly blamed his colleagues. He has not utilised the support that he has been offered and given or taken the advice from himself, his manager and the CMA. Naresh still carries a belief that he is an EL2 and not an ML3 despite having previously had an appeal decision following CEP, but refuses to accept this and move on.”

...

Conclusion

Naresh is an experienced Manager who should be more than capable based on his previous roles of doing the ML3 Letter Lead role. However, since CEP he has not been able to accept that he got moved from his role as an EL2 on nights to an ML3 on Lates. During our meeting he claimed that he was still an EL2 and a CMA rep (despite having no elected position). This has shown that Naresh is unable to move forward following decisions that he does not agree with or like.

Naresh has demonstrated behaviour throughout the process which is not what would be expected of a leader who wants to achieve or is able to manage others including other managers.

By not engaging he has further demonstrated that he is unable to deal with feedback about his performance.

Naresh has been on the IPP process between 29th April 15 to 9th Feb 18 and then moved to SPI Stage 1 until 23rd May 16, during this period of approximately 13 months Naresh made no effort to improve his performance what so ever.

Naresh commenced SPI Stage 2 on 24th May 16 and it was only during this period that Naresh made some effort to improve however, he did not complete the plan. This demonstrates to me that Naresh was capable of some improvements but chose not to do so for over 13 months.

There has not been sufficient improvement that would suggest to me that Naresh is able to undertake the full duties of the role of ML3 Letter Lead which is his role.

Naresh has said himself that he does not feel he can support others whilst being the ILSM manager which is exactly what the role of the Letter Lead would be if he was doing the full role.

Decision

Naresh has informed me that should I consider not dismissing that he would like a move away from Jubilee and nearer to home.

I have considered this opinion and feel that this is not only a case of capability and performance but also behavioural given his failure to make any effort to improve his performance over a sustained period of time. As such I do not feel that a move to another unit would be appropriate.

I have also considered the potential of downgrade options, but due to the behaviour demonstrated previously with moving from EL2 to an ML3 and subsequent failure to improve performance over a sustained period of time, I do not believe this is appropriate. In essence Naresh has only been doing the equivalent of an ML4 role whilst on the performance improvement process.

It is therefore my conclusion that Dismissal is appropriate as I do not believe from the evidence that improvements will be met and sustained to fulfil the role of the ML3 Letter Lead.”

26. The Claimant appealed against the dismissal and an appeal meeting took place on 23 November 2016 chaired by Mr Stephen Phillips. The Claimant was accompanied by his trade union representative Mr Horlock. Following the appeal hearing Mr Phillips also carried out some further enquiries by interviewing Mr Chelvan, Mr Stapleton and Mr Bleach. Copies of the minutes of the appeal meeting and of the interviews were sent to the Claimant and Mr Horlock who provided comments on them. After concluding the appeal hearing and the subsequent investigations, Mr Phillips then considered his decision which was provided in a lengthy and detailed outcome letter date 28 December 2016. It included the following:

“Decision

4.1 From reviewing the Action/Improvement plans and meeting outputs from the weekly reviews, I believe direction had been given to Mr Chauhan on what he needed to do and what steps he needed to take to improve his performance. By removing around 50% of his role, I believe he has been afforded an excellent opportunity to focus on the actions needed to improve his performance and that of his work area. Regrettably, I do not believe Mr Chauhan ever accepted this was a genuine attempt by local management to help him improve his performance and meet the standards expected. Rather than work with his line manager on this, the notes suggest to me that, at times, the opposite had occurred. It was only towards the end of the process did he start to engage and make progress [sic], notably in ILSMs throughputs. I further note that progress had also been made towards work area tidiness and managing employees on long term sick absence. However, the main despatches, clearance to work plan and other administration tasks all remained a cause of concern.

4.2 The National Appeals Panel previously considered the IPP stages of the process and determined that it was appropriate to place Mr Chauhan at Stage 1 of the SPI process. I have reviewed the SPI process and have identified concerns with the meeting notes from the stage review meetings and the working of some of the actions could also have been better. Overall, I believe the SPI process has been applied in a reasonable manner and that Mr Chauhan has had every opportunity to input to the process and request any additional support he may have felt he needed. I also believe the level of support provided went over and above what would normally be expected.

4.3 An important consideration for me is the level of progress Mr Chauhan had demonstrated since the meeting on 28 April 2015, where 5 areas of

underperformance had been highlighted, and how many of these areas had been addressed, or part addressed, after around 14 months of formal IPP/SPI interventions. The five areas were:

- You have fallen behind on your administration work.*
- You are not currently performing your full role, this being the Line Manager responsible for ILSMs and line managing the remaining automation managers.*
- The performance of the ILSMs and associated measures has fallen and is below its targets.*
- As Automation Maintenance Pillar Lead you have not achieved the expected results to progress through the pillar that is required.*
- Your relationship with your team both frontline and shift management.*

4.4 I believe some real progress had been made towards point 3, which notably increased just before the end of the process. I also believe some progress had been made towards point 1, and to a lesser extent, point 5. Regrettably, points 2 and 4 have not been addressed in part or at all.

4.1 Unfortunately, the only conclusion I can reach from this is the IPP/SPI process has not had the desired effect on Mr Chauhan. Despite an extended period of IPP/SPI interventions, he has not demonstrated sufficient improvement against the performance issues originally identified.

4.2 I have also taken account Mr Chauhan's length of service, which is significant.

4.3 The options open to me at appeal under the SPI process are to confirm the dismissal or reinstate and remove Mr Chauhan from the procedure. I considered both, however following my investigations I do not deem reinstating Mr Chauhan and taking him off the SPI process would be appropriate. He has not reached a position where he would be able to fulfil his full role. I also considered reinstatement and placing him on a previous stage of the SPI process. However, I have little confidence this would have the desired effect given the length of time Mr Chauhan had already spent on the process,

4.4 Downgrading is a further option, which has to be mutually agreed. I considered this, but do not feel it to be a viable option given Mr Chauhan has effectively performed a role with less responsibility under the IPP/SPI process and had not met the expected standards."

Relevant Law

27. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his employer.
28. *Section 98. General.*
- (1) *In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
- (a) *the reason (or if more than one the principal reason) for the dismissal, and*
- (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it-*
- (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.*
- (b) *relates to the conduct of the employee, ...*
- (3) *In subsection 2(a) –*
- (a) *“capability” in relation to an employee means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality ...*
- (4) *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.*
29. In James v Waltham Holy Cross UDC [1973] ICR, it was said that an employer should be slow to dismiss an employee for incapability without first telling the employee of the respects in which he was failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance. In other words, there should be:

- (a) Proper investigation/appraisal of the employee's performance and identification of the problem;
 - (b) Warning of the consequences of failing to improve; and
 - (c) A reasonable chance to improve.
- 30. In Alidair v Taylor [1978] ICR 445, the Court of Appeal said that the test of a fair capability dismissal (aside from procedure) has two elements:
 - (a) Does the employer honestly believe the employee is incompetent or unsuitable for the job?
 - (b) Are the grounds for that belief reasonable?
- 31. A Tribunal has to decide whether there was sufficient material in front of the employer which satisfied him of the employee's competence or unsuitability and for which it was reasonable to dismiss. An employer must therefore produce evidence of poor performance and show that this was the real reason for dismissing the employee.
- 32. An employer will not be expected to create a new post for an employee in such a case but if a suitable alternative job is available it may be unreasonable not to offer this post to the Claimant rather than dismiss him. In Bevan Harris Ltd (t/a The Clyde Leather Co) v Gair [1981] IRLR 520 the EAT said that any obligation upon an employer to find alternative employment for an incapable employee must be influenced by the size and administrative resources of the undertaking. The correct test is not whether a reasonable employer would have considered demotion rather than dismissal, but whether dismissal fell within the range of options available to a reasonable employer in the circumstances.
- 33. The Tribunal must not substitute its own view for that of the employer, but must assess the employer's conduct against the range of reasonable responses.
- 34. In the ACAS Code of Practice on Disciplinary and Grievance Procedures, the introduction to the code states that it is designed to help employers and employees deal with disciplinary and grievance situations in the workplace and confirms that disciplinary situations include poor performance. The code contains the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide employees with an opportunity to appeal.

Claimant's Submissions

35. In the Claimant's closing submissions, it was submitted that although the Respondent claimed that the Claimant was dismissed by reason of capability, it was not based on any genuine belief that he was incapable. It was submitted that the following factors were behind the decision to dismiss:
- (a) His grievance which challenged the decision to move him and resulted in him being paid at a higher rate for the job he was doing (EL2 for an ML3 post) with his night shift allowance even though he was on the late shift.
 - (b) He was seeking to become an accredited trade union representative.
 - (c) He was placed on the IPP quickly, a few months after he started in a new role without first trying to manage him through the normal performance management cycle.
 - (d) The Respondent failed to follow their own procedures by having SMART (Specific Measured Achievable Realistic Timetabled) targets.
 - (e) Mr Stapleton exaggerated the case against the Claimant to justify dismissal by saying that the Claimant had failed to engage with the process and made no effort to improve his performance whatsoever.
36. The Claimant also asserted that the most likely alternative reason for the Claimant's dismissal was misconduct, that is based on fault and not capability. It was said that this was made clear because in the dismissal decision Mr Stapleton had said that the Claimant *"refused to engage", "constantly blamed his colleagues", "made no effort to improve his performance whatsoever"*. He also said *"This is not only a case of capability and performance but also behavioural given his failure to make any effort to improve his performance over a sustained period of time"*.
37. It was said that if the dismissal was for misconduct, there was a failure to comply with the Burchell guidelines, namely, a genuine belief in the Claimant's guilt, based on reasonable grounds, and following a proper investigation and dismissal an appropriate sanction in all the circumstances of the case. Also, the Respondent, if the dismissal was for misconduct, had failed to follow its own disciplinary procedure and failed to follow the ACAS Code of Practice on disciplinary procedures.
38. Any defect in the dismissal procedure and the decision to dismiss was not corrected on appeal.

39. Also, dismissal was not within the range of reasonable responses because of the following:
- (a) The Claimant has no previous disciplinary or other warnings;
 - (b) The Claimant's length of service – 29 years;
 - (c) The Claimant was clearly engaging and trying to improve;
 - (d) The Claimant was reaching his targets for much of the period in question.
40. Also, the Claimant claimed that if the dismissal was by reason of capability, it was nevertheless unfair because
- (a) Mr Stapleton did not have reasonable grounds to support his reasoning to dismiss the Claimant. He accepted in cross examination that the record of the capability process did not support his assertion that the Claimant was not engaging and had made no effort whatsoever to improve.
 - (b) The Respondent did not properly appraise the Claimant's work under their own performance management cycle and there was no record of any proper appraisal before being put on the IPP process.
 - (c) The Claimant was not given a reasonable chance to improve; in particular, because the Respondent did not set SMART goals in accordance with its SPI policy and SMART goals were a fundamental part of the process. The Claimant was not working towards clearly identified and measurable goals which he could ever reach as the record of process shows little more than an ongoing monitoring of the Claimant's day to day work and no clear goals were given to achieve over a six week period in accordance with the SPI policy.

Decision

41. The Tribunal found that the reason for dismissal was capability. It was not by reason of the Claimant having lodged a grievance or by reason of misconduct.
42. There was no evidential basis for the allegation that the grievance of 10 October 2014, expressing the Claimant's objection to moving to a lower grade and a different role had any influence upon the decisions of Mr Stapleton or

- Mr Phillips. The grievance was successful at least in part in that the Claimant retained his previous rate of pay. There was no evidence that Mr Stapleton or Mr Phillips were involved at any stage in the grievance and Mr Stapleton confirmed that the Claimant's rate of pay made no difference to his budget.
43. Additionally, although Mr Stapleton made reference to the Claimant's conduct in failing to engage with the IPP/SPI process (see extract from the dismissal letter above), this was in the context of the capability procedure. The fact that reference was made to the Claimant's efforts to engage with the process and to improve his performance, or lack thereof, did not make the capability procedure unfair or convert it into a misconduct dismissal. The Claimant's conduct throughout the procedure was clearly relevant and, although Mr Stapleton resiled from the use of the word "whatsoever" in cross examination, he nevertheless stood by his conclusion that what efforts the Claimant had made, were little and late.
 44. The Claimant was placed upon the IPP procedure because Mr Chelvan had concerns about his performance. The process is not punitive, but is designed to assist employees to improve their performance to an acceptable level. That the Claimant's performance was below an acceptable level was evidenced by the notes of meetings with Mr Chelvan in January and March 2015 (see above) and those concerns were documented following the meeting on 29 April 2015. The Claimant having been placed upon an IPP process which transitioned to the SPI process was looked at in detail by the independent NAP Panel in March 2016, a body which included both management and trade union representatives, and there was no criticism of the Claimant having been placed on either process.
 45. The Claimant attended many scheduled performance review meetings with Mr Chelvan which were well documented.
 46. The Tribunal did not accept that there was any animosity on the part of Mr Stapleton towards the Claimant's trade union activities. His concern was that the Claimant had applied to attend trade union official accreditation courses when he should have been wholly focussed on improving his performance at work. He took the view that the trade union courses were not necessary at that time and were a potential distraction from the performance improvement process. The Claimant was recommended to avoid such distractions as early as the e-mail dated 29 April 2015 (quoted above).
 47. The Tribunal also did not accept the Claimant's complaint that he was not set sufficiently clear targets to meet such that he could achieve a successful outcome to the various action plans. Although Mr Stapleton accepted that not all of them were SMART, there were four key targets in the areas of Safety,

Productivity and Quality with deadlines for completion. He emphasised that these were targets underpinned by activities which were key activity indicators which the Claimant would need to complete to achieve targets. All of these were part of the Claimant's day to day job and none of them were outside what the Claimant should have been doing on a daily basis. He emphasised that it was not only necessary for the Claimant to achieve the targets but for the achievement to be sustained and sustainable. At SPI stage 1 and stage 2 the four key targets remained in the areas of Safety, Productivity and Quality. Mr Stapleton's evidence, which was supported by the documentation was as follows:

At SPI Stage 1

- "56.1 Our main despatch target was 75% however at the end of May 2016 we were only averaging 51%;*
- 56.2 Naresh Chauhan was asked to identify the top three quality impactors (e.g. issues with letter sorting machinery resulting in mis-sorted mail) for his area. This was a standard requirement across all areas in the plant. Managers are required to convert the top three quality impactors into 'hazard boxes' (which means that the mail is boxed and manually checked for mis-sorts before being dispatched to delivery office). Naresh Chauhan failed to do this;*
- 56.3 Naresh Chauhan was asked to perform mandatory checks on foreign letters but he failed to complete these;*
- 56.4 The plant failed to achieve the wave 1% to our Delivery Offices due to Naresh Chauhan failing to meet the DSA work plan clearance;*
- 56.5 The ILSM OEE ('Overall Equipment Effectiveness') target was 70% but we were only averaging 65%; and*
- 56.6 The throughput target for the area was 8,000 but we were only averaging 6,900."*

At SPI Stage 2, he noted

- "66. In summary, Naresh Chauhan had failed to achieve the following targets set for him by Uma Chelvan:*
- 66.1 Naresh Chauhan again failed to achieve OEE targets for ILSMs, which were averaging 62%;*

- 66.2 *There were work plan failures with DSA and 1c resulting in us having to send special services to all hubs to clear 1c;*
- 66.3 *Work area throughput was 7,100 against a target of 8,000.*
- 66.4 *Naresh Chauhan failed to meet the machine meal break coverage required to support clearances; and*
- 66.5 *Naresh Chauhan failed to meet the plan for a dedicated employee to be placed on tray segregation or to reduce the mis-sorts from Jubilee to other plants from the tray segregation.”*
48. The Tribunal found that the Claimant had been given a clear action plan with achievable targets.
49. Additionally, during the period April 2015 to October 2016 the Claimant's duties, as noted above, were reduced. 50% of his shift hours were allocated to focus solely on his WCM role. Responsibility for managing other work area managers and work areas was taken away from him so that he could focus on performance with ILSMs and his role within WCM. Later during the process the WCM responsibilities were also taken away so that he could focus purely on ILSMs. Accordingly, although the Claimant's work load and responsibilities were significantly reduced, his performance continued to be below the standard required.
50. The Claimant was given support and coaching. From September to December 2015 an experienced Machine Manager stayed within the area to assist the Claimant to develop in the role and daily support was provided to him through the provision of a workplace coach. Cover was provided for him on Thursday and Friday afternoons in order for him to complete his other work and the Plant Engineering Manager also provided support on a number of occasions and was available when required. He was given mentoring and had a weekly meeting about his performance with Mr Chelvan.
51. The documentation shows that there was a reasonable investigation into the Claimant's performance and the areas where he was failing to achieve the necessary standards of performance were identified. He was warned of the consequences of failing to improve and was given a reasonable chance to improve over a lengthy period from April 2015 to October 2016. The Respondent's SPI policy was followed, as were the basic principles of fairness set out in the ACAS Code of Practice.
52. The Tribunal found that the Respondent genuinely believed that the Claimant was not suitable for the job he was employed to do. Both Mr Stapleton and Mr

Phillips considered alternatives to dismissal. Mr Stapleton confirmed in his decision letter (quoted above) that he considered alternatives of a move, redeployment and demotion. Mr Phillips also considered alternatives and they are set out in the extract from his outcome letter (quoted above). Both of them were aware of the Claimant's length of service and previous unblemished record. In his evidence before the Tribunal, Mr Stapleton confirmed that there were no alternative vacancies in other offices closer to the Claimant's home address. He noted that within the SPI process there is an option of mutually agreed downgrade and he did consider this but took the view that even a reduction to a lower grade ML4 job would have similar responsibilities as the job in which he was underperforming. He considered that the Claimant had failed to make sufficient improvement to his performance over a sustained period of 13 months and had failed to take ownership of his performance issues.

- 53. The decision by Mr Stapleton to dismiss and the decision of Mr Phillips to uphold the dismissal were decisions within the range of reasonable responses.
- 54. The Tribunal found that the dismissal was not unfair.

Employment Judge Vowles

Date: ...11 April 2018

Sent to the parties on:

12 April 2018

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For the Tribunal Office