



EMPLOYMENT TRIBUNALS

Claimant: Mr C Poole

Respondent: Prestbury Golf Club Limited

HELD AT: Manchester

ON: 14, 15 & 16 August
2018
12 & 13 November
2018
19 November 2018
17 January 2019
(In Chambers)

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Ms J Ferrario, Counsel

Respondents: Mrs M Peckham, Consultant

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal succeeds. A Remedy Hearing will be listed in due course.

REASONS

1. The claimant brings a claim of unfair dismissal after he was dismissed following his failure to meet performance standards.

2. The respondent's response form indicated that they were arguing capability in that it was a part of the claimant's job to undertake mechanical repair and maintenance and he had failed to do so. It would be understood normally that this meant the claimant was dismissed for capability however at the hearing the respondent submitted a skeleton argument saying that the claimant had been dismissed for conduct.

3. The issues

1. The claimant's role

Was the claimant contractually required to be responsible for machinery repair and maintenance by agreement, custom and practice etc

2. The dismissal

a. Was it reasonable for R to find that C's performance had not reached the standard required for the role.

b. Did R arriving at this decision take into account all of the circumstances.

c. Was a reasonable investigation carried out by R to ascertain all the factual circumstances and account or explanation from C.

d. Was it reasonable of the respondent to believe that the claimant's failure to meet the performance standards required was because of idleness, carelessness or negligence such as to make it a matter of misconduct. Has the respondent complied with the requirements of the **BHS vs Burchell 1978 EAT** in respect of misconduct dismissal?

e. Was the dismissal procedurally fair with reference to ACAS Code of Practice and the respondent's internal disciplinary policy,

f. Was the decision to dismiss within the band of reasonable responses.

g. Did the claimant contribute to his dismissal?

h. Should Polkey be applied to reduce the claimant's compensation.

4. Accordingly, it was not clear until the hearing that in fact the respondents were relying on conduct rather than performance. It was the respondents case ultimately that the claimant made a choice, he was disillusioned and chose not to do the work he was required to do.

Claimant's Submissions

5. The claimant submitted that the respondent in a Performance Improvement Plan concentrated on his ability to maintain the respondent's machinery, but that he had never been employed as a Mechanic and the level of work required was beyond his capabilities. In addition, he had insufficient time to do the work that was within his capabilities because of his other Greenkeeping duties.

Respondent's Submissions

6. The respondent submitted the claimant was legitimately required to work as their mechanic and that he repeatedly failed to perform that role, he was put on a performance improvement plan but chose to prioritise greens work over the mechanical work. Accordingly, after the performance process was exhausted he was properly dismissed for misconduct. In final submissions the respondent referred to the claimant being unwilling to change.

7. The claim was originally listed for 14 – 16 August 2018 inclusive but required a further three days of hearing on 12 and 13 November and 19 November 2018.

Witnesses and bundle

8. The Tribunal heard from the following witnesses. For the claimant the claimant himself, Mr Antony Davies, previously Head Greenkeeper, Mr Neville Young, previous General Manager, Mr George Senior fellow employee. For the respondent: Mr Mark Crossley current head Greenkeeper; Mr David Holmes current general manager, M Geoffrey Davison member of the Greens committee and Mr Arthur Dicken, Past chairman of the respondent's board. There was an agreed bundle.

Tribunal's Findings of Fact

The Tribunal's findings of facts are as follows.

9. The claimant began working for the respondents as a Greenkeeper on 1 June 1996, he had previously worked for eight years for Titherington Golf Course. The claimant also lived on the premises at Number 2 Cottage which he rented from the respondent but at a very favourable rent.

10. The claimant applied for the job of deputy greenkeeper but his contract of employment only referred to this in 2014. The head greenkeeper was Antony Davies who was well known and well regarded in the golfing world. Neville Young was the General Manager at the time.

11. The claimant had referred to the fact that he had mechanical knowledge in his application for the job and implied he had qualifications however as can be seen from the C.V. he submitted he had no formal qualifications in mechanics. It was not until the respondent's mechanic left in 1997 that he began to look after the machinery.

12. It was the claimant's evidence, supported by Mr Davies (previous Head Greenkeeper) that he would try and mend things where he could, if he could not, it would be sent away. He carried out basic maintenance on turf equipment including tractors and would do this work in the Winter, but come the Summer his Greenkeeping duties would come to the fore. Mr Davies' evidence was that the claimant was not an official mechanic. Mr Davies also said in evidence to the Tribunal that he regretted letting the claimant undertake mechanical work without being trained as it was a health and safety risk to himself and others however he pointed out at the same time the claimant had saved the club thousands of pounds

by undertaking this work. In addition, the respondent's health and safety policy stated that employees should not undertake any work for which they were not trained.

13. There was also a reference in an email from the previous MD Mr Young where he described the claimant as coasting but he stated in evidence he was not referring to the claimant's mechanical ability but to his green keeping.

14. However, there was evidence of an appraisal between Mr Davies and Mr Poole on 17 April 2008, it was not clear from this who was saying what but it indicated that the maintenance and machinery had suffered due to course priority, the solution was going to be to increase overtime hours so the machinery work could be done and obtain further assistance in the workshop. There was a criticism of the claimant in failing to produce maintenance records but he was going to attempt to update the system in the coming year and some software was going to be provided. Mr Davies said he was aware that paperwork was not the claimant's strongest point and he was hoping the software would help him to do this. No further action was taken regarding these issues and there was no evidence of any further appraisals.

15. There was also a complaint on 13 June the same year from the Chairman of the Committee, Mr Dicken (he would later hear the claimant's appeal) about the state of the claimant's cottage which he says was not in a suitable condition. He was told he was at risk of losing his tenancy if he did not improve it. There was a further complaint on 12 September 2008 regarding there not being sufficient towels at the club house, (the claimant had additional job doing the laundry of the towels and he was paid separately for this).

16. Anthony Davies left in December 2014 and a new Head Greenkeeper Mark Crossley was recruited in May 2015.

17. The claimant applied for the Course Manager's role and the respondent pointed out that in his application he had referred to himself as Deputy Greenkeeper/mechanic. The claimant agreed he had but maintained the mechanic role was voluntary. The actual C.V. itself did not refer to any mechanical skills or work only referring to maintenance of all type of vehicles as a hobby.

18. The claimant's perception was that Mr Crossley (MC) did not use him as a Deputy and he felt that the atmosphere changed with two long serving Greenkeepers Neil Bamford and Paul Harvey eventually leaving after periods off sick. From late disclosure it was clear that they both raised complaints against Mr Crossley although Zach Stewart was mentioned as well and they made allegations of bullying. The claimant's perception was that Mr Crossley used Zach Stewart as Deputy rather than the claimant and that both of them used a high degree of foul language which had not been the norm under Anthony Davies's regime and which the claimant did not like.

19. The claimant also referred to an incident in January 2016 when Mr Crossley had to make an apology to George Senior for calling George "Spaz" and the claimant maintained that Mr Crossley had told Mr Senior he was worse than his father who had MS. Mr Senior gave evidence that Mr Crossley had called him "Spaz". I accept

in the light of this conversation that Mr Crossley used intemperate and offensive language.

20. The claimant also explained Mr Crossley set up whiteboards with everybody's names on it where he listed the jobs people had to do against each person's name. It was a reasonable way of organising the work if of course the tasks allocated could be done in the time available.

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21. On 4 March 2016 Mr Crossley carried out a review of the claimant's performance. As is normal with an appraisal the individuals were given forms to fill in to assess their own performance and then the reviewer would go through that with them and add his comments.

22. The claimant had written his job title on the appraisal as 'Deputy Course Manager' but Mr Crossley had crossed it out and put in 'Deputy Head Greenkeeper' with no mention of any formal responsibility for mechanics work.

23. The claimant's recollection of that meeting on 4 March is that it was all criticism of him and there was nothing positive and that he was told that he was not doing enough maintenance on the machines. Mr Crossley had said to him he was a "19-stone bloke standing in the way of younger Greenkeepers". I accept that this was said as I found the claimant a credible witness. In addition, the claimant repeated this allegation at a meeting on the 20th June where it was recorded.

24. Mr Crossley took that appraisal form away and the claimant did not see it again. The claimant said that he never saw any minutes at the time and the ones which were subsequently supplied to him he believed were completed later. I accept this due to the content of those minutes. These notes were highly critical of the claimant and do not read as a record of a contemporaneous meeting and in particular it says, "Clive treats his peers with contempt" and "I do not trust Clive and this is another example of why he should not be in the role he is in". Mr Crossley was asked to clarify when these notes were prepared however he could not advise the tribunal when and why they were completed. This contributed to my view that he was a unreliable witness.

25. In addition, the meeting of 4 March there was some discussion about the claimant's doing the greenkeeping NVQ however in the end another member of staff was sent on that course so there was absolutely no discussion about the claimant doing any qualification in mechanics including an NVQ in Mechanics or any other training in that area.

26. It should also be noted that by 2016/17 the amount of equipment in use at the golf club had greatly increased. Prior to Mr Crossley's advent there had been approximately 15 machines plus chainsaws, subsequent to his arrival there were 46 machines of various descriptions, 9 buggies, 3 utility trucks and chainsaws. Indeed the increase had been at Mr Crossley's legitimate behest as he felt the club greens were suffering due to the lack of appropriate, modern and sufficient equipment.

27. Mr Young the General Manager left at the end of March 2016 and was replaced by David Holmes in early April 2016. Mr Holmes did not know the claimant.

28. In any event, on 19 April Mr Crossley presented the claimant with a letter of concern for capability/performance, which said:-

“I write further to our meeting on 4 March which we discussed the following allegations.

...Ongoing poor cleanliness of the workshop and poor maintenance of machinery both new and old

At our meeting the reason you gave for your performance was lack of time afforded to you by A Davies” Mr Crossley went on to say that he found the explanation unsatisfactory because he had not requested more help. He said “I have decided that on this occasion no formal disciplinary action will be taken in relation to the matters discussed ... I do require that an immediate and sustained improvement will be made in relation to the following:

- You must comply with Torro guidelines on service intervals;
- You must make the utmost effort to produce a workshop which is clean, tidy and safe;
- You must act in a preventative manner in the maintenance of all machines rather than a curative way”

29. Mr Crossley had devised a performance improvement plan which he enclosed with this letter and advised him that if he did not improve disciplinary proceedings may result. The performance improvement plan set out the tasks as:-

- (1) Tidy workshop and ensure the quality of cleanliness is maintained at all times;
- (2) Provide up to date maintenance records for all machinery;
- (3) Ensure all machinery is maintained in accordance with Torro guidelines and service intervals;
- (4) Ensure all machines ride on or otherwise are fit for the purpose and ready to be used by the next operator;
- (5) Ensure there is a paper trail for all purchase orders;
- (6) Ensure that your job board is clear of all outstanding jobs;

30. As can be seen the majority of the issues raised related to the claimant's mechanical role which Mr Crossley accepted in cross examination.

31. The issue of whether the claimant had enough time to do the mechanical work was a constant theme from this point onwards. I note that the white board could

have any job on it and the claimant and Mr Seniors evidence was that the claimant was given many tasks do on the whiteboard which were not possible to complete in time. Mr Senior gave an example of moving a mound of sand which he thought was a 3-day job but the claimant was expected to do it in one with other jobs on the board at the same time. Although this was denied I accept the claimant's evidence as he was supported by Mr Senior to some extent in This contention. Mr Senior also stated that Mr Crossley would add jobs to the board once the claimant had completed the original ones. I accepted Mr Senior's evidence he did not want to attend the Tribunal but once he did his evidence was credible.

32. It was intended that the review period would end on 27 May.

33. A new contract was signed by the claimant on 3rd May which described his role as "deputy"

34. A meeting was held with the claimant on 1 June. A note was taken of the meeting which took place with Mr Crossley and Mr Davies a Committee Member in this minute Mr Crossley stated "during the meeting I heard many excuses to why any of the set tasks had not been completed, he accepted he had been receiving more time in and around the workshop/sheds than ever before but this still isn't enough, at times he feels he should complete allocated Greenkeeping tasks in the afternoon so as to not let me down rather than work on machinery and workshop issues as agreed. At no time has he asked to be relieved of these tasks and it appears he would prefer to be outside rather than working inside He has fallen behind with servicing and maintenance". He went on to say there had been no improvement in making the workshop a clean and workable space, and he said he proposed:-

- (1) That Clive would issue another PIP until Friday 29 July;
- (2) Issue with a written warning for failing to achieve any progress;
- (3) Stopped from using the workshop at weekends;
- (4) The club's laundry should be taken off Clive.

35. The final paragraph said "I feel Clive is trying to complete too many jobs outside of his contracted Greenkeeper/Mechanic position and by reducing these extra jobs we will therefore help him focus on his main role and indicate to him the seriousness of his current work performance".

36. It is true that the claimant at this stage did not raise the point that he was not a trained Mechanic.

37. On 20 June the claimant was invited to a meeting regarding his alleged failure to meet agreed performance improvement plan, the four issues to be considered were cleanliness of the workshop, machine maintenance service records, ensuring machinery is ready for the next user, completing outstanding work from the jobs board.

38. A detailed note was kept of the meeting which took place on 28 June. In this meeting the claimant saw for the first time the alleged notes from the 4 March, the

claimant disputed that the notes were from then, he had never seen these before and he did not accept Mr Crossley had gone through these criticisms with him at the appraisal or given him a chance to respond to the allegations. He believes that these notes were done retrospectively or at least partly retrospectively and I agree with this as things were mentioned which were not relevant.

39. In addition, Mr Crossley put in these notes "I do not trust Clive and that is another example why he should not be in the role he is in". That is clearly not something that would be said face to face in an appraisal and this looks more like a note to the incoming General Manager Mr Holmes regarding the claimant. What is also clear from the 'trust' comment is that Mr Crossley had formed a view of the claimant.

40. The claimant did say in this meeting that he felt that the Greenkeeping duties were foremost and he was maintaining the machines as much as possible in the time he had left. He did ask for assistance with other green staff to help him grease the machinery, and he was not being given Tuesday and Thursday as promised to maintain the machinery, he was lucky if he got two hours per week to do this. This also left no time to tidy up the workshop after setting up the machines, in the past he had been used to servicing the machines during the winter months but this year the course had been short staffed with only five Greenkeepers. He needed more time to carry out the activities outlined in the improvement plan, he needed help from the other Greens staff and felt they should clean off the machine they had been using at the end of the day and set it up for the next day.

41. Regarding tidying the workshop, the claimant that this realistically was a Winter job as old stock needed to be thrown away and it would take some time, further there were new Greenkeepers who had started on the 1 April and he was spending a lot of time training them.

42. Mr Holmes said he should prioritise the matters on the PIP. Mr Crossley had provided the meeting with comments on the PIP which were mainly critical, the claimant's view was he had three overdue machines which had become due for servicing just before he went on one week's holiday, they were done straight away on his return, each machine needed servicing after a certain number of hours and he said it would help him if the person operating the machine checked the hours each time and when it got near it hours limits writes a message on the board, this suggestion was never implemented. He also stated that 'the Course Manager put jobs down on the board which were physically impossible to complete due to lack of time.'

43. He stated in this meeting again that a lot of the matters recorded in the appraisal meeting notes were not discussed in the appraisal, he said he felt no trust with the present Course Manager, he recorded that the Course Manager had said to him "there are three lads that are keen to get on and there is a 19-stone man in the way" and he also produced print outs of What's App group chats highlighting abusive language the Course Manager had used about him. He also said the Course Manager was very aggressive and gave an example of when he had been watering the greens prior to the ladies' competition and the Course Manager had reprimanded him stating that "I asked you to do the fucking job of watering other greens". He felt

he was being targeted and personally attacked because he was trying to get rid of him.

44. Mr Holmes stated the claimant's priorities should be to work on the PIP rather than working on the golf course and he would speak to Mr Crossley to ensure this happened. However, as the County Championships were due soon the claimant replied the course had to take priority this week and Mr Holmes agreed to postpone everything until the week after. The claimant also pointed out that as they had been short staffed he had not got behind with the maintenance and he specifically requested help from the Green staff by washing down and/or greasing machines after they had used them. An updated PIP was then produced.

45. The claimant pointed out that in this meeting Mr Holmes had complained about the state of the workshop and said that it had been identified as a health and safety hazard in a recent independent inspection. The claimant insisted on seeing the report from the Inspector and Mr Holmes said he did not have it. When the claimant eventually saw the report, it was nowhere near as bad as Mr Holmes had suggested, it said 'housekeeping and the Greenkeepers workshop requires attention to ensure members of staff and visitors can walk around safely without risk of tripping and falling. 'It was number 22 of 30 medium priorities following 18 higher priorities and immediate priorities for the Golf Club as a whole. The claimant saw this as an indication that the respondents were looking for every excuse to get rid of him.

46. There was an email from 10 August from Mark Crossley to Simon Bolam which he copied two days later to David Holmes which contains some criticism of the claimant. A piece of equipment was unable to be used, the Vertedrain, Mr Crossley said that the claimant had said he hadn't serviced it because he thought they were alright, Mr Crossley commented "it is simply not good enough I am losing the will to live by repeatedly banging my head against Clive, he has since offered his apology which of course I accepted". He then spent all Tuesday repairing the Vertedrain. "This is the most frustrating thing with Clive, he has the know how to identify problems with machinery and the skillset to usually put them right but he has to be forced to do it, unless I stand over him and go through what he is doing piece by piece he is completely incapable of managing his own time and job roles suitably. At least three of the lads have been to see me this week and asked pretty much the same question what has Clive been doing, why are the machines not ready for this week, and he's fucked this week up. I am now finding myself fire fighting between Clive and the other lads because they realise he can't be trusted. "

47. The PIP for 26 July to 31 August stated:

unwanted stock ... CP's office is a disgrace, it was noted that Clive had said he hadn't had time, his focus was elsewhere, and he needed an electric socket to be installed to be able to use his office.

In relation to up to date maintenance records It was noted that the claimant had produced templates pre-start sheets for the maintenance, he was then criticised for not having produced some earlier. He commented that he has got logs when each machine was serviced but an itemised checklist was not included.

In relation to maintenance machinery the previous criticisms were repeated and it was added that the Gator battery needed replacing, petrol hand tools were of a poor working quality. It was noted that the claimant had produced the leaf collector for use,

ensure all machines are fit for purpose and ready to be used by the next operator, it was noted there was no progress on this, the claimant had not been greasing all the machines, it was stated he should delegate the task if he did not have the time and apparently the claimant agreed he had been granted the hours per week he had requested to do this work.

48. The summary states “little progress has been made since we last met with Clive on 1 June, there was no evidence of CP grasping how the club wants the role of Mechanic to be fulfilled, preventative maintenance rather than breakdown response, anticipation rather than reaction and fully documented record keeping of maintenance and servicing to enhance the life of the machines and protection of the warranty.

49. The issues still are machinery not set up ready for use, allowing service intervals to pass, grumbling to the staff about his role, no preventative measures taking place, having to be told to back lap by the lads, a lack of general maintenance on all machinery and poor management of time”.

50. It is clear from this that all the emphasis was on the claimant’s failure to undertake the role of a Mechanic.

51. Mr Crossley then had a meeting with Mr Davison on 5 September regarding the claimant’s progress on the PIP. It was noted that although there was a slight improvement had been made, it was felt it was last minute and rushed and due to this the proposal was to issue the claimant with a written warning. On further consultation it was agreed that the claimant would be granted an extension to complete the PIP until 31 August but “disciplinary action would follow if his performance was not satisfactory”.

52. There were 54 points in the review of the claimant’s performance produced at this point which started on 2 June.

53. Geoff Davidson then emailed Simon Bolam, David Holmes and stated that he believed the claimant did not grasp the ideas of preventative maintenance and he did not act in the manner of professional mechanic being organised and working in a safe and orderly environment, and he took satisfaction from being able to fix breakdowns but had no sense of pride in maintaining the equipment ready for use. “He enjoys being hands on machines or as Greenkeeper and I suspect hates paperwork. He does not meet the requirements we currently have for a Mechanic/Greenkeeper. I make no comments about his Greenkeeping skills or managerial ability, we have a problem”. Again, clearly all the emphasis was on the role as a mechanic.

54. There was a management meeting held on 13 September to go through all these issues and it was agreed that the claimant would be invited to a disciplinary hearing with David Holmes to discuss his capability/performance and his failure to meet the PIP standards. At the end of it said which referred to Citation the respondent's HR advisors who were going to be spoken to to ask, "if it is ok for either of them to speak to CP should this take place before or after a written warning is issued". Accordingly, it appears that a written warning was going to be issued even though obviously that should not be decided before the meeting.

55. On 20 September the claimant then was invited to a meeting on 26 September "to discuss your capabilities/performance in your role as Deputy Course Manager", in particular his alleged failure to meet agreed performance plan. It ended up by saying a potential outcome of the hearing could include a formal sanction under the company's disciplinary procedure.

56. On 27 September 2016 Mr Crossley reported that he came back from holiday to find three Greens riddled with take all patch and another with Fusuriam and one with Anthracnose Diseases. Mr Crossley blamed the claimant for this as he was in charge whilst Mr Crossley was away, he had concerns about the claimant's ability to deputise in his absence.

57. A disciplinary hearing took place on 3 October with Mr Holmes and the claimant. At this meeting the claimant told Mr Holmes that the Golf Club needed a full-time mechanic to do all the work that was required, it did not work tending to the machinery and the course at the same time.

58. In a letter of 10 October Mr Holmes stated that he found the claimant's explanation for failing to meet his performance improvement plan unsatisfactory for the following reasons: -

- (1) That on 21 July two staff had spent four hours tidying the workshop but no further progress had been made;
- (2) Template pre-start sheets were given to him in October 2015 in readiness for the new season and they had not been used, although they had started to be used by 5 September, Mr Holmes commented at present we have no official logs of any servicing carried out.
- (3) At the meeting on 5 September concerns were raised over the lack of greasing of the machinery but he was told he should delegate if he could not manage to do all the greasing himself.
- (4) That Cheshire Turf had serviced some machines for him.

59. He was now issued with a formal written warning that would stay on his file for twelve months. There was then a list of things that needed to be done and improved- the cleanliness of the workshop, machinery maintenance service records, ensuring machinery ready for the next user, completing outstanding work for the jobs board, work closer with Mr Crossley to ensure the most important jobs are undertaken first. He went on to say "as a Mechanic you have the skills that none of

the Greenkeepers have, you need to focus on these tasks and the other Greens staff can do the work on the course which they are capable of." He noted:

"Mark will lay out your daily/weekly duty schedule and prioritise work for you.

You remarked the Greens staff needed to grease the machines, you will ask them to carry this out, you said you needed to re-do the pre-start checklist as Mark wanted some more items added.

The deadline for completion of the tasks in your Performance Improvement Plan has been extended until 30 November 2016."

60. It was stated he could face further disciplinary action and said that after this meeting.

61. The claimant said that after this meeting Mr Crossley scrunched up the claimant's draft attempts at drawing up pre-start checks sheets and threw it to his dog to play with and told him to do another. When he gave him his further attempt he took it off him and used it as a coaster for his mug. As already noted Mr Senior corroborated one of these events which further adds weight to the claimant's credibility. He also complained that Mr Crossley replaced all the names on the white boards with pictures of monkeys and used monkeys on the What's App communications and continued to use unprofessional and abusive language on What's App.

62. The Performance Improvement Plan from 10 October to 30 November was then updated, in respect of the workshop the claimant thought it was tidy and of a standard acceptable contrary to Mr Crossley's view. In relation to up to date maintenance records this appeared to be the same as previously, there were no comments from the claimant recorded. It said the claimant had stated he had last night completed the pre-start check sheets but provided no evidence of these but said it would be provided the next date which was 6 December, there was still no official records of service or maintenance. In relation to maintenance it is stated no service of any Torro equipment was due during the period but the small tools were of poor working quality, there was no chain saw oil because this hadn't been replaced from Spring. The claimant said the machines had suffered from a lack of greasing, he must ask the lads for help but his pride had prevented this. In respect of machines fit for the purpose it was again stated this hadn't happened, and regarding the jobs board he said he had added a board for all the machines in the tractor shed. It was noted that 'Mr Crossley told CP two weeks ago this was not acceptable' but was not clear in what sense it was not acceptable and then it was commented that 'CP still has not amended the boards'.

63. A further review meeting was held on 5 December, there was a lot of background information in this going back to when Mr Crossley started. Overall, he stated there had been no improvement after six months of the Performance Improvement Plan, Mr Davison also wrote an email again on 6th, Mr Bowle, Mr Crossley, Mr Holmes and Mr Woof (the club's current chairman) . He stated "I think we can all accept he is not idle but his efforts are misplaced. I sense he is happiest when he is doing anything other than his prime responsibility". A reference to his role

looking after machinery. Mr Davidson said he could only see one outcome unfortunately. The claimant was then invited to a disciplinary hearing on 5 January and told that a formal sanction under the company's disciplinary procedure could be the outcome.

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64. In the meeting on 5 January the claimant said he was not qualified to be a Mechanic, he also said the club needed to give him adequate training. Mr Holmes said, "we need someone capable to deal with our fleet of machinery". The claimant said he did not have time to do the final set up, this should be done by the operator and not by him. David Holmes said, "things have changed and Mark wanted him to do the pre-start checks and final settings", he also said "the Verti Core and Core Collector were not ready for course maintenance at the beginning of August". The claimant said when he was going to do this he was asked to look at one of the mowers which he did and that only a slight adjustment was needed for the Verti Drain and that he had already discussed this with Mark. The filter had come off leading to an oil leak from the turbine but that sometimes happens. Mr Holmes said, "these three incidents have all happened in the last six months", the claimant said, "the machines had not broken down they were just not set up right, it's not down to the Mechanic but to the Greens staff, there are 40 machines to maintain and only 13 are on a service contract". Mr Holmes said, "are you saying we need a full time Mechanic", he said "I am capable not qualified". Mr Holmes said then "there is two choices, you either get trained up or the club finds a qualified mechanic". The claimant replied saying he was being pushed out, he did not get his Christmas bonus.

65. Mr Holmes said that the workshop was still untidy, the claimant said it was a working environment, it met health and safety regulations, they then referred to photographs that Mr Crossley had taken, Mr Holmes said it was an unsatisfactory state and his office was a disgrace. He then said, "why did you help putting up the Christmas decorations in the club house". He said, "well the ladies asked Mark for assistance and Mark had sent him to help". Mr Holmes commented that was going against what had been agreed and needed to be discussed with Mr Crossley. The comment regarding the club needing a qualified mechanic or that it needed to train the claimant up was never followed up.

66. The claimant said he should have got his bonus as he had stayed behind after his hours of work to do extra jobs. Mr Holmes said he was expected to do extra because he lived in such a cheap rent at the cottage it wasn't unreasonable that he was the first port of call in an emergency. The claimant said he tried as best as he could but from his appraisal and comments from Mark were all negative and he felt he wanted to get rid of him. Mr Holmes denied this but said that the claimant just didn't appreciate how serious how it was or didn't care. The claimant said he tried to keep on top of the jobs board but that Mr Crossley expected too much for one person, he said he was willing to go on courses to help him look after the machinery and that he had only two hours a day at this time of year to carry out the work and 40 pieces of kit needed servicing. That everyone needed to grease the machines, which took an hour, it was not possible for him to do that, and that he had never caught up from the Winter when they were short staffed, it would need three weeks to catch up. Mr Holmes appeared to be going along with the suggestion of the

claimant that he needed further training, the claimant said he did not have the knowledge to maintain the Torro machinery. The claimant said that he needed to spend time doing the Stunt Grinding as no one else knew how to do it. Mr Holmes said, "I don't want you to spend your time doing this, any of the Greens staff could do that job". The claimant said, "I will have to show someone how to use the Stunt Grind", Mr Holmes said, "Fine then do it". The claimant said, "I am trying", Mr Holmes said, "this is your last chance, I will get the notes typed up and give a decision on what we will do".

67. On 26 January the claimant was issued with a final written warning for twelve months. It was clear from the discussion and the letter that the claimant had made clear he was not a qualified mechanic and that he had insufficient time to look after the number of machines.

68. On 17 March the claimant contacted Mr Bolam, this was recorded by Mr Bolam as the claimant 'being quite agitated, ranting about Mark and quite incoherent'. He said he was sick of being criticised, Mr Bowman recorded that "when I pointed out he was a Mechanic and it was his job to service and repair machines he declared that he was not a Mechanic but the Deputy Head Greenskeeper. I replied by telling him that over the last twenty years one of his primary roles was servicing and repair of machinery and therefore by virtue of that fact he is a Mechanic. "His email also refers to there being other options apart from dismissal such as 'a complete reassessment of your role' however this was never pursued.

69. The claimant was then invited to an investigation meeting on 10 April, to discuss the allegation of "your alleged failure to meet the agreed Performance Improvement Plan" to be held by David Holmes. The matters referred to were the cleanliness of the workshop and photographs were attached; Machinery maintenance service records which stated that there was no progress; ensuring machinery ready for next user and completing outstanding work from the jobs board. It was said that the meeting was not a disciplinary procedure however it could lead to formal disciplinary action.

70. In this meeting the claimant said he was demoralised with Mark picking at everything he did, whatever he did, he was working weekends to try and keep on top of everything, his paperwork skills were not that good. He said he had serviced the Torro Range Mower, the Torro Greens Mower and the two MDX buggies, the John Deer Gator still has hours until a service is due but an oil change is required. The leaks had been fixed on the Boomer Tractor, he was waiting for a Carburettor for the Strimmer. He said he was servicing the Torro machinery every 100 hours although the recommendation was 150. He agreed he needed to improve his recording of this and that all the tractors had been done. He went on to indicate all the matters that he had had done. Random matters were raised by David Holmes regarding the claimant attending the gym (he had been on light duties following a back problem). Mr Holmes criticised him for giving Mr Crossley no feedback regarding some courses but the claimant said he had given some feedback and needed to improve on hydraulics, electrics and organisation. He said he was demoralised. He agreed however that the tasks were achievable. Mr Holmes said: "it sounds to me like it could be too little too late".

71. The claimant made complaint on 12 May via his solicitor of harassment and discrimination, and this was dealt with as a grievance by Mr Holmes. A Graham Keys, Deputy Chairman of the Board was to chair the grievance meeting, it was re-arranged as it was felt insufficient notice had been given and a meeting was held on 23 May 2017. The claimant complained about Mr Crossley having said; "I do not trust Clive and this is another example of why he should not be in the role he is". He complained about the staff being shown as monkeys, he complained about some of the comments Mr Crossley made against him, he referred to the comment in the PIP that regarding something the claimant had allegedly said to Richard Howdon, he said he keeps being told to do mechanical work but he was not trained to do that work, he had asked for training but none had been provided. He had discussed his training requirements with Mr Crossley but nothing came of it. He disputed that Torro had said that he should not attend on the second day due to his poor attitude, the course actually covered matters the claimant already knew what to do. He had identified a two-day course that he wanted to attend but nothing had been done about it, hit had been suggested it was his responsibility to look at what courses he needed to do, the claimant said he thought it was the employers. He said it was true he had agreed the tasks and the PIP were achievable if he had been given the time and he agreed that he had been told mechanic work took priority but in his eyes the Golf Course has to take priority. He would do the machines but he needed help from other people, he said that in reality he had not been given fifteen to sixteen hours a week, he was only spending an hour a day in the workshop. He claimed that Mr Crossley was giving him more and more work to do on top of his normal day to day duties, his motivation morale was down due to being put on a PIP after twenty years working at the club without any issues. He believed he worked twice as hard as some of the other staff. GK stated that after looking at the PIP minutes the club had been found patient, giving him multiple extensions, the claimant said he was not given any help but then agreed that two people had helped him create a spreadsheet for service records but that help should have come from Mr Crossley and the other Greens keepers not from two unrelated members of staff. He admitted he was not good on computers, and at record keeping. Mr Keyes said paper records or a diary would be sufficient, he said it was a way of documenting matters was not discussed with Mr Crossley. He agreed he had failed in the area of keeping a record of exactly what he had done on a service.

72. In an email from Mr Keyes to John Woof, Mr Keyes opined that the claimant was in denial and that he suspected a large part was obstinance/bordering on paranoia, worried he was drifting into reactive depression. Mr Keyes then gave his outcome on 30 May, he said he had interviewed Mr Crossley and partially upheld the claimant's complaint. He said that the monkeys to be were taken down, he said that Mr Crossley had assured him that the claimant was being given enough time to do the mechanical work.

73. On 9 June the claimant was then invited to a disciplinary hearing on 14 June regarding the same issues as before and had been advised that one potential outcome was his dismissal. The claimant stated in this meeting that he believed the decision had already been made to get rid of him. He said he had not been able to do the tasks as he had not had the training. Mr Holmes said training wasn't necessary to keep the workshop clean and tidy and the claimant said it was a common area, mess was created by other people, he could not tidy it every day it

should be a team effort. He was busy doing other jobs on the Golf Course which were more important and didn't have the time to keep the workshop clean and tidy.

74. Mr Holmes said it was a question of priorities, the claimant said the Golf Course should take priority. Mr Holmes said he had emphasised in previous meetings that the tasks and the PIP must be the priority. He said he had to do the jobs on the white board first (this was one of the PIP areas) which involved work on the Golf Course and by the time he completed those jobs he didn't have time to be in the workshop. Mr Holmes said it had been agreed that he would get a certain number of hours in the workshop, he stated he had not been employed as a Mechanic but as a Deputy Head Greenkeeper, he had no qualifications to be a Mechanic and had only undertaken the role because the person that had been doing it left, he was a capable mechanic but had not received any training. Mr Holmes stated the claimant's original letter of application stated he was experienced as a Mechanic and had passed several courses, and that had been an important factor in his recruitment (however Mr Holmes had not been at the Club when the claimant was appointed). He had attended a Hydraulic and Electrical Systems course in January 2017. Mr Holmes said that the club was not questioning CP's ability as a Mechanic but his ability to keep the workshop clean and tidy, keep service records and prioritise his work. The claimant said he didn't accept he had been given extra time but he realised he should really have kept note of the hours he was actually being given to work in the workshop. He said it was a very lengthy task to maintain written records for so many machines and mentioned the understaffing in the Winter of 2015 to 2016 but said that now he had virtually caught up with all the servicing just not writing everything down.

75. Mr Holmes said it was common practice for Golf Clubs to have a mechanic who looked after the machinery whilst other Greens keepers concentrated on the golf course. The claimant said but his title was Deputy Head Greenkeeper and not mechanic, the other greens staff should be helping him setting up machinery and should not all have fallen on him. Mr Holmes referred to two instances of the Core Collector not being ready for use and the Verti Drain which had broken down. The claimant said that he did fix the Core Collector but it was not capable of collecting big cores and he felt the machine was outdated and should be replaced. He had overlooked sending it out for repair, regarding the Verti Drain it was fixed and the damage had occurred on the green because the machine had been set up by someone else when he was absent.

76. On 23 June Mr Holmes sent the claimant a letter dismissing him, he referred in the meeting to two comments the claimant had made "I have been lax on certain things and I sometimes forget to do tasks". The claimant was dismissed with twelve weeks' notice (indicative of capability not conduct). He was told he would have to vacate the property by 18 August and he was advised he could appeal.

77. He appealed by letter of 27 June. His points of appeal were that: -

(1) He had not received sufficient training, he needed a three-day course.

(2) During his PIP he should have been allotted twelve hours per week for mechanical work and then he set out a typical day's workload, which clearly showed he did not have enough time to do the mechanical work.

- (3) Regarding the mess in the workshop he said the photos taken by the Course Manager were at times when he was either out on the course or not on shift, they were taken at selected times to make it look like I was not keeping on top of it and if it was poorly kept why did it pass the HCS Inspection carried out by an independent company?
- (4) Course priority. He was simply following instructions and the tasks set out by his immediate line manager. Hopefully the club could agree the course had never looked better and played so well due to the team we have in place doing the tasks set out by the Course Manager. There is no point in having a tidy workshop if the course falls below the standards expected by the membership.
- (5) Keeping of records. Whilst it was well known that his computer skills were poor at no point did anyone offer to help either electronically or manually to set up any kind of record keeping documentation, the General Manager stated to use examples in the back of training manuals. He pointed out they had copious numbers of manuals for Torro equipment but were severely lacking for all other equipment, he feel that was very poorly supported in carrying this out.
- (6) He felt he said he believed that his dismissal had been in process from April 2016 when the Course Manager had stated that he was a "19-stone man in the way of younger staff progressing" and that Mr Crossley as stated he did not trust the claimant which is why the claimant should not be in the position he is in".

78. Mr Arthur Dicken, past Chairman of the club was tasked with hearing the appeal which took place on 12 July. The points of the claimant's appeal were discussed in this meeting, he stated that he had asked for training but not been given it, that he had done the turf machinery course in 2016 and a one day case in Harrogate but he needed a three day course in Harrogate to fully understand the subject matter, he had never had any training but been self-taught, but he had serviced and repaired machinery ever since starting work even though he was not trained, he shouldn't have to set up machines all the staff should do that and he did not have the time to do that. He had given Mark Crossley a pre-start check sheet which Mark Crossley had used as a coaster. It was time consuming to set up a machine and took between 45 minutes and 1 hour per machine, in total it would take three whole working days each week to set up the machinery. He was given 12 hours per week in the workshop but did not actually receive this time as he hadn't finished his other jobs and the club were not prepared to pay overtime. The other staff didn't finish using the machines early enough to give him sufficient time to set them up for the next day. No one gave him any help greasing the machines and that Mr Crossley had given him other priorities by putting them on the wipe board and expecting him to do the jobs on the wipe board as well as the jobs indicated in the PIP. He agreed that there were not adequate service records but he forgot and/or that there were too many machines and no system for keeping records. He did forget to write things down, but he was servicing machines earlier than recommended in order to maintain them.

79. His appeal was not upheld. Mr Dicken did go through the points the claimant made, he felt the claimant had been given advice and had been supported by his colleagues and given help with cleaning the workshop and by being given extra time.

80. In cross examination however, Mr Dicken stated that he also said that he was unaware at the time of the appeal that all the other Greenkeepers had keys to the workshop and therefore were in a position to contribute to a state of untidiness, that he had formed the view that the claimant was unprofessional, inefficient, in capable of carrying out the roles of Deputy Course Manager, Machine Engineer and he had shown an unwillingness to learn. He said he had arrived at this view from observing the mess in his cottage, watching the claimant appear in the club lounge on one occasion in his overalls and from information that Mr Crossley had provided to him. He agreed he had formed this view prior to being asked to take on the role of Appeals Officer but felt he could be impartial notwithstanding his view of the claimant, and he agreed that his appointment could appear to have biased against the claimant.

81. One other matter of note was that the claimant on 31 May that the respondent had failed to renew his subscription to the British and International Green Keepers Association even though the decision to dismiss had not been made at that stage. This was something that the club normally paid automatically every year.

82. As training was an issue in this case I note that the respondent says the claimant was sent on 3 relevant courses in 2016-7, the claimants evidence was they were very basic courses and did not equip him as a mechanic.

83. The claimant then brought this Tribunal claim on 22 September 2017.

The Law

The claimant's role

84. One of the issues in this case was whether the claimant's job role required him to do the mechanical work or required him to do it to the extent the respondent believed at the time and therefore this requires the Tribunal to determine whether his contract of employment included these responsibilities.

85. A contract of employment does not have to be entirely written but in this case, it was written, the question is given that there was no alteration to include any responsibilities as a mechanic has it been amended by any oral agreement or otherwise?

86. The respondents cited the following cases: **Franks -v- Royters Limited 2003 Court of Appeal** which said that responsibilities can be implied from the parties' conduct. Further when terms of a written contract are ambiguous it may be permissible to construe what the parties meant by using evidence of clearly established practice which continued both before and after the contract was made, **Dunlop Tyres Limited -v- Blowes 2001**. However, in my view this is unlikely to apply here as there were no ambiguous terms in the contract.

87. Regarding implied terms the terms would be implied into a contract if it is so obvious that both parties would have regarded it as a term even though they have not expressly stated it, or if it necessary to imply the term in order to give the contract business efficacy (**Scally -v- Southern Health and Social Services Board 1991**). Terms may also be implied if they are customary in a particular trade or calling, or form the usual practice of the particular employer if it is sufficiently well known. The custom has been followed with such regularity it becomes legitimate to infer the parties follow the practice because they now regard it as a legal obligation rather than a practice followed as a matter of policy, **Solectron Scotland Limited -v- Roper 2004**.

Unfair dismissal

88. An employee has the right not to be unfairly dismissed by his employer under Section 94(1) of the Employment Rights Act 1996, the respondent must establish that the claimant was dismissed for one of the fair reasons set out in Section 98(2). In this case the respondent relied on conduct.

89. Section 98 of the Employment Rights Act sets out the relevant law on unfair dismissal. It is for the employer to show that the reason for dismissal or the principle reason and that that reason was a potentially fair reason falling within Section 98(2). Conduct is a potentially fair reason for dismissal. In *Abernethy v Mott, Hay & Anderson [1974]* it was said that:-

“A reason for the dismissal of an employee is a set of facts known to the employer or it may be the beliefs held by him which caused him to dismiss the employee.”

90. In a case of a misconduct dismissal the Tribunal has to be satisfied that the **British Home Stores v Burchell [1978] EAT** test has been met. This states the following standard must be satisfied:

- “(1) Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged?
- (2) Was the belief based on reasonable grounds?
- (3) Did the respondent carry out such investigation as was reasonable in the circumstances?”

91. One of the issues in this case was whether the claimant's situation was a case of incapability rather than misconduct.

92. In **Sutton & Gates (Luton) Limited x Boxall [1979] EAT** it was said that:

“Where someone fails to come up to a standard through his or her own careless, negligence or idleness that is not incapability but misconduct.”

93. This is also relevant in determining the steps that a reasonable employer ought to take before dismissing the employee. It can prove difficult to distinguish between the two.

94. A Tribunal is not bound by the label the employer puts on its reasons but it should consider the reason put forward by the respondent first.

95. In some cases, the wrong label will not make any difference. However, in a capability/conduct case it is likely it would make a difference as the procedure for a capability process would be very different from a misconduct issue. The respondents followed a capability process in this case but relied on conduct at the Tribunal conversely.

96. In addition, in relation to unfair dismissal a respondent must follow a fair procedure. There must be a full investigation of the conduct and a fair hearing to hear what the employee wants to say in explanation or mitigation.

97. In **Taylor v OCS Group Limited** Court of Appeal, it was stated that:

“The Tribunal should take account of the whole of the procedure including the appeal.”

98. The ACAS Code of Practice sets out the minimum standards to be followed.

99. The more serious the allegations the more thorough the investigation should be. In particular, if the claimant's future employment in their chosen field is put at risk (**Salford Royal NHS Foundation Trust v Roldan 2010**). Here a nurse was dismissed for gross misconduct and faced not only criminal charges but the risk of deportation resulting from the dismissal.

100. Further in **Sainsbury's PLC v Hitt [2003]** the court established that:

“The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable.”

101. In a capability dismissal the respondent must show:

1. That they honestly believed the employee was incompetent or unsuitable for the job and
2. The grounds for that belief were reasonable

Alidair Ltd vs Taylor 1978 CA

A fair procedure would include proper training, supervision and encouragement. An employer must set realistic targets or standards, hold meetings to discuss the employee's performance and give appropriate warnings.

102. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

“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 sufficient reason for dismissing the employee; and
- (b) shall be determined in accordance with equity and the substantial merits of the case.”

103. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982] EAT** states that the function of the Tribunal:

“...is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.”

In a capability dismissal it might be reasonable for the employer to consider alternative employment but not necessarily.

104. The Tribunal must not substitute its own view for the range of reasonable responses test.

Conclusions

Unfair Dismissal

105. Firstly, I find in this case that the claimant was not dismissed for conduct but was dismissed for capability.

106. The respondents case that it was conduct i.e. that the claimant could do the work but was failing to do the work for no legitimate reason - through carelessness or inattentiveness does not stand up to scrutiny. In any event, if I am wrong in saying that the real reason was capability the dismissal was unfair for conduct

107. In respect of the issue as to whether the claimant’s role had become that of greenkeeper and mechanic I reject that contention, the claimant and his line manager Mr Davies at the time stated that they were both of the view that he was prepared to do what he could do and that was the only expectation. There was no evidence to support Mr Holmes contention that the claimant’s mechanical abilities were why he had got the job in the first place and in fact it was inherently unlikely as the club already had a mechanic in place then. Indeed, this was also supported by the obvious point that no contractual changes were ever made and that on the other hand Mr Crossley had bothered to alter the contract to describe the claimant’s title as Deputy Greenkeeper, but did not for example change it to Deputy Greenkeeper and Mechanic. This is not a situation where the respondent has set out a contract with a change in it and the claimant has failed to object to it, there was never any change.

108. The fact that the claimant described himself as deputy/mechanic when applying for the course managers role in 2015 is not determinative of his contractual status.

109. Therefore, at its highest, through the contractual interpretative principle of custom and practice I find it could be said is that the claimant agreed to undertake mechanical work, maintenance and repair when and if he could manage it but not that it had been elevated to a primary role over and above his green keeping role. Whereas suddenly in 2016/7 to respondent wanted the claimant to spend all his time on mechanical work - preparing, maintaining and repairing a significantly increased amount of equipment (indeed given that increase -three fold- the respondent did in fact need someone to spend all their time on this work, such as a fulltime qualified mechanic) yet this had never been his job.

Capability

110. Although the respondent adopted an elaborate performance procedure and invested a lot of time in that procedure following ostensibly the correct procedures I find the dismissal for capability unfair because:-

- (1) The dismissal was *procedurally* unfair for the following reasons:-
 - (1.1) Mr Dicken who held the appeal was clearly biased against the claimant.
 - (1.2) Mr Crossley was not impartial and he was organising the PIP and the claimant's work, his bias is exemplified by his comment about the claimant being a 19-stone man blocking the way of others, the way he crushed the claimant's efforts to draw up paperwork and stating very early in the process that he did not trust the claimant.
 - (1.3) The fact that on a number of occasions minutes or notes of the meetings were not sent to the claimant for agreement and in particular the alleged notes of 4 March were clearly not notes of that meeting or contemporaneous and were likely to be some sort of briefing to the General Manager or an Aide Memoire.
 - (1.4) That in the investigation and appeal the points the claimant made in his favour were not properly followed up.
 - (1.5) That the outcome had been decided as can be seen from the comment about citation indicating the respondent had already decided to issue a written warning and the non-renewal of the claimant's subscription to the BIGA before the appeal had been decided.
- (2) Substantively unfair

(2.1) The claimant's role did by 2018 involve responsibility for some of the mechanical role but this was always limited on the basis of what the claimant was able to do, qualitatively and quantitatively. I have accepted the claimant's and Mr Davies evidence on this point. The fact that the claimant referred to his mechanical ability in his application form is not persuasive, it was clear that he had no mechanical qualifications and by the time Mr Crossley decided to performance manage the claimant the machinery had greatly increased in number and complexity

(2.2) I am satisfied that the PIPs were set up in an unfair way in that:

(2.2.1) the claimant always had to complete his white board jobs as well as the mechanical jobs in accordance with the PIP;

(2.2.2) that the PIPs were based on an assumption the claimant was totally responsible for all mechanical matters; and ignored the increase in machinery and the increase in expectations that the claimant would have every piece ready to be used and maintained even if someone else had used it, not returned it until after the claimant had left work and not treated it correctly.

(2.2.3) the emphasis on the untidiness of the workshop was clearly exaggerated and the fact that other people used the workshop was not properly taken into consideration.

(2.3) That the claimant was not provided with training to support his limitations in mechanical matters and/or in relation to paperwork.

(2.4) the claimant was not given proper encouragement even when it was recognised he may have been depressed, and when he himself had said he was demotivated because Mr Crossley was so negative.

Therefore, in terms of *Alidair vs Taylor* the respondent did not have reasonable grounds for deciding the claimant was incapable.

Mitigation/reasonable to dismiss

In addition, in the failure to consider the claimant's mitigation points and properly take into account the claimant's long service it was outside the range of reasonable responses to dismiss the claimant for capability. The claimant's mitigation was not weighed properly at the dismissal and the appeal stage i.e. that completing the mechanical work had got behind due to short-staffing, that the respondent had many more machines at the point of the claimant's PIP than they had when he started; that the other Greenkeepers were not pulling their weight in looking after the machinery and leaving them in a proper condition; that the other Greenkeepers untidied the workshop; that the claimant had always had problems with paperwork, that the claimant had been bullied and intimidated by Mark Crossley and

consequently would struggle to articulate his difficulties to Mr Crossley and complete the jobs.

Misconduct

111. If I am wrong about the claimant being dismissed for capability and he was dismissed for conduct I would say that I find dismissal for conduct was unfair also.

112. Firstly, it would be unfair for the procedural reasons given above.

113. Secondly, the respondents had insufficient evidence to bring this case within the Sutton and Gates test of carelessness, negligence or idleness. It was recognised the claimant was working extremely hard. As the PIP procedure was self-evident based on assessing performance, the investigatory process did not look at the relevant issues for misconduct in detail i.e. carelessness, negligence, idleness,

114. The investigation was flawed by the fact he was being tested against a standard that he was not required to perform to. For example, the mechanical role the claimant voluntarily undertook was vastly expanded with the increase in the machinery. Further the requirement for the claimant to not just repair the machinery but to maintain the machinery so they were always ready for use was a new requirement introduced by Mr Crossley. It was clearly stated that these were new expectations were different, it was unfair then to measure the claimant against expectations which he had never agreed to and were different from anything which had arisen through custom and practice. It could not be said he was careless when the expectations were too high, it could not be said he was negligent when he did not have the time or training and it could not be said he was idle when he was working additional unpaid hours to try and keep up, he could not be unwilling when he was being asked to do something he was not required to do.

115. In respect of times whilst the claimant did at times acknowledge he was being given the time to do the machinery he more often contradicted this on many occasions pointing out that this was not the case. In his PIP in addition he was required to undertake all the jobs on the white board and although on at least two occasions Mr Holmes says "well I must speak to Mr Crossley" about the fact that the claimant had alleged he was not being given enough time and was being specifically told to do green keeping tasks before machinery tasks was no evidence that anything changed and there was no recognition that it was always part of his PIP to complete the jobs on the white board which would include green keeping jobs. Accordingly, the evidence pointed to the claimant having insufficient time to complete the mechanical work and the requirements being placed on him simply being far too great.

116. Therefore, I find this was the reason why he did not complete the majority of the matters in his PIP which were heavily weighted towards the mechanical tasks rather than it being due to carelessness, negligence or idleness.

117. It was also unfair of the respondent to seize on a few comments of the claimant as evidence that 'he couldn't be bothered.' He did refer to being demotivated but the respondents made no efforts to resolve that situation.

118. Therefore, if the matter was one of conduct the respondent have failed to meet the BHS and Burchell test, in that they could not have genuinely believed the claimant was careless, negligent or idle on the evidence they had and their investigation into these matters was inadequate to support such a conclusion.

119. In closing submissions, the respondent referred to the claimant being unwilling to change. Firstly, the claimant was being asked to work differently and give priority to his mechanical work, that was, I find outside the contractual obligations of the claimant who was only required by custom and practice to do what he could when he could. To ask him to be a mechanic first and a greenkeeper second was a significant change to his job to which he had never agreed. Accordingly, to attach culpability to the claimant for not acquiescing in this change and meeting the new requirements was unreasonable. Whilst he did not raise this initially in the PIP process he did eventually and was ignored. Accordingly, again the basic premise on which the respondent concluded the claimant was unwilling was wrong.

120. Further the respondent adamantly would not accept there was a time issue here even though there was no evidence they objectively checked that the claimant was receiving sufficient time to complete the tasks he was being given. The claimant at one point said he should have kept a record of the hours he was spending on the different tasks in order to support his contentions he was not being given enough time but neither did the respondent do this. In addition, as far as they checked they took the word of Mr Crossley who clearly had an animus against the claimant from the beginning of his employment.

121. Accordingly, the respondent did not rely on reasonable grounds in concluding the claimant was simply unwilling to change and therefore do not meet the BHS and Burchell test.

122. I raised with both parties whether they wish to canvas the proposition that the claimant should have been found alternative work but neither party wanted this to be considered.

Remedy

123. Issues of contributory conduct and Polkey will be considered at the Remedy Hearing although I note that the claimant was seeking re-instatement. The claimant is to confirm to the tribunal within 28 days whether he still seeks reinstatement. Following which orders for the remedy hearing will be given.

Employment Judge Feeney

Date: 28th May 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

03 June 2019

FOR THE TRIBUNAL OFFICE

[JE]