



EMPLOYMENT TRIBUNALS

Claimant: Mr C Adomako-Mensah

Respondent: The Commissioners for Her Majesty's Revenue and Customs

Heard at: London Central Employment Tribunal

On: 22 and 23 August 2019

Before: Employment Judge Quill (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr J Duffy, counsel

RESERVED JUDGMENT

- (1) The claim of unfair dismissal fails and is dismissed.
- (2) The remedy hearing is therefore cancelled.

REASONS

Introduction

1. The Respondent is a large and well-known government department. The Claimant is a former employee of the Respondent.

The Claims

2. The Claimant brought a claim, within the appropriate time limit, alleging that the dismissal was unfair contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA").
3. The Respondent admits that the Claimant was an employee, and that he was dismissed. It asserts that the reason for dismissal was poor performance. It denies that the dismissal was unfair.

The Issues

4. I had to decide what the reason was for the dismissal.
5. I had to decide if the process followed, and the decision reached, were reasonable in all the circumstances.
6. In particular, the Claimant alleged unfairness due to bias by particular decision-makers (Christou and Patel), and failure to acknowledge that his work was good (and/or had improved), and failure to move him to another post.

The Evidence

7. I had an agreed bundle of about 650 pages that filled two lever arch files. There were also some documents appended to the Claimant's witness statement.
8. I heard oral testimony from:
 - 8.1 For the Respondent, Mr Patel and Ms Houston-Wood
 - 8.2 For the Claimant, the Claimant.

The Hearing

9. The Claimant confirmed at the outset that his claim was for (ordinary) unfair dismissal only, and nothing else. This was a point which he reiterated while being cross-examined.
10. After the evidence was completed, and before submissions, I received a document which the Claimant had supplied to the tribunal and to the Respondent, which referred to events which were described as "protected acts". I discussed this with the Claimant, and he confirmed that he was not seeking to bring a claim alleging victimisation contrary to the Equality Act.
11. During submissions, the Claimant stated that he believed that Mr Patel had been "prejudiced" against him. I asked him about this, and he stated that he was using the word to assert that Mr Patel had reached a predetermination of certain issues, rather than listening with an open mind to the Claimant's arguments. He confirmed again that he was not seeking to raise any complaint under the Equality Act.

The findings of fact

12. Prior to his dismissal, the Claimant had worked for the Respondent for more than 20 years. Since 2011, he had been in his current job, which is a Support Officer in the Litigation Support Business Area. His duties included providing assistance to paralegals and other lawyers who were preparing documents for hearings. This included making copies of bundles of documents, and arranging for delivery of those bundles to the correct destinations.

13. At different times relevant to current dispute, the Claimant had two different line managers. These were Ms Neelim Ahmad and Mr Tony Christou. The line manager for each of those was Mr Krupal Patel.
14. The Respondent has a Managing Poor Performance (“MPP”) policy HR 71020 and a Managing Poor Performance (“MPP”) procedure HR 71022 and MPP Guidance 71200. These documents were in the bundle. Amongst other things, they state:
 - 14.1 There is a requirement to ensure that employees are aware of the level of performance required.
 - 14.2 Performance levels can be compared against any objectives set.
 - 14.3 Managers are required to provide all reasonable help, support and encouragement to help employees reach and maintain the required standards.
 - 14.4 If there is deterioration in performance, managers should identify this and address it as part of day-to-day management. In such circumstances, a Performance Improvement Plan (“PIP”) might be agreed with the employee.
 - 14.5 There is no absolute requirement to have an informal period of performance improvement and/or a Performance Improvement Plan prior to commencing formal action under the MPP procedure.
 - 14.6 Before any formal meeting, the manager is required to write to the employee giving at least 5 working days’ notice of the meeting. The letter should contain sufficient information about the alleged poor performance and its possible consequences.
 - 14.7 Notes of performance discussion meetings should be kept and supplied to employee.
 - 14.8 At any formal meeting, managers should set out clearly the specific areas where the employee is said to be failing to meet required standards and should give the employee the opportunity to respond and to comment on any issues that may have impacted upon performance, including personal issues and health issues.
 - 14.9 After formal meetings managers are required to write to the employee, including:
 - 14.9.1 a note of the discussion;
 - 14.9.2 the decision taken following the meeting;
 - 14.9.3 the improvement required from the employee;
 - 14.9.4 details of help and support available and
 - 14.9.5 the date of the next meeting.
15. The MPP procedure includes “stage 1 and stage 2 written warnings” (referred to in the Guidance as “First and Final Written Warnings”).
 - 15.1 These can only be issued after a meeting.
 - 15.2 They must include details of a review period and details of what the employee is expected to do during the review period in order to demonstrate satisfactory performance. Review period should usually be one month.
 - 15.3 There is a right of appeal against each.

- 15.4 During review periods managers are expected to monitor progress carefully and have regular meetings with the employee and give feedback. If the employee successfully reaches required standard during review, then the requirement is that they maintain that performance for 12 more months after which all action under the procedure would cease.
16. Stage 3 of the MPP procedure is to consider potential dismissal. An employee moves to stage 3 if they fail to improve their performance after a final written warning (or else fail to maintain performance for at least 12 months).
17. The Respondent's appraisal year ran 1 April to 31 March each year.
18. On 13 July 2016, the Claimant completed a skills matrix. The skills matrix listed some of the tasks that were required as part of the Claimant's duties. "Company House searches", "Land Registry searches", and "Hearing Listings" were each marked as "N/A". In relation to "counsel booking" and "CJEU-database" and "ordering transcript", these were each marked as training needed. The remaining items were marked as "competent" by the Claimant.
19. Prior to his mid-year review in November 2016. His then line manager Ms Neelim Ahmad had some concerns about his performance. These included that, in her opinion, the Claimant
 - 19.1 had ignored a job request to help out with delivery of boxes,
 - 19.2 had been the subject of a complaint from a colleague who had regarded a communication from the Claimant as aggressive and unreasonable,
 - 19.3 had ignored a request to make sure that particular document was delivered safely to the post room, and
 - 19.4 had failed to follow instructions to take some boxes to the first floor.
20. In November 2016, the Claimant's mid-year marking was "Development Needed."
21. At meetings in November 2016, Ms Ahmad discussed the Claimant's performance with him, and raised several issues, which included, amongst other things:
 - 21.1 that his email inbox was full (around 900 emails);
 - 21.2 that his email inbox included many personal emails.
22. On 9 November 2016, a Performance Improvement Plan ("PIP") was put in place.
23. On 8 December and 14 December and 15 December 2016, Ms Ahmad had further discussions with the Claimant in relation to performance issues, including the length of time that he was spending on tasks and the amount of time that he was spending reading emails, and his failure to complete certain tasks (and therefore leaving them for somebody else to complete).

24. Following these additional meetings, Ms Ahmad noted that there was some improvement in the Claimant's performance. Her decision was that there was not enough improvement for his midyear rating to be changed from "Development Needed".
25. Miss Ahmad ceased to be the Claimant's line manager in approximately February 2017.
26. There followed a period while Mr Patel directly managed the Claimant pending the start date of Ms Ahmad's replacement.
27. On 9 May 2017, Mr Patel carried out the Claimant's performance management review for the previous year, 1 April 2016 to 31 March 2017. Mr Patel gave the Claimant a rating of "Development Required". In Mr Patel's opinion, this was the appropriate rating taking into account the Claimant's performance levels and the opinion of Ms Ahmad, who had managed the Claimant for the majority of the period. Mr Patel had also had several meetings with the Claimant and had independently reached his own view that the Claimant needed to develop. Mr Patel had explained his opinion, and the reasons for it, to the Claimant at previous meetings and did so again on 9 May 2017. The concerns included the excessive amount of time taken to complete tasks allocated to the Claimant and the failure to complete some tasks at all. The Claimant appealed against Mr Patel's decision to give this rating as the outcome of the performance management review; his appeal was unsuccessful.
28. Mr Christou commenced as the Claimant's line manager on 15 May 2017 and took over day-to-day management of the Claimant from that date onwards. Mr Patel continued to have some dealings with the Claimant, as Mr Christou's immediate line manager.
29. The fact that the performance management review had led to an outcome of "Development Required" meant that the Claimant was automatically put onto a PIP for the following year. A review meeting to discuss this PIP took place on 30 June 2017. The Claimant attended as did both Mr Christou and Mr Patel. The Claimant did not believe that it was appropriate for him to be put onto a PIP, and amongst other things, suggested that he had satisfactorily achieved the requirements which Ms Ahmad had set for him in November. However, the Respondent made clear at the meeting that a PIP would be put in place. At the meeting, the Claimant did agree to be placed on the PIP, albeit reluctantly.
30. At the 30 June meeting, there was a discussion about development needs which the Claimant had indicated he wished to pursue. These were shadowing other employees (paralegals and/or solicitors) in some particular teams and also attending court hearings. Mr Christou and Mr Patel indicated that he would not be able to do those things at this time, and that his performance in his own job needed to be improved before he could take on different work outside of his job description.

31. The PIP was sent to the Claimant and was dated 3 July 2017. It had 3 main headings:
 - 31.1 “improving communication skills and conduct when interacting with others”; “improving performance”; “flexitime”.
 - 31.2 Each of those was an “area to be improved”.
 - 31.3 For each of them there were some comments about how it would be done.
 - 31.4 The timetable for improvement was said to be “immediate” and there were to be review dates every 2 weeks.

32. On 6 July 2017, the Claimant sent an email to Mr Christou again requesting to be allowed to shadow other workers and to attend hearings at the High Court. He said that these were to help him achieve his long-term aim of becoming a solicitor. Mr Christou replied to say that these were the same points which had been discussed previously, and that the Claimant needed to improve in his current job role before any consideration would be given to those items.

33. Review meetings in relation to the PIP took place regularly between Mr Christou and the Claimant. In addition, there were performance management review meetings, which took place approximately once a month. The Claimant had the opportunity to inform Mr Christou about everything that he was doing to attempt to meet the targets.

34. On 4 October 2017, Mr Christou met the Claimant and said that the Claimant’s performance remained below the required standard. By letter to the Claimant dated 13 October 2017, Mr Christou:
 - 34.1 stated that the Claimant was moving to the next stage of the MPP process;
 - 34.2 stated the reasons were the Claimant’s failure to improve in relation to the 3 elements in the PIP;
 - 34.3 referred to a particular alleged incident on 22 September 2017 (when the Claimant was said to have failed to carry out a work request);
 - 34.4 referred to alleged constant challenging of decisions made by line managers;
 - 34.5 alleged that the Claimant had been behaving unprofessionally during PIP review meetings.

35. The letter invited the Claimant to attend a meeting on 24 October 2017 and informed the Claimant of his right to be accompanied. It enclosed the MPP procedure and previous discussion notes.

36. The meeting took place on 1 November 2017 and the Claimant was accompanied by Guss Addow (union representative). At the meeting:
 - 36.1 the allegations in the letter were discussed;
 - 36.2 as were specific incidents in which it was alleged that the Claimant had not carried out his duties and or had been argumentative with colleagues;

- 36.3 there was a discussion about the fact that the Claimant had not completed all of his mandatory training by the target date of 30 June 2017;
- 36.4 Mr Christou stated that the Claimant had taken an excessive amount of time to complete those courses which he had completed (for example 7 hours to complete equality and diversity course which Mr Christou believed should take approximately one hour).
37. The 1 November meeting was adjourned and continued on 9 November. At the end of the meeting, Mr Christou indicated that he would deliberate and give his decision in writing. By letter dated 10 November 2017, Mr Christou supplied the following information to the Claimant:
- 37.1 The Respondent was giving the Claimant a first written warning in accordance with the Respondent's MPP procedure;
- 37.2 The improvement that was required was that the Claimant would adhere to all of the points in the current PIP (plus any additional points that were later added) and would not unreasonably refuse requests to carry out particular tasks, and would not unreasonably challenge line manager decisions and requests, and would behave professionally, especially during meetings with line manager.
- 37.3 The support which had been provided included the PIP and also implementation of a skills matrix which (according to Mr Christou) allowed the Claimant to inform Mr Christou of any particular support needs or training needs.
- 37.4 The review period was between Monday 20 November and Wednesday 20 December 2017.
- 37.5 There were to be meetings within the review period and on Thursday, 21 December 2017 at the end of the review period.
- 37.6 The time and place of the 21 December meeting was supplied, and the Claimant was informed that he could be accompanied to it.
- 37.7 The Claimant was told of his right of appeal against this first written warning.
38. Meetings did take place during the review period. During the review period, amongst other things:
- 38.1 Mr Christou met the Claimant and his union representative and discussed the need to comply with the PIP and the fact that the Claimant would also need to improve his standards of performance, and also complete outstanding items of the mandatory training.
- 38.2 The Respondent used a system called Visual Files. The Claimant and other employees were supposed to use this system to make notes of the tasks which they had been allocated in which they had completed on particular days. Mr Christou indicated that there were some days that the Claimant was not complying with this requirement and he told him that he should do so.
- 38.3 Mr Christou said that time recording was to be done on a daily basis.

- 38.4 Mr Christou informed the Claimant that significant improvement was required and asserted that he, Mr Christou, was attempting to try to support the Claimant in achieving better standards.
- 38.5 Mr Christou said that it was important that the Claimant understood the seriousness of the situation and that it was in the Claimant's best interests to attempt to make the required changes to its performance.
- 38.6 The Claimant also supplied Mr Christou with some documents confirming praise which he had received from lawyers in relation to matters which he had worked on.
39. The 10 November letter had said that the formal meeting at the end of the review period would take place at 1 PM on 21 December at 1017. On 21 December, the Claimant submitted a grievance to Mr Patel by email. The grievance had the title "My Grievance against Mr Tony Christou". The Claimant asserted that concerns about his performance were not warranted and that in fact, Mr Christou was motivated by the Claimant's race, and or a pre-judgement about the Claimant which had been formed following a discussion with a deputy manager, Patience Ohuruogu.
40. The same day, Mr Patel asked what outcome the Claimant was seeking from the grievance and the Claimant replied to say that he would like to have a change of manager if his grievance was upheld.
41. Mr Patel sought advice from human resources and, on 28 December 2017 referred the matter to his own line manager, Tracey Capel. Ms Capel arranged for the grievance to be investigated by Debbie Horn an employee who had no previous dealings with the matter.
- 41.1 Ms Horn commenced her investigation on 9 January 2018.
- 41.2 She interviewed the Claimant and his new union rep Alastair Cunningham on 29 January 2018.
- 41.3 Over the following days, she also interviewed the note taker from the meetings between the Claimant and Mr Christou, and the Claimant's previous rep Guss Addow and Mr Patel.
- 41.4 Ms Horn produced an investigation report dated 7 February 2018, in which she concluded that the grievance was not upheld.
- 41.5 On 8 February 2018 Ms Horn sent an email to the Claimant, including a grievance outcome letter, as well as notes of the meetings she had held with witnesses.
- 41.6 The grievance was rejected, and the letter explained Ms Horn's reasons. The letter also supplied the Claimant with details of his right to appeal.
42. In order to appeal the Claimant needed to ensure his appeal reached the nominated appeal manager (Julie Houston-Wood) within 10 working days of 8 February. The Claimant did seek to appeal, but his appeal was not submitted until 9 March 2018. The Respondent made no substantive decision on the appeal. It

was rejected by Ms Houston-Wood (having taken HR advice on the matter) on the grounds that it was submitted too late.

43. During the grievance investigation, the meeting which had been planned for 1 December 2017 did not take place, and Mr Patel took over some line management responsibilities for the Claimant from Mr Christou. Mr Christou continued to manage other members of the team. On 25 January 2018, Mr Patel held a meeting with the Claimant and asked Mr Christou to attend as well. At that meeting, Mr Patel mentioned that he was concerned that the Claimant was not completing enough work and also that the Claimant's Visual Files records were not being kept up to date.
44. Once the grievance outcome was issued, and agreements was rejected, Mr Christou resumed day-to-day line management responsibility for the Claimant,
45. A further PIP was agreed with a start date of 26 February 2018. It contained similar issues to the previous one. Meetings continue to take place between Mr Christou and the Claimant.
46. By letter dated 18 April 2018, Mr Christou invited the Claimant to attend a further meeting under the MPP procedure on 25 April 2018 letter informed the Claimant of his right to be accompanied and stated that the meeting would discuss allegations that work performance was below the expectations required.
47. At the Claimant's requests and due to the availability of his union representative, Mr Cunningham, the meeting was rearranged for 30 April 2018 at 2 o'clock. At the Claimant's further request, the meeting time was changed to 9 o'clock
48. At the meeting, the Claimant was issued a final written warning in relation to work performance. The written warning
 - 48.1 made assertions that the Claimant had failed to improve in accordance with the Performance Improvement Plan,
 - 48.2 referred to the alleged incident on Friday, 22 September 2017,
 - 48.3 suggested there was constant challenging of line managers' reasonable decisions,
 - 48.4 suggested that the Claimant obstructed performance review discussions, and had behaved unprofessionally during meetings, including on 28 March 2018
 - 48.5 referred to the Claimant's general conduct and behaviour, including alleged failures to allow access to his Outlook email inbox and clear his Outlook inbox when asked to do so.
49. The letter stated that:
 - 49.1 there would be a review period running from 1 May 2018 to Friday 1 June 2018;

- 49.2 there would be reviews every week during the period on 9 May, 16 May and 23 May;
 - 49.3 there would be a meeting at the end of the review - on 28 May – to discuss work performance;
 - 49.4 the Claimant could appeal against this written warning within 10 working days by writing to appeal manager, Michael Jones.
50. There were various enclosures, including notes of previous meetings, with the letter.
51. Later that day, 30 April 2018, the Claimant's representative - Mr Cunningham - wrote to Ann Tomlinson asserting that he had concerns in relation to Tony Christou's line management of the Claimant and his conduct of the meetings. The email requested that a new manager be found for the Claimant to "ensure a fair supportive relationship".
52. Ms Tomlinson considered that request and investigated whether there are were any alternative vacant roles within the Department. There were no roles which were vacant which were suitable for the Claimant either within Legal Ops or the business team.
53. The Respondent did not have a policy that employees automatically had the right to be moved to a new team on request, either as a general rule, or where the stated reason for the request was an alleged difficult relationship between the employee and the line manager. In reaching this finding of fact, I have taken account of the Claimant's allegation in the hearing that such a policy existed. In my judgment, it is inherently implausible that such a policy would exist, and the Claimant produced no documentary evidence to support his assertion. The Claimant said in evidence that he had been told about such a policy by a union representative, but did not call that person as a witness. The Claimant also stated that he had had moves approved in the past. It is true that the Claimant did other work for the Respondent in the past. However, that does not convince me that the employer had approved previous transfers due to an obligation to do so, as opposed to making a discretionary decision to agree to a request.
54. During the review period, Mr Christou received some complaints from colleagues in relation to the Claimant's work which he forwarded to the Claimant for comments.
55. A review meeting took place on 9 May 2018, at which the Claimant's performance was discussed and it was suggested by Mr Christou that performance had not improved.
- 55.1 There was discussion of the colleagues' complaints about the noncompletion of certain tasks.
 - 55.2 It was suggested that the Claimant or had taken 5 hours and 47 minutes to type a 1.5 pages of minutes, summarising 4 pages of notes.

- 55.3 It was suggested that entries on Visual Files were inaccurate.
- 55.4 The Claimant stated that he did not welcome the support of Mr Christou during the review period.
56. By letter dated 11 May 2018, the Claimant issued an appeal against the final written warning. The appeal alleged:
- 56.1 that Mr Christou had been aggressive and did not listen to the Claimant.
- 56.2 That Claimant's performance had improved significantly.
- 56.3 That Mr Christie was not properly taking into account evidence which was in Claimant's favour, including praise which he had received for his own work and for extracurricular activity such as a presentation he had given for the Cabinet Office as part of Black History Month.
57. On 18 May 2018, Mr Jones wrote to the Claimant inviting him to a meeting to discuss the appeal on 31 May 2018. At the Claimant's request, the meeting was changed to 4 June 2018 to accommodate his union representative.
- 57.1 At the meeting on 4 June 2018, Mr Jones asked for some additional evidence to be supplied to him in relation to the Claimant's work activities and time recording.
- 57.2 By letter dated 11 June 2018, the appeal was rejected.
- 57.3 Mr Christie's decision to issue the final written warning was upheld and Mr Jones rejected the suggestion that this decision had been biased or showed a lack of objectivity.
- 57.4 The appeal officer also found that Mr Christou had followed the correct MPP procedure and the guidance in relation to that procedure.
- 57.5 Mr Jones found that there was no evidence of improvement in the Claimant's performance in relation to any of the three areas referred to in the PIP.
58. While the appeal was being considered, review meetings continued. These were conducted by Mr Patel rather than Mr Christou.
59. A review meeting took place on 16 May 2018. Amongst other things discussed was that Claimant's time recording included such things as having breakfast, reading intranet news for 1 hour 39 minutes, reading emails and talking with team for 5 hours and 34 minutes, spending 3 hours and 46 minutes booking one travel and accommodation request.
60. Performance reviews also took place on 30 May 2018 and 6 June 2018. Mr Patel, and the Claimant also had discussions in between meetings, including Mr Patel, replying to the Claimant's comments and observations in relation to the meeting notes.
61. Following the issuing of the decision on the appeal. Mr Patel wrote to the Claimant by letter dated 12 June 2018 to invite him to a meeting under stage 3 of the MPP process.

62. The meeting date was originally to be 20 June 2018. At the Claimant's request, the meeting was moved to 26 June 2018. The meeting notice stated that the meeting would be one hour, and no request was made by the Claimant or his representative for a longer hearing. On 26 June 2018, the meeting took place and came to an end after an hour. Someone else needed the meeting room, and so there was no opportunity to extend the meeting on the day. After the meeting, a complaint was made, by Mr Cunningham, to Mr Patel's manager that more than one hour should have been set aside for the meeting. His then manager, Ms O'Neill, replied on 27 June 2018 to say she would consider the matter. She replied on 3 July 2018 to inform Mr Cunningham that the Respondent's guidance had been followed.
63. On 27 June 2018 the Claimant asked for the opportunity to submit some further documents to Mr Patel before he made his decision.
64. The Claimant had queried whether Mr Patel was the correct manager to make the decision, and Mr Patel gave consideration to that argument. In due course, having considered the procedures, and taken HR advice, he decided that he was the right person to make the decision.
65. The Respondent's guide to MPP (at 10.1) states that employees will move to stage 3 of the procedure if they fail to improve their performance after final written warning. It says that "the manager" must meet with the employee and make a decision as to whether to dismiss. It says decisions to dismiss an employee will normally be taken by "the manager", who must be a "Higher Officer" or above, and who must be at least one grade higher than the employee under consideration. If "the manager" does not meet both these criteria, then the decision must be taken by a manager in the line management chain who satisfies these conditions, (normally the managers manager). Mr Patel did meet the two conditions of being a "Higher Officer" or above, and at least one grade higher than the Claimant.
66. Prior to taking the decision about whether or not to dismiss the Claimant, Mr Patel considered all of the information available to him, including what he had heard at the meeting with the Claimant.
67. Mr Patel wrote to the Claimant on 3 July 2018 to say that he was still reviewing matters and considering his decision and that he would give the decision by 16th of July. On 6 July 2018, Mr Patel wrote to the Claimant informing him that the decision was that the Claimant would be dismissed on the grounds that his work performance was not acceptable and had not reached the required standards. The letter stated that the Claimant was dismissed on the grounds of poor performance. He was given 13 weeks' notice, meaning that his last day of service would be 5 October 2018.
68. The letter informed the Claimant that he had the right to appeal by submitting an appeal document to Julie Houston-Wood within 10 working days.
69. He submitted his appeal by email dated 18 July 2018 to Ms Houston-Wood.

- 69.1 It stated that the decision to dismiss him lacked merit and was wholly unreasonable.
- 69.2 It suggested that Mr Patel had had a difficult relationship with the Claimant and had refused to allow the Claimant to shadow a paralegal in the past, and was biased against the Claimant.
- 69.3 It said there were documents which demonstrated that his work output levels had been much higher than he had been given credit for by Mr Christou and Mr Patel.
70. Ms Houston-Wood worked in a different geographical region and a different work area to Mr Patel or Mr Christou. Her only previous dealing with the Claimant had been when she made the decision mentioned above, that his grievance appeal should not be processed because he had submitted it out of time.
71. Ms Houston-Wood wrote to the Claimant on 22 July 2018, suggesting that she meet him on 31 July. At the Claimant's request, this meeting was postponed to 8 August 2018 so that his union representative could accompany him.
72. Ms Houston-Wood also contacted Ms Tomlinson to ask about the request which had been submitted for the Claimant to be allocated a different job.
73. The appeal meeting took place on 8 August 2018, and the notes are in the bundle. In addition to the points in the appeal letter, matters which were raised included:
- 73.1 Mr Cunningham suggested that Mr Patel (as Mr Christou's line manager) had not been sufficiently independent and that somebody else should have dealt with the matter.
- 73.2 Mr Cunningham also suggested that it was wrong for the Claimant to have been dismissed given that he had requested a move to a different section and the Respondent had not actioned that.
74. By letter dated 14 August 2018, Ms Houston-Wood wrote to the Claimant to say that she rejected his appeal and that therefore the decision to dismiss him would stand.
- 74.1 She rejected the argument that Mr Patel was not the appropriate decision-maker.
- 74.2 On the basis of the argument that one hour had not been long enough for the meeting, she said that the invitation to the meeting stated that the meeting was scheduled for one hour and therefore, the Claimant's representative ought to have said in advance of the meeting if they believed that they required longer than one hour to put their case.
- 74.3 She rejected the argument that Mr Patel been biased against the Claimant.
- 74.4 Ms Houston-Wood said she considered the additional evidence which the Claimant had supplied with his appeal letter about work output. The documents the Claimant gave her had not been the documents which the Respondent requires employees to complete to measure work output.
- 74.5 Her decision was that while there may have been some improvement in the

time which the Claimant took to complete certain tasks (eg bundling and photocopying), he was still far below the required standards expected of an employee in his post.

74.6 Her letter also stated that her opinion was that appropriate support had been offered to the Claimant.

75. Ms Houston-Wood carefully considered the points which had been made to her during the appeal, and she rejected them for the reasons stated in her decision letter. She believed that Mr Patel had taken relevant all relevant considerations into account. She did not think that the Respondent had acted incorrectly by not complying with Mr Cunningham's request that the Claimant be moved

The Law

76. Sections 98(1)(b) and (2) of the Employment Rights Act 1996 (ERA) set out the potentially fair reasons for dismissing an employee. As per Section 98(2)(a), one such reason is where the dismissal "*relates to the capability ... of the employee for performing work of the kind which he was employed ... to do*". That is the reason relied on by the Respondent in this case.

77. As per Section 98(3)(a) ERA capability means "*capability assessed by reference to skill, aptitude, health or any other physical or mental quality*".

78. The Respondent bears the burden of proving, on a balance of probabilities, that the Claimant was dismissed for a reason within the definition in Section 98(2).

79. In order to do so, the Respondent must prove that it honestly believed that the Claimant was not sufficiently capable of performing the work which he was employed to do, and that that belief was the reason for the dismissal. It is not necessary for the Respondent to prove that the Claimant actually was incapable.

80. If the Respondent fails to persuade the tribunal that it had a genuine belief that the Claimant's capability was below the required standard and that it genuinely dismissed him for that reason, then the dismissal will be unfair.

81. Provided the Respondent does persuade me that the Claimant was dismissed by reason of capability, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA. In considering this general reasonableness, I must take into account the Respondent's size and administrative resources.

82. The burden of proof is neutral, and I must consider, amongst other things,
82.1 the reasonableness of the Respondent's belief in the Claimant's lack of capability (which includes consideration of the material in front of the decision-maker which led him to form that belief), and
82.2 whether the Respondent conducted a reasonable investigation to prior to making its decision, and

- 82.3 whether the Respondent acted reasonably or unreasonably in treating the belief as a reason to dismiss.
83. A dismissal will not be unfair simply because this particular Respondent set higher standards for performance than comparable employers set for their own employees, provided that the standards set are not unrealistically high.
84. Some examples of procedural defects which might lead to a finding of unfair dismissal include (but are, by no means, limited to) where there has been:
- 84.1 No proper investigation/assessment of the employee's performance, and/or
 - 84.2 Insufficient notification to the employee of the alleged concerns, and/or
 - 84.3 Insufficient warning of the consequences of failing to improve, and/or
 - 84.4 No reasonable chance to improve, and/or
 - 84.5 Insufficient opportunity for the employee to comment on whether his performance is adequate, and/or on any reasons for poor performance, and/or on whether further support or training is being requested
85. The ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") is relevant to dismissals relating to capability and should be taken into account by a tribunal when determining the reasonableness of a dismissal (see s207 Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A)). If the dismissal is found to be unfair, the tribunal can increase (or decrease) an award of compensation by up to 25 per cent for an unreasonable failure to follow the ACAS Code if it considers it just and equitable to do so. See s207A TULR(C)A.
86. Amongst other things, the ACAS Code discusses the relevance of warnings. Eg at paragraph 19: "*Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.*"
87. A failure by an employer to provide a mechanism for appealing against a decision to dismiss could lead to a finding of unfair dismissal, and also would be contrary to the guidance given to employers by the ACAS Code. At paragraph 27 of the ACAS Code, it states that an appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case. Ideally, the appeal should be heard by a higher level of management than that which made the decision to dismiss.
88. It is not the role of this tribunal to access the evidence and to decide what this particular Respondent's minimum requirements ought to have been, or whether the Claimant did / did not have the ability to perform to those minimum requirements, and/or whether the Claimant should or should not have been dismissed. In other words, it is not my role to substitute my own decisions on those issues for the decisions made by the Respondent.

Submissions

89. The Respondent referred to case law that it considered relevant. It asserted that there had been a fair and reasonable procedure, a genuine belief, and a decision within the band of reasonable responses. It asserted that the Claimant was effectively trying to challenge individual aspects of the alleged poor performance and was asking me to substitute my decision for that of the employer.
90. The Claimant said that he had had good performance over many years, and the problem was with the perception of Mr Christou and Mr Patel, rather than his own performance. He asserted that the refusal to allow him to shadow colleagues in other teams showed a bias against him. He did not accept that warnings had been validly issued in good faith, but, even if they had, he asserted that there had been sufficient improvement in response to those warnings to mean that dismissal was unfair. He also asserted that the Respondent acted unreasonably by not moving him to another team, with a different manager, despite the fact that his union representative had written to a senior officer requesting this.

Analysis and conclusions

91. The PIPs which were drawn up related to the work which the Claimant was employed to do, as did the matters referred to in the Respondent's letters to the Claimant in relation to the MPP.
92. The standards that were set were not unreasonably high.
93. It was not impossible for the Respondent to measure performance or possible improvement. It is true that to some extent it is a matter of judgment to decide (for example) how long a particular photocopying job ought to take a reasonably competent employee, and (for example) and whether the Claimant was taking longer than colleagues to undertake comparable jobs. However, based on the evidence presented to me, it appears that Mr Christou and Mr Patel made genuine efforts to make fair assessments of whether the volume of work being produced by the Claimant was sufficient. For example, when the Claimant was allocated a job on a particular day, but left the job incomplete at the end of the day, it was possible to make a reasonably accurate assessment of what percentage of the task had been completed. By then noting how long a different colleague took to complete the task the following day, it was possible to make a reasonably accurate comparison of the Claimant's speed on the task compared to the colleague's.
94. It was not unfair or unreasonable of the Respondent to decline to slot the Claimant into another post.
 - 94.1 The Claimant provided no evidence to dispute the Respondent's assertion that it had no vacant posts for Litigation Support Officers. The Respondent produced emails showing that Ms Tomlinson had asked colleagues if they had vacancies, and had received replies to say "no".
 - 94.2 The Claimant asserted that even if all the posts were filled, the Respondent

should have required the holder of one of the filled posts to switch places with the Claimant.

- 94.3 The basis of the Claimant's argument was not that he lacked capability to do his own job and was only capable of doing alternative work. His argument was that the Claimant was dissatisfied with Mr Christou as line manager, and believed he had the right to insist upon a change.
 - 94.4 The Respondent had investigated the Claimant's grievance and not upheld it. In those circumstances, it was not unreasonable for the Respondent to retain Mr Christou as the Claimant's line manager.
 - 94.5 Furthermore, in May 2018, the Respondent arranged for Mr Patel rather than Mr Christou to hold the performance discussions with the Claimant.
95. Having taken into account the evidence presented to him, Mr Patel formed a genuine belief that the Claimant's performance was so inadequate that dismissal was potentially appropriate.
 96. Mr Patel formed a genuine opinion that the Respondent had complied with its own procedures prior to reaching Stage 3 of the MPP procedure. He was satisfied that the Claimant had been warned that the consequences of a failure to improve might be dismissal, and that the Claimant had been given sufficient opportunity to improve, and had been offered support to help him to improve.
 97. Mr Patel had reasonable grounds to form those opinions.
 98. The evidence satisfies me that the Respondent did follow its own procedures prior to reaching a decision to dismiss and that those procedures are fair and reasonable. The procedure was not one which was so unreasonable that no reasonable employer would have adopted it.
 99. Mr Patel's reason for dismissing the Claimant was that he believed that the Claimant's performance was inadequate. His decision to dismiss was made after properly considering the alternatives and was not outside the band of reasonable responses.
 100. Ms Houston-Wood approached the appeal with an open mind and I am satisfied that she would have overturned the dismissal if she had concluded that the procedure was faulty, and/or that there was evidence which Mr Patel had not taken into account which should lead to a different outcome.
 - 100.1 She looked at the evidence which the Claimant submitted. Her decision that these items did not persuade her that Mr Patel had come to the wrong decision (and/or had overlooked relevant evidence) was not an unreasonable one.
 - 100.2 She decided that she should only look in detail at the most recent review period. Given that the decision to issue the Final Warning had been the subject of a separate earlier appeal (dealt with by Mr Jones), that was not unreasonable. In any event, she did not prevent the Claimant alluding to the full history of the matter.

100.3 Having contacted Ms Tomlinson, and considered her response, Ms Houston-Wood decided that the Respondent had adequately dealt with the Claimant's request for a change of team, and had genuinely come to the view that there were no vacancies for him to be moved into.

Outcome and next steps

101. For the reasons stated above, my decision is that the dismissal was not unfair and that the claim fails. There is therefore no need for a remedy hearing, and that hearing is cancelled.

Employment Judge Quill

Date: 01/10/2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

01/10/2019

FOR EMPLOYMENT TRIBUNALS