EMPLOYMENT TRIBUNALS

Claimant: Miss E Crotty

Respondent: SMRS Limited

Heard at: Manchester **On:** 14, 15 and 16 January 2020

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr J Heard, Counsel

JUDGMENT

The judgment of the Employment Tribunal is that the claimant was not unfairly dismissed and the claim of unfair dismissal is not well-founded.

REASONS

Introduction

1. The claimant was employed by the respondent from 29 May 2007 until her dismissal on 4 June 2018. By the end of her employment the claimant was the Operations Manager, a role which supported the respondent's Service and Performance Team in the delivery of weekly billings and the associated commercial and financial reporting. The claimant alleges that she was unfairly dismissed. The respondent contends that the claimant was dismissed by reason of capability, that is performance, following a full and fair procedure. The claimant's primary assertion is that there were no performance issues whatsoever and that her dismissal was motivated by a desire to get rid of her after she had raised a grievance in November 2017.

The Issues

2. The issues were confirmed by Employment Judge Howard at a preliminary hearing on 1 April 2019. The issues were as follows:

(1) Can the respondent establish a potentially fair reason for dismissal falling within section 98(1) and (2) of the Employment Rights Act 1996? The respondent states that the reason was capability. The claimant disputes this and believes that her dismissal was motivated by a desire to get rid of her after she raised a grievance.

(2) If so, is that reason fair in the circumstances applying section 98(4) of the Employment Rights Act 1996? The claimant argues that her dismissal was substantively and procedurally unfair and that the respondent failed to follow their own procedures.

(3) If the claimant has been unfairly dismissed:

(a) do the *"Polkey"* principles apply to reduce any compensatory award;

(b) and/or did she contribute to her dismissal to any extent by her conduct?

(4) The claimant claims an uplift of any award for the respondent's unreasonable failure to follow the ACAS Code of Practice on disciplinary and grievance procedures.

3. It was confirmed with the parties at the start of the hearing that these were the issues to be determined. Other issues in relation to remedy were left to be determined at a subsequent remedy hearing, should that be required.

The Hearing

4. The claimant represented herself throughout the hearing. The respondent was represented by Mr Heard of counsel.

5. The Tribunal considered a bundle of documents which ran to approximately 262 pages, the content of which was largely agreed. Any pages referred to in the witness statements or expressly referred to by the parties were read by the Tribunal. The claimant did make an application for a document to be considered, to which the respondent objected on the basis that it was without prejudice. It was confirmed to the Tribunal that the relevant document was headed "without prejudice and subject to contract" and was part of correspondence between the respondent's solicitors and the claimant's solicitors as part of negotiations. On that basis the Tribunal decided that it would not consider that document. The claimant did not put forward any arguments which would result in the protection of "without prejudice" not applying (nor which would stop the documents being inadmissible in accordance with the provisions of section 111A of the Employment Rights Act 1996).

6. On the final day of the hearing the respondent produced three additional pages (60A, 60B and 62A). This documentation related to the claimant's performance in 2017. The respondent apologised for the late production of these documents, but explained that the respondent had not identified that they were relevant to the issues in the case. They had been identified by Miss Cope, a witness, following questions that were put to her whilst she was being cross

examined. The Tribunal did allow the documents to be added to the bundle and to be considered at the hearing. However, as a result of the documents being admitted, Miss Cope was recalled to give evidence and the claimant was able to further cross examine her.

7. The Tribunal heard evidence on behalf of the respondent from: Miss K Cope, the Head of Performance and Value; Mrs Sturgess, Agency Director; and Mr T Windsor, one of the respondent's Managing Partners and founders. Each witness had prepared a statement, attended the hearing, and was cross examined by the claimant. Miss Cope was the subject of lengthy cross examination by the claimant.

8. The claimant gave evidence and was cross examined by the respondent. The claimant's witness statement was only four pages long and did not provide much evidence about the historic issues which were part of the claimant's submissions and were the focus of her questions in cross examination. Nonetheless the claimant was cross examined about issues relating to her employment from 2016 onwards.

9. The claimant's witness statement included elements that were "without prejudice" and/or inadmissible under section 111A of the Employment Rights Act 1996, and, at the outset of her giving evidence, the Tribunal confirmed that it would not consider the contents of paragraph 12 and the beginning of the first sentence of paragraph 13 of her witness statement.

10. The parties made submissions on the afternoon of the third day of hearing. In the light of the fact that the respondent was represented, the claimant was offered the opportunity to decide whether she wished to give her submissions first or would prefer to make her submissions after she had heard what the respondent's representative had to say. The claimant chose to make her submissions after she had heard the respondent's submissions. The respondent's representative provided the Tribunal with written submissions as well as making oral submissions. The claimant made oral submissions. The case concluded at 4.30pm on the third day, and therefore judgment was reserved.

11. Based on the evidence heard, and insofar as relevant to the issues that must be determined, the Tribunal makes the findings set out below.

Findings of Fact

12. The claimant was employed by the respondent from 29 May 2007. The contract which applied at the start of her employment, which was included in the bundle (pages 34-46), records the claimant as being an Account Coordinator. The contract also includes a clause which confirms that the claimant should carry out such other duties as the company from time to time reasonably directs. The respondent has a capability procedure (57-60).

The claimant's role

13. The claimant's role with the respondent changed significantly over time. The evidence of Miss Cope was that in 2014-15 95% of the claimant's time was taken with client matters, whereas by 2016-17 probably 5% of what she did was directly client related.

14. In 2016 there was a significant restructure at the respondent which resulted in substantial redundancies. It was the respondent's case that the claimant's role changed significantly following this restructure, to become more finance and internal focussed. The claimant disputed this. In answer to questions put in cross examination she contended that she was not responsible for financial forecasting in her role until September 2017. The claimant relied upon a job description dated 19 January 2017 (pages 229-231). This records her duties and responsibilities as Client Operations Manager. These included:

(1) working collaboratively across the respondent to deliver accurate and efficient billing and reporting processes;

(2) updating the relevant manager on billing progress each week; and

(3) liaising with the relevant teams to ensure that all appropriate income was released in any relevant month.

15. The Tribunal heard extensive evidence about the respondent's billing processes. Part of the claimant's role involved ensuring that each month the correct proportion of bills and invoices were recorded and allocated appropriately. The respondent's case was that part of the claimant's role was also to ensure that the financial forecasts were complete and accurate. That forecasting would enable the Senior Management Team of the respondent to identify not only the financial information on a monthly basis, but also the forecasts and projections for work and income in future months.

16. Miss Cope described the claimant's role as a "business critical" position and her evidence was that if the role was not carried out correctly it could have a significant impact on the financial health of the respondent's business and the decision making of the leadership team. When questioned about this, the claimant did not accept that her role in undertaking such tasks was business critical, albeit she did confirm that if she did not do her job correctly it may have significant implications.

2017

17. During 2017 the claimant reported to Mrs L Webb, the respondent's Agency Operations Manager. The Tribunal did not hear evidence from Mrs Webb. However, the Tribunal did hear evidence from Miss Cope, who was Mrs Webb's line manager, of the conversations she had with Mrs Webb during 2017 about the claimant's performance in role. The claimant's evidence was there were no issues with her performance at all and that Mrs Webb never raised any issues whatsoever with her.

18. What is common ground is that a meeting took place on 14 November 2017 between the claimant, Mrs Webb and a member of the respondent's HR team. The claimant was upset about the way in which this meeting was arranged and the explanation given for the HR person's attendance.

19. The Tribunal was provided with a written note of the meeting (pages 63-64). The claimant, in answer to questions, confirmed that she thought that the notes did

roughly record what was said in the meeting. Those notes record a discussion about the claimant's performance in her role, and towards the end of the note, record:

> *"Your* [job description] *was written for you and therefore every part should be being done. At the moment* [we] *don't think it does and that needs to change and the onus is on you, because if it's not then we'd need to begin performance review, which nobody wants to happen."*

20. The evidence of Miss Cope was that this meeting was intended to be a more serious conversation with the claimant about her performance, as Miss Cope did not feel that informal conversations had achieved what was required. She also explained that the timing of the meeting coincided with the start of the respondent's new financial year.

21. The claimant in her evidence was adamant that the meeting on 14 November 2017 was not about her performance. She described how she was invited to a one-to-one meeting, which is all she expected it to be. She then felt that bad things were said about her and did not accept that this was a performance meeting.

Were performance issues raised with the claimant before April 2018?

22. A key part of the claimant's case was that performance issues were not raised with her prior to April 2018, and that any performance issues raised were in response to her raising a grievance with the respondent on 16 November 2017. In her evidence to the Tribunal, in her answers to questions during the respondent's internal processes, and in the solicitor's letter written on her behalf dated 18 May 2018 (198), the claimant asserted that none of the performance issues that were subsequently raised with her, had ever been raised before a meeting which took place on 6 April 2018.

23. The Tribunal does not find the claimant's evidence in this respect to be accurate or credible. It is clear that the meeting on 14 November 2017 did address what the respondent perceived to be performance issues with the claimant, irrespective of the claimant's view of the merits of those issues. The claimant's refusal to accept that those were matters of performance and her statements that performance issues had never been raised, are inconsistent with what is recorded in the notes of that meeting.

24. In her evidence the claimant appeared to find it difficult to distinguish between: when she disagreed with the performance issues which were being raised; and whether performance issues were raised at all. Her evidence was that any performance issues were not genuine because she was doing the job perfectly well. The Tribunal finds that the claimant did not accept that performance issues were being raised with her because she disagreed with the issues being raised. Therefore, when the claimant said that performance issues had never been raised prior to April 2018, this was not correct. Performance issues were certainly raised with her on 14 November 2017 at the very latest (being prior to the grievance being raised).

The grievance

25. Immediately following the 14 November 2017 meeting, the claimant raised a grievance (66-68). The claimant's grievance raised complaints about her role and the tasks that she had been required to do. It culminated with a statement that the reason that the claimant had been left with no choice but to raise the grievance, was because of the meeting and because she was accused of not doing her job properly.

26. The claimant's grievance was heard by Mrs Sturgess, an Agency Director. Mrs Sturgess met with the claimant on two occasions (27 November and 15 December 2017) and the Tribunal was provided with the lengthy notes of those meetings (71-80 and 82-87). The claimant alleges that: the outcome of the grievance process was dealt with in a way only to suit the respondent's purpose; that the main areas of her concern were not addressed or investigated; and that the manager overseeing the grievance had made her decision based only on her personal view.

27. The Tribunal heard evidence from Mrs Sturgess, who emphasised that she had spent considerable time trying to address the grievance and assist the claimant going forward. Her evidence was that she could do two things to assist the claimant: change her line manager; and clarify her role and set clearer objectives. These aspects were addressed in the outcome letter of 5 January 2018 (90-91), which confirmed that the claimant's line manager was being changed to Miss Cope and a new job description had been written for (and agreed with) the claimant, which outlined the tasks that she was expected to do.

28. The claimant's particular criticism of the grievance outcome was that it did not explicitly say that her grievance was or was not upheld. It also did not provide any detail of what was being done in response to the bullying allegation. The claimant gave evidence that she believed that the bullying allegations had been upheld. There is nothing in the outcome letter which suggests that is the case. Mrs Sturgess' outcome focussed on the future and on resolving the claimant's issues, rather than determining the merits of her complaints. The Tribunal finds that the way the grievance was handled was appropriate and that Mrs Sturgess considered it in good faith and endeavoured to reach what she believed was an appropriate outcome. The outcome was clear.

29. The claimant did not appeal against the grievance outcome, although she was informed in the decision letter that she had the right to do so.

Meetings in January and February 2018

30. Miss Cope became the claimant's line manager and meetings took place between the claimant and Miss Cope on 24 January and 20 February 2018, although there was considerable dispute between the parties about what occurred at those meetings. The only contemporaneous evidence of the meetings are diary entries confirming that they took place. The claimant arranged the second meeting. There are no agreed notes which record what was discussed.

31. The claimant's evidence was that these meetings did not discuss her performance at all. She believed the second meeting, the one that she had

arranged, was arranged following an email sent to all staff telling them to arrange a quarter one feedback meeting. Her evidence was that she perceived that the second meeting had resulted in a positive outcome and a pay increase that was subsequently given to her. In her witness statement the claimant made no reference whatsoever to what actually happened at these meetings, which she accepted in evidence had taken place, save to allege that *"the respondent has lied about other meetings that took place before the hearing, in order to try to cover up the fact that they had failed to follow their own procedure".*

32. In her evidence, Miss Cope provided a detailed account of exactly what was discussed at these two meetings. She said that she told the claimant that performance issues were becoming more serious and would have to be addressed formally. When questioned, Miss Cope confirmed that it did not affect her evidence if the second meeting was arranged by the claimant as part of the quarter one review process, as the matters discussed were exactly those which she would expect to be discussed in a review meeting.

33. Included in the bundle (103-109) was a copy of the claimant's revised job description as Operations Manager and her roles and responsibilities, with annotations. It is this job description which had been confirmed with the claimant as part of the grievance appeal, and to which the claimant was expected to be working. It was Miss Cope's evidence that she recorded against this job description what she believed to be the progress made against each element of it, at each of the January and February meetings, with the entries in different colours for each meeting. Miss Cope accepted that this document had never been sent to the claimant or given to her, but she contended that the claimant was shown this document during the meetings.

34. It would clearly have been ideal for there to have been documents and emails recording what had happened in the meetings and the issues that had been identified, and it would have been sensible for Miss Cope to have sent the claimant the annotated job description as a record of the meetings. However, the Tribunal does not find (as the claimant alleged) that Miss Cope fabricated her account of, or her record of, the content of the meetings. It accepts the note as a record of what was discussed and prefers the evidence of Miss Cope where there is any dispute. In reaching this conclusion the Tribunal took into account: its view of Miss Cope's evidence; the absence of anything specific in the claimant's witness statement about what was said in the meetings; and the findings recorded above about the claimant's evidence in the light of the record of the November meeting.

35. The claimant placed significant emphasis on a pay rise she subsequently received from the respondent as evidencing that there were no performance issues raised with her whatsoever. Mrs Sturgess and Mr Windsor both gave evidence in relation to the pay increase. Their evidence was that in fact the claimant had received the minimum increase given to any employee, which equated to a cost of living increase, and the respondent felt it appropriate to give the claimant this increase. The Tribunal does not find that the pay increase at cost of living level, at a point when the claimant was being performance managed but was not in any formal procedures, undermined Miss Cope's evidence about these meetings or supported

the claimant's contention that Miss Cope lied about what was discussed at the meetings.

Final written warning

36. On 5 April 2018 the claimant was invited to a capability hearing. The invite letter (135 and 136) describes what the hearing was to consider. These were performance issues arising from the understating of financial income.

37. The immediate catalyst for the letter was an issue relating to a significant client of the respondent about which there had been an exchange of emails between the claimant and Miss Cope. The Tribunal heard considerable evidence about this client and the way in which the respondent's finances operated. The claimant's evidence was that: she had done exactly what she was asked to do in the relevant emails; that part of the issue in relation to that client's billings being queried was explained by a conversation to which Miss Cope had been a party (but had forgotten); and this client was treated differently to almost all of the respondent's other clients – something which had been done at the express request of Mrs Webb. Miss Cope's evidence was that whilst the claimant may have answered the task-specific questions asked, she had not provided the broader overview required. Her evidence was that part of the claimant's responsibilities were ensuring that the information available to the Senior Management Team was accurate and enabled appropriate forecasting and business decisions, and that the claimant's role required her to take a more holistic and far-reaching overview of the financial reporting. This distinction between task-specific actions, and an expectation that the claimant would take responsibility for ensuring that the broader overview was accurate, does appear to reflect a key difference between the claimant's evidence about her role, and the evidence from Miss Cope about what was expected of the claimant. Miss Cope's view was that this accurate reporting was not provided. It is neither appropriate nor necessary for the Tribunal to reach findings on the details of the issues raised and/or on whether the precise task requested had been undertaken. The Tribunal does find that Miss Cope's concerns were genuinely held.

38. The capability hearing took place on 6 April 2018. The notes (137-141) were accepted by the claimant to broadly reflect what was discussed although the claimant stated that some entries were inaccurate and some matters had not been recorded. The claimant's view of the meeting was that she was not given the opportunity to respond to matters and simply had allegations made against her. The notes record a more detailed and rounded conversation about the specific issues, Miss Cope's concerns, and some attempts by Miss Cope to support the claimant. In the meeting there was some discussion about whether the claimant had the support she needed for the role. The claimant did not request any additional support, her response was that she did everything that she needed to and she got it done.

39. Following this meeting, the claimant was given a final written warning. A letter was sent to the claimant on 9 April 2018 (143-145). That recounted what was discussed in the meeting and (at page 145) explained what was needed from the claimant in the future. The letter made clear that were there to be further capability action that could lead to the termination of the claimant's employment. The letter said:

> *"In accordance with your job description which I have attached for your reference, I need you to deliver against this job description and not just deliver parts of it. I need an accurate monthly picture of the agency's income and all billing procedures need to be followed. I also need you to make sure that you investigate any issues thoroughly in a timely manner."*

40. Accordingly, the decision did outline to the claimant what was required of her, albeit it did not necessarily do so in as clear a form as may have been possible (such as if she had been given a list of required tasks, and timescales for their completion).

41. The respondent's capability procedure (57-60) provides *"The company is not obliged to follow the stages below if the circumstances warrant the omission of one or more of the warning stages".* The first formal stage would normally be a written warning. The second formal stage is a final written warning which the policy records should be issued *"where there has been no or insufficient improvement in the employee's performance following the issue of a written warning or where the underperformance is sufficiently serious".* Miss Cope explained the move straight to final written warning as being because of the time during which performance management had been undertaken and the number of warnings that the claimant had received. In doing this she referred back to warnings she believed the claimant had received since April 2017. The Tribunal finds that Miss Cope imposed a final written warning based upon her own considered view of the claimant's performance, what she believed to be the history of discussions with the claimant, and the failings which she had identified.

Appeal against final written warning

42. The claimant appealed against the final written warning on the basis that she thought the comments made were unfair and untrue, and the respondent had not complied with its own procedure. That appeal was considered by Mrs Sturgess. An appeal meeting took place (162-168). An outcome was provided dated 16 May 2018 which addressed the appeal in detail (pages 187-189). The final written warning was upheld. The Tribunal accepts Mrs Sturgess' evidence about this appeal and accepts that she considered it carefully. The Tribunal does not find that this appeal was predetermined or part of a predetermined process against the claimant.

Subsequent performance

43. The claimant's evidence was she did not change her approach towards the significant client following the final written warning. She believed that the way she processed that client's billings and financial information had been previously authorised, was right, and she was awaiting the appeal outcome. Accordingly, on the claimant's own evidence, between the final written warning on 9 April 2018 and the appeal outcome of 16 May 2018 the claimant continued to operate that client's financial recording in a way which was contrary to that requested by Miss Cope. The claimant did not rectify or amend any of the previous information, as she had been asked to do.

44. Miss Cope did send the claimant emails relating to things that the claimant needed to do and/or which Miss Cope identified that the claimant had not (in her view) done correctly: on 18 April (150-154); 25 April (156-159); 11 May (174-176);

and 15 May (178-182). The claimant did not accept that any of these emails indicated any performance issues and contended that she always did what she was asked to do. Miss Webb (the claimant's former manager) also emailed Miss Cope on 14 May 2018 having identified what she believed to be a longstanding issue which had not been rectified by the claimant (177), which the claimant did not accept.

45. On 16 May 2018 Mr Windsor also emailed Miss Cope about financial issues (186). This followed the respondent's Management Accountant raising concerns about the way that the respondent's finances were being recorded (185). The accountant's email stated that the risk was that the management accounts were being significantly mis-stated. This email was forwarded on by Mr Windsor, with him adding that he felt the email did not do justice to the seriousness of the issues. In the Tribunal hearing the claimant's evidence was that she believed that the Management Accountant was raising the need for a change in the way in which the respondent recorded and forecasted its finances, rather than a criticism of the way that it had been done (although this was based upon the claimant's reading of the email and not any discussion which she had at the time with the Accountant or anyone else). However, the evidence of Mr Windsor was very clear: that the email was only part of what had been highlighted to him; that the Management Accountant had alerted him to serious failings in the financial reporting processes; and that these needed to be rectified. For Mr Windsor, this was the first time in the company's history that there had been serious concerns about financial reporting. Mr Windsor and Miss Cope gave evidence that the claimant's failings in recording and forecasting were (in their view) a key factor in the matters identified by the Management Accountant. Whilst the claimant in her evidence, and indeed in her questioning, endeavoured to challenge the impact that her recording and forecasting could or did have, the Tribunal finds Mr Windsor to be a truthful witness and finds that both Mr Windsor and Miss Cope believed that what was reported by the Accountant was partly as a result of the claimant's performance in her role.

Dismissal

46. On 18 May 2018 the claimant was invited to a further capability meeting. The invite (196-197) attached a number of emails and other documents which evidenced the issues which Miss Cope wished to discuss at that meeting. The claimant's evidence was that the relevant emails were *"conveniently timed"* and her contention was that these documents were collated in order to make out that she was failing in her performance, when that was not in fact the case.

47. A letter was sent by a solicitor on the claimant's behalf. The proposed hearing was re-arranged on two occasions. A revised letter (203-204) was sent on 31 May, and ultimately the hearing was moved to 4 June. It was made clear to the claimant that the hearing would go ahead, whether or not she attended.

48. The capability hearing took place on 4 June without the claimant's attendance. Notes were taken of that meeting and a recording made and sent to the claimant. The notes (209-213) record Miss Cope and an HR Adviser as having reviewed and discussed the various performance issues and reached a conclusion. Miss Cope's decision was that the claimant should be dismissed, and the claimant

was informed of this in writing (214-215). The decision was that the allegations made were substantiated and that the claimant had failed to meet the improvements required for her role.

49. In her evidence the claimant did not complain about this meeting going ahead in her absence. She did not raise that as an issue in her subsequent appeal, either in writing or in person. In answers to questions, the claimant confirmed that there was no medical evidence to explain her non-attendance at the meeting nor had she visited her GP. She explained that she felt unable to attend due to the way she felt at that time and how stressful she found the process, and she did not think she would be able to cope at that time with the meeting. However, she did not ask for the meeting to be postponed and did not object to it proceeding in her absence.

50. The Tribunal accepts Miss Cope's evidence of the reasons why she dismissed the claimant and why she believed that the claimant's performance was such that dismissal was the appropriate decision. Miss Cope did place reliance on the existing final written warning in reaching her decision. The Tribunal does not find that the reasons for dismissal were in any way false or collated with the aim of justifying a decision reached for other reasons, and finds that the reason for the decision reached was Miss Cope's view of the claimant's capability and performance in her role.

Appeal

51. The claimant subsequently appealed. The appeal was heard by Mr Windsor, the respondent's Managing Partner. The hearing took place on 21 June 2018. The notes (218-223) were accepted by the claimant as broadly reflecting what was discussed. The claimant elected not to attend the meeting in person, but it took place over the telephone at her request. The notes record a meeting in which Mr Windsor gave the claimant an opportunity to explain her grounds of appeal and to discuss all of the issues which she wished to raise. Amongst other things, the claimant asserted that there had been lies told. At the end of the appeal meeting the claimant said that if the appeal was successful she did not think it was realistic for her to return to work with the respondent.

52. Mr Windsor considered the appeal in detail and investigated the matters that were raised. His conclusion was that the claimant seemed to be almost oblivious to the matters which had been raised as concerns regarding her performance, and she did not recognise any shortcomings in her performance or accountability for financial mismanagement. His overriding impression was that the claimant did not appreciate or understand that there were elements of the job that she needed to perform better. Having considered all of the evidence, he concluded that: the performance management process had been lengthy and reasonable; the claimant had been given ample opportunity to improve and meet the performance standards that were required; and he considered dismissal correct in all the circumstances. An outcome letter was sent dated 28 June 2018 which stated that Mr Windsor had decided that the decision made at the original capability hearing was appropriate and that he would not uphold the claimant's appeal (224-225). The Tribunal found Mr Windsor to be a truthful and credible witness.

The Law

53. The respondent bears the burden of proving, on a balance of probabilities, that the reason for the dismissal was capability. If the respondent fails to persuade the Tribunal that it had a genuine belief in the claimant's incapability and that it dismissed her for that reason, the dismissal will be unfair. If the respondent does persuade the Tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) of the Employment Rights Act 1996.

54. Section 98(3)(a) of the Employment Rights Act 1996 provides that ""*capability" in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality".*

55. The claimant's case was primarily focussed upon her belief that capability was not the genuine reason for her dismissal.

56. The correct starting point in relation to the question of whether the dismissal is fair in the circumstances is section 98(4) of the Employment Rights Act 1996, which provides as follows:

> *"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

57. The respondent's representative placed reliance upon four authorities in his submissions, and the Tribunal has also considered one other. The Tribunal has considered all the issues raised in submissions.

58. It is not the Tribunal's function to determine whether or not the Tribunal itself would have dismissed the claimant and/or to determine whether the Tribunal believes that the claimant demonstrated the capability to do the role or not.

59. The test to be applied in deciding whether or not a dismissal is fair was outlined in *Taylor v Alidar Limited [1978] IRLR 82* (albeit using rather old-fashioned language):

> "*Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.*"

60. The factors which should be taken into account were outlined in the following two authorities: *James v Waltham Holy Cross UDC [1973] ICR 398:*

> "*An employer should be slow to dismiss an employee for capability without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance*."

61. In *D B Schenker Rail v Doolan [EAT/0053/09]:*

> "*Although this was a capability dismissal rather than a conduct dismissal, the Burchell analysis is, nonetheless, relevant because there was an issue as to the sufficiency of the reason for dismissal – a potentially fair reason relating to capability – in this case. Accordingly, the Tribunal required to address three questions, namely whether the respondent genuinely believed in their stated reason, whether it was a reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did*."

62. With regard to a case where there is a final written warning upon which the decision is based, the guidance on the issues which the Tribunal needs to determine was outlined in *Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374* which says:

> *"The correct starting point for this appeal is Part X of the Employment Rights Act 1996. It enacts the law of unfair dismissal…As for the authorities cited on final warnings, Elias LJ observed, when granting permission to appeal, that the essential principle laid down in them is that it is legitimate for an employer to rely on a final warning, provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it must not have been manifestly inappropriate to issue it. I agree with that statement and add some comments. First, the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s.98(4) to particular sets of facts. The broad test laid down in s.98(4) is whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant. Secondly, in answering that question, it is not the function of the ET to reopen the final warning and rule on an issue raised by the claimant as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a 'nullity'. The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct. Thirdly, it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, inter alia, the circumstance of the final warning.*"

63. More recently, and with reference to that case, what was said in *Bandara v BBC [EAT/0335/15]* was:

> *"The guidance is not of course a replacement for the statutory test in section 98(4). It is helpful guidance as to the operation of the statute that Employment Tribunals must take into account. Generally speaking, earlier decisions by an employer should be regarded by an Employment Tribunal as established background that should not be reopened. It should be exceptional to do so ... An earlier disciplinary sanction can of course only be open to criticism if it was unreasonable by the objective standard of the reasonable employer, but that is not enough, otherwise the Employment Tribunal would have to reopen and reinvestigate previous disciplinary sanctions whenever an employee was aggrieved by them. A threshold has to be set. An allegation of bad faith that has some real substance to it, as in Way, will be one example. So will the absence of any prima facie grounds for the sanction. So will something that makes the sanction manifestly inappropriate. I think a sanction will only be manifestly inappropriate if there is something about its imposition that once pointed out shows that it plainly ought not to have been imposed."*

64. Accordingly these authorities establish that the correct starting point is the terms of section 94 itself, but in relation to the final written warning the Tribunal needs to determine whether that final written warning was: in bad faith; made in the absence of any prima facie grounds for the sanction; and/or manifestly inappropriate. If the Tribunal were to determine that any of those categories were satisfied, the Tribunal would then need to go on and consider whether the dismissal was unfair more broadly in the light of those issues. However, if the Tribunal were to establish that the final written warning imposed did not fall into those three categories, the question for the Tribunal is whether the final written warning was a circumstance which a reasonable employer could reasonably take into account in deciding to dismiss.

65. The Employment Tribunal is also required to, and did, take into account the ACAS Code of Practice on Disciplinary and Grievance Procedures. The claimant was asked to confirm the ways in which she said that this had not been complied with, and she argued (32) *"The respondent did not carry out necessary investigations to establish the facts of the case. They did not act consistently, and there were delays in hearing my appeal and confirming their response. I was not given an opportunity to respond to the case before decisions were made, and the appeal process was not dealt with appropriately".*

66. In relation to the grievance, the claimant did contend that the outcome did not comply with the ACAS Code; she said that had she known expressly that her grievance was not being upheld and/or that a sanction was not imposed on the person whom she alleged had bullied her, she would have appealed and taken it further.

67. Paragraph 40 of the ACAS Code says (in relation to grievances):

> *"Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer*

intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken."

68. The Employment Tribunal notes that the ACAS Code does not define the outcome of the grievance in terms of it being upheld or not upheld, but rather that a decision should be communicated. It emphasises the actions that the employer intends to take to resolve the matters, not whether or not the claimant's grievance has been upheld.

69. In confirming the law which the Employment Tribunal has applied, it is important to emphasise two things that it is not the Employment Tribunal's role to do: determine whether the claimant's performance/capability was below the standard required and/or incompetent; and/or determine whether the Employment Tribunal itself would have taken the decision to dismiss the claimant.

Discussion and Analysis

70. The Employment Tribunal finds that the reason for the dismissal of the claimant was capability. The evidence of Miss Cope and Mr Windsor is accepted: the reason why they reached the decisions that they did was because of their perception of the claimant's performance in her role.

71. The Tribunal does not find that the claimant's grievance was the reason why the performance process was followed. In reaching this conclusion, the Tribunal has taken account of the finding that issues of performance were raised by Mrs Webb with the claimant first before her grievance was raised. The Tribunal accepts that the respondent had performance concerns about the claimant before she raised her grievance, which in fact was the claimant's response to the way in which those issues were raised with her. In any event, the Tribunal does not find that the fact that the claimant had raised a grievance was the reason why Miss Cope followed a capability/performance management process with the claimant in 2018.

72. The Tribunal does not find that the entire process followed was one which was orchestrated in an attempt to exit the claimant, nor does it find that the process followed was essentially a cover-up as the claimant alleges. The Tribunal is satisfied that Miss Cope perceived the claimant's failings to be significant.

73. As is identified in the section relating to the law above, for all of the issues that pre-date the final written warning, the matters which the Tribunal needs to determine are limited. The Tribunal does not find that the final written warning was imposed in bad faith. It accepts that there were grounds for the decision to be made. The Tribunal does not find that the sanction was manifestly inappropriate.

74. The majority of the questions asked by the claimant and the issues raised by her in the course of the hearing were in fact focussed on the history of the process, the absence she said of warnings in 2017, and the rapidity with which the respondent progressed to a final written warning in 2018. As confirmed above, in the light of the conclusions reached by the Tribunal and the factors outlined in the case of *Davies*, the final written warning is not something which the Tribunal needs to re-open (once it has determined that there were reasons for it, it was not manifestly inappropriate or imposed in bad faith). As outlined in the case of *Bandara*, it will be

exceptional for a Tribunal to do so, and this Tribunal does not. In respect of whether the final written warning plainly ought not to have been imposed, the Tribunal does not find that to be the case.

75. In terms of the decision to dismiss, following the capability hearing on 6 April 2018, the claimant was fully aware of the matters in which the respondent felt her performance fell short of what was required, and was aware of the gravity/seriousness with which continued non-compliance would be treated by the respondent. The capability hearing outcome letter makes clear the respects in which the respondent believed the claimant was failing to do her job adequately and warned her of the possibility of dismissal. The claimant herself accepted that she had not rectified the issues identified. The claimant was given the opportunity to improve her performance from 9 April 2018 until her dismissal on 4 June 2018.

76. Miss Cope genuinely believed in her stated reason for dismissal. There was no particular further investigation which was required in the context of a capability/performance decision being made about the claimant by her line manager. The investigation, such as it was, was reasonable (and the Tribunal particularly notes the detailed consideration of the issues in the meeting of 4 June). The final written warning was a circumstance which a reasonable employer could reasonably take into account in deciding to dismiss. Dismissal was a sanction which fell within the reasonable responses of a reasonable employer, where the claimant had a current final written warning.

77. It may have been better had the claimant been in attendance at the meeting at which the claimant's capability was ultimately reviewed and a decision made. However the decision not to attend was the claimant's; she did not ask for that hearing to be postponed and it was not inappropriate for the respondent to continue with the hearing when it had informed the claimant that it would do so if she did not attend.

78. The respondent's representative submitted that the appeal process was a rehearing such that it rectified any potential issues in relation to the original decision (albeit the respondent did not accept there were any such issues). The Tribunal finds this to be correct, the nature of the appeal was such that any defects with the dismissal hearing would in any event be rectified. Mr Windsor's appeal hearing effectively reconsidered the issues and Mr Windsor's decision was one he was able to reach. The decision and the reason for it was fully reviewed and considered by Mr Windsor in the appeal hearing held on 21 June 2018 (attended by the claimant by phone), when the issues were reconsidered, and the claimant was given the full opportunity to explain her case. As confirmed above, the Tribunal found Mr Windsor to be a truthful and credible witness who genuinely believed in the stated reason for dismissal, a reasonable investigation had been undertaken, and he had reasonable grounds for concluding that the claimant should be dismissed (taking into account the final written warning).

79. The Tribunal finds that the process followed by the respondent complied with the ACAS code of practice on disciplinary and grievance procedures. In the context of the concerns with the claimant's performance, the necessary investigation was undertaken. The claimant was given the opportunity to respond to the case before a

decision was made. There was no significant delay in the appeal being heard and, as confirmed above, the appeal was considered appropriately, in detail and in good faith. For the reasons explained, the Tribunal should not reopen the final written warning, however in terms of the grievance raised by the claimant the Tribunal finds that it was addressed in accordance with the ACAS code. The outcome was exactly the type of decision described by paragraph 40 of the ACAS code (being focussed upon resolving the grievance).

80. From her evidence and arguments at the hearing it is clear that the claimant felt strongly about a number of issues. She believed that she did her job well and to the best of her ability. Her issues included: the speed with which Miss Cope held her first meeting with the claimant in January 2018 following the clean slate referred to in the grievance appeal; the fact that Miss Cope took into account performance issues from 2017; the move to a final written warning without first imposing a written warning; and the absence of clearly documented objectives and timescales. The Tribunal understands why the claimant felt aggrieved about these issues. Nonetheless for the reasons explained above they do not mean that the claimant's dismissal was unfair, nor do they mean that the imposition of a final written warning was manifestly inappropriate.

81. As a result of the Tribunal's findings in relation to the process, the Tribunal does not need to go on and determine the issues of *Polkey* and/or contributory fault.

Conclusion

82. For the reasons given above, the conclusion of the Tribunal is that the claimant was not unfairly dismissed.

Employment Judge Phil Allen

Date: 6 February 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
18 February 2020

FOR THE TRIBUNAL OFFICE