Case Number: 3201836/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Chapman**

Respondent: **Tesco Stores Ltd**

Heard at: **East London Hearing Centre**

On: **12-13 March 2020 and 28 April 2020 (in chambers)**

Before: **Employment Judge O'Brien sitting alone**

Representation:

Claimant: In person (assisted by Mr T Woolnough, McKenzie friend)

Respondent: Mr T Welch (Counsel)

JUDGMENT

The judgment of the Tribunal is that

1. **The claimant's complaint of unfair dismissal pursuant to s98 of the Employment Rights Act 1996 succeeds.**

2. **Pursuant to s122(2), s123(1) and s123(6) of the Employment Rights Act 1996, the claimant's basic award and any compensatory award will be reduced by 80%.**

REASONS

1 On 2 August 2019, the claimant presented a complaint of unfair dismissal. The respondent resists the claim.

ISSUES

2 At the outset of the hearing, it was agreed that the issues I would have to determine were as follows:

2.1 Whether the respondent had proved that the reason for the claimant's dismissal was his capability.

2.2 If so, whether the respondent acted reasonably in treating that reason as sufficient to dismiss the claimant, including in particular:

2.2.1 Whether the respondent had reasonable grounds to believe that the claimant was not capable of fulfilling his role.

2.2.2 Whether the claimant was given a reasonable opportunity to improve.

2.2.3 Whether the claimant was given reasonable warning of the consequences of failing to improve.

2.2.4 Whether dismissal fell within the range of reasonable responses.

2.3 If the respondent followed an unfair procedure, the likelihood that the claimant would have been dismissed in any event.

2.4 The extent to which the claimant contributed to his dismissal.

EVIDENCE, SUBMISSIONS AND APPLICATIONS

3 Over the course of this hearing, the Tribunal took evidence on the basis of written witness statements. The claimant gave oral evidence on his own behalf. Mr Woolnough also provided a witness statement in support of the claimant, which it was agreed I could take as read. On behalf of the respondent I heard oral evidence from: Kraig Weeks (lead night manager at the Sudbury Tesco Extra Store), Marie Lloyd (Store Manager of the Chelmsford Tesco Extra Store) and Kate Green (People Partner).

4 I was also provided with a substantial joint bundle comprising approximately 800 pages. Mr Welch had provided an opening note and the claimant's witness statement included comprehensive submissions. Mr Welch had also prepared a cast list and chronology which was agreed by the claimant.

5 The parties each made oral submissions, Mr Welch on the basis of a skeleton argument prepared for the second day of the hearing. I took into account the entirety of the parties' written and oral submissions when determining the issues in the case.

FINDINGS OF FACT

6 In order to determine the issues as agreed between the parties, I made following findings of fact, resolving any disputes on the balance of probabilities.

7 All in all, I found all of the witnesses to have been doing their very best to assist me. None of the respondent's witnesses sought to embellish or alter their evidence and, except where specifically indicated, I found them to be reliable historians of fact. The claimant was rather more emotionally invested and certainly his written evidence tended often to argue his case rather than focus on the facts. I have no reason to doubt that the claimant honestly recounted how he felt about the events in question; however, when his account of the events in question conflicted with the contemporaneous documentation or the evidence of the respondent's witnesses, on balance I preferred the latter.

8 The claimant was employed by the respondent, initially as a general assistant, on 30 October 2006. On or around 3 May 2015, the claimant was appointed Night Manager at that store.

9 At the material time, Ben Snook also worked at the Great Notley Store as a Night Manager. Mr Snook and the claimant were both line-managed at the material time by Simon Horner. Prior to Mr Horner's permanent appointment at the store in early 2018, Mr Snook was Night Manager responsible for fresh foods and the claimant Night Manager responsible for groceries.

10 The respondent's employees' performance is assessed from time to time (usually annually or on commencement of a new role), and rated on both what they do ('what') and how they do it ('how'). The three self-explanatory rating levels are 'exceed', 'met' and 'missed'. An employee's overall rating is the lesser of two ratings awarded for 'what' and 'how'. As an example, an employee who exceeds in 'what' but falls below expectations for 'how' will receive a 'missed' overall.

11 Shortly after Mr Horner's appointment he exchanged roles between Mr Snook and the claimant, so that the former was responsible for groceries and the latter for fresh foods. He had not been satisfied with either individual's performance in their previous roles.

12 In or around February 2018, the claimant was given a Role Pack for his role as night manager. The Role Pack confirmed that his role included amongst other things: conducting interviews with new colleagues; conducting legal training for new starters; completing new colleagues' reviews and training; completing his team's annual holiday review meetings and managing absence.

13 The Role Pack also required the claimant to undertake training appropriate to his role as night manager. This was divided into training to be completed within 4 weeks, 12 weeks and 26 weeks of issue of the Role Pack.

14 The respondent manages individuals whose performance is unsatisfactory through its 'Supporting Your Performance' process ('SYP'). An individual assessed as 'missed' will initially be supported informally with objectives set to achieve a 'met' rating. If the individual fails to demonstrate sufficiently improved performance then SYP provides for a formal process: an individual's performance is formally investigated, if still rated as 'miss' then a formal performance review is undertaken. Formal outcomes normally progress from a first performance warning, through a final performance warning to redeployment (usually a demotion) or dismissal. With regards to redeployment, the SYP states:

> 'If a colleague has poor performance, we wouldn't generally look to move them to a different role unless we have a genuine belief that they don't have the necessary skills and expertise to carry out their current role (regardless of additional training and support, and a positive attitude from the colleague) but would succeed in an alternative role.'

15 The respondent also operates a grievance policy compliant with the ACAS Code of Practice on Disciplinary and Grievance procedures.

16 On 4 April 2018, the claimant was given his end-of-year review. He was rated 'miss' for both 'what' and 'how' and so was given an overall performance rating of 'miss'.

17 An action plan meeting was held on 18 April 2018 between Mr Horner and the claimant, and an action plan was agreed. The claimant was to write up a plan for conducting performance reviews of his team members and to action that plan by carrying out one review per week, starting with poor performers. The claimant was to have made that plan visible to Mr Horner and to have commenced actioning the plan by 25 April 2018. The claimant was to have conducted all of his team's holiday reviews and certain aspects of their training (including legal and 'fresh' training) by 15 May 2018. The claimant was to have completed his role pack and all of his own relevant e-learning also by 15 May 2018. The latter objective appeared to have required the claimant to have completed the 26-week training long before it otherwise would have been required (sometime in August); however, the claimant did not take that point then or indeed at any time prior to these proceedings.

18 On 2 June 2018, the claimant attended a review meeting with Mr Horner. It was noted that the claimant had made no progress on his action plan and that his performance remained at 'missed' level. In particular, the claimant had not delivered the required legal and 'fresh' training, had not completed holiday reviews and had not progressed his personal development (role pack). The claimant was required to attend a performance investigation meeting on 6 June 2018.

19 At the meeting on 6 June 2018, the claimant was asked why he had not completed the tasks in the agreed action plan, given that he had not said in April that he would struggle to get them done. He stated in particular that he had had too much to do on the shop floor; he had recently spent 10 days single manning. When challenged that he should have completed his action plan long before, the claimant referred to dealing with his girlfriend moving out. Nevertheless, Mr Horner considered that the claimant had not progressed sufficiently in the areas of training, reviews, holiday reviews and personal development. He confirmed that the claimant's performance remained at 'missed' level and invited him in writing on 8 June 2018 to a formal performance review hearing on 13 June 2018.

20 'Single manning' means being the sole manager at the store on the shift in question. It was the claimant's unchallenged evidence that, for much of the material time, this meant that he was responsible for manning the rear door, as a consequence of which he could not go to the office to complete paperwork. Single manning was something that the claimant was used to doing, and he does not appear to suggest that historically he had been singled out for single manning. Indeed, it does not appear to be the claimant's case that he was singled out for single manning during the material time, but rather that he should not have been expected to single man whilst the subject of SYP. Consequently, I find that the claimant was single manning at all material times approximately as often as comparable managers and that the rate did not increase after commencement of SYP.

21 At the conclusion of the hearing, the claimant received a first performance warning. Mr Horner was satisfied that the claimant had not completed any of the agreed tasks on the action plan. The claimant did not disagree and, as a matter of fact, Mr Horner was correct. The warning was stated to remain live for 13 weeks. It recorded that the following improvement was still required by the claimant: completion of all training reviews and holiday reviews; bringing his role pack and e-learning up to date; and proper involvement in drawing up rotas and with price integrity. The claimant did not appeal this

warning, nor did he allege that Mr Horner had been bullying him or deliberately preventing him from completing his action plan.

22 On 23 August 2018, Mr Horner held a further SYP investigatory meeting with the claimant, and which he asked the claimant to explain why his next steps were still outstanding. The claimant accepted that some of his subordinates' holiday reviews had yet to be done (he stated that they were 95% done), that he had not had a chance to complete his new starter reviews and that he had put completion of his role pack 'on the back burner'. The claimant did, however, state that he had completed all of his team's legal training and fresh training.

23 The claimant was invited on 24 August 2018 to a formal performance review hearing on 5 September 2018. He was notified that he had failed to make sufficient progress in the areas of: holiday reviews; new starter training and reviews; his role pack; and improving the productivity of his team.

24 However, on 30 August 2018, the claimant reported himself unable to work and the next day was signed off work by his GP, the reason given being work-related stress. The claimant describes, and I have no reason to disbelieve, that he had been 'single manning' at his store on the night of 29 August 2018 and had been unable to 'shut off' after his shift because of the stress of his situation at work.

25 The circumstances which the claimant complains caused him to be absent with work-related stress comprised not only the formal hearing and the claimant's worry that single manning would impede his making progress towards completing the action plan but also perceived unfair treatment of him by Mr Horner. The claimant had begun keeping a diary in March 2018 of his experiences at work but ultimately did not raise a grievance against Mr Horner until February 2019.

26 The claimant returned to work on 20 October 2018 and had a return to work meeting with Mr Horner at the end of that shift. He complains now about being required to single man the following night, but did not at the time. Instead, he was eager to return immediately to full duties, and subsequently described himself as 'stronger and better focussed on return from sickness absence'. No adjustments were suggested by Occupational Health in the claimant's stress risk assessment undertaken on 27 October 2018.

27 On 5 December 2018, the claimant was required to attend a formal performance review meeting the following day. He was notified that he had failed to make sufficient progress in the areas of: training and reviews; his role pack; and addressing the productivity of his team.

28 The claimant complained at the meeting that he thought the SYP had been put on hold, although he was not able to identify any specific instruction to that effect. Mr Horner gave the claimant a final performance warning, to remain live for 26 weeks, for the following reasons: not attempting his role pack; not completing new starter reviews and training; not completing legal training; and not resolving the productivity of his team. The improvement required by the warning was: whilst no work was expect on the claimant's role pack in December 2018, it was to be 'caught up' by the end of January 2019; new starter training and reviews to be completed per company policy, with 4, 8 and 12 week reviews to be completed on time; 'legal 2' training to be completed as soon as possible;

and the productivity of his team to be improved. Again, the claimant did not appeal the final warning nor did he allege at that time that Mr Horner had been bullying him.

29 On 31 January 2019, Mr Horner invited the claimant to a performance investigation meeting on 1 February 2019. He notified the claimant that his performance was still assessed as 'missed' because 'despite showing improvement in some areas' the claimant had still not: completed his role pack and e-learning; completed new starter training; and coached his team on productivity.

30 The letter referred to a review meeting on 30 January 2019; however, the bundle contains no notes of any such meeting and the claimant describes the meeting as one the respondent 'claimed' happened. On balance, I find that no such review meeting took place on 30 January 2019.

31 At the investigation meeting, Mr Horner observed that the holiday reviews had been completed but the lateness of their completion had caused the store problems. The claimant stated that his role pack had been completed save for two modules: the 'managing hours toolkit' and the 'moving people hours workshop part one'. Mr Horner accepted that the claimant had completed the legal training but noted that he was 'well behind' with new starter training. Mr Horner criticised the claimant for leaving everything to the 'last minute', and notified him that he would be passing the case forward to a formal disciplinary hearing. Mr Horner did not, however, discuss with the claimant or criticise him about his team's performance.

32 The next day, 2 February 2019, the claimant raised a grievance against Mr Horner for treating him differently to other managers, constantly singling him out, belittling him and bullying him. The claimant's grievance was dealt with by Mr Weeks, who interviewed the claimant, Mr Horner and a number of witnesses identified by the claimant. Mr Horner essentially denied the claimant's allegations, save that he did accept that he had called the claimant a 'new starter' upon return from sickness absence in October, as a joke.

33 The witnesses interviewed by Mr Weeks told him the following:

33.1 Laura Albon thought that Mr Horner treated the claimant differently to Mr Snook, giving the latter more opportunity to do paperwork and review but did not class Mr Horner's behaviour towards the claimant as bullying but rather 'childless [sic]' banter. She said that Mr Horner's 'sick little comments' were a running joke amongst the staff, and also that the claimant could make more of an effort on his role pack.

33.2 Claire Brewster recounted the claimant offloading to her about his performance meetings but said that she did not see Mr Horner's behaviour as bullying. She felt that the claimant did not help himself.

33.3 Atilla Shefik had heard the claimant being sick one night and recalled seeing the claimant and Mr Horner walking out of work together when the claimant's body language suggested that he was not happy.

33.4 Martin Cheale felt that the claimant had been treated differently but had not heard anything to make him think that the claimant was being bullied. He felt that the claimant did not help himself.

33.5 Charlie Baltop stated that Mr Horner and Mr Snook had bullied the claimant but had not witnessed anything herself. She felt that the claimant was being managed unfairly.

33.6 Paul Brown stated that Mr Horner had said to him that he is 'out to get' the claimant and has made clear that he wishes to replace the claimant with another individual (Jason). He was clear in his belief that Mr Horner treated the claimant differently to Mr Snook and thus was bullying the claimant. He did, however, accept that most of the claimant's warnings would be justified, if any other manager were taken out of the equation.

33.7 Emma Gooch recounted Mr Horner being vocal in his dislike of the claimant. When she challenged Mr Horner, he explained that there were lots of issues with the claimant's performance in respect of which he had been put on a management programme. She also recounted a rumour that Mr Horner was trying to get Jason back, which she felt had been confirmed when Jason visited one night and said he wanted to speak to Mr Horner about moving to the store. She felt that Mr Horner treated the claimant differently to Mr Snook but had not seen anything else which Mr Horner had done directly to the claimant. She felt that the claimant 'did not help himself' but that he had been treated unfairly.

33.8 Mr Horner told Mr Weeks that, whilst there were issues with both the claimant and Mr Snook's performance, the claimant was worse and that he had been advised by Faye Cooper (People Partner responsible for the store) to place only one manager on SYP at a time. This reported advice accorded with Mr Weeks' own experience and opinion.

34 Mr Weeks considered that the claimant had not made out his grievance on balance and notified him so by letter dated 8 March 2019. The claimant was notified of his right to appeal within 14 working days of receipt of the letter.

35 On 13 March 2019, Mr Horner notified the claimant in writing that he was to attend a formal performance review hearing with Marie Lloyd on 16 March 2019. It was said that, despite having time and support to improve his performance, the claimant had not progressed sufficiently as follows: his role pack was not complete; his new starter training was not complete; and the productivity of his team had not improved.

36 The letter makes reference to a performance investigation meeting without giving the date of that meeting. The claimant does not accept that any such meeting took place in March, and there are no notes of any meeting between the two after 1 February 2019. Therefore, I find that Mr Horner was referring to their meeting on 1 February 2019.

37 At his formal disciplinary meeting, the claimant insisted that by then he had completed the next steps required by Mr Horner. He accepted that his performance had been 'missed' for much of the process but was insistent that he was now a 'met' performer. Whilst Ms Lloyd challenged the claimant on why it had taken him until January 2019 to make significant steps to meet his action plan, she did not challenge or explore his assertions that he had by early February completed it all. Ms Lloyd gave no express consideration to the claimant's management of his team's performance.

38 Ms Lloyd confirmed to me that she did not check the claimant's role pack herself. She claimed to have checked his training cards; however, these have not been produced and, given her lack of challenge in the meeting, I find on balance that all required training had been completed before the disciplinary hearing. Therefore, Ms Lloyd was either aware at the time that the claimant had completed his role pack or ought to have been so aware.

39 Having adjourned briefly to consider her decision, during which time she checked to see if there were any alternative full-time positions into which the claimant could be redeployed and found that there were none, Ms Lloyd dismissed the claimant. That decision was confirmed in writing that day. The reasons given were as follows:

39.1 'Your performance is still a 'missed'. There is evidence that next steps have not been met throughout the process.'

39.2 'Not completing your job role by not demonstrating the skills to do the job.'

39.3 'The process has been followed throughout with evidence of 121s, meetings including action planning and the length of time given.'

39.4 'Supported your return to work after your absence by a referral to occupational health, stress risk assessment completed and deferring SYP by 8 weeks to support your return.'

40 The claimant was dismissed with immediate effect but was paid in lieu of notice. He was also notified of his right to appeal against dismissal.

41 The claimant exercised that right on 18 March 2019, on the grounds that dismissal was too severe when he had completed his next steps and role pack. He also appealed on 20 March 2019 against dismissal of his grievance.

42 The claimant's dismissal and grievance appeals were dealt with together by Kate Green, a people partner for a group of large stores not including the claimant's own store. In addition to meeting with the claimant, she interviewed or re-interviewed a number of witnesses regarding his grievance.

42.1 Emma Gooch confirmed her earlier evidence, including her view that Mr Horner personally disliked the claimant. She recounted comments by Mr Horner to the effect that the claimant was unreliable, let his team down and did not do his job properly. She stated specifically that, when Mr Horner swapped the claimant's and Mr Snook's roles in early 2018, he did so knowing that the claimant had no experience on fresh, that she and others weren't to help the claimant and that it was a case of seeing if the claimant 'sinks or swims.'

42.2 Dianne Giddings did not feel that the claimant was bullied by Mr Horner and had told the claimant to 'get on with his job and he wouldn't get into trouble.'

42.3 Nikki Turner knew nothing of any bullying of the claimant by Mr Horner.

42.4 Claire Brewster felt that if the claimant actually did what Mr Horner asked that he would not have to constantly chase the claimant, which was probably why the claimant felt he was being pressured by Mr Horner.

42.5 Mr Horner denied disliking the claimant or telling people not to help him. He could not recall a conversation in which he had said that people should see if the claimant sinks or swims, but said that, if he had, it would have been when the claimant was first moved to fresh foods. Mr Horner maintained that the decision to put the claimant on SYP before Mr Snook was the correct one and was not taken alone.

43 Ms Green notified the claimant at a meeting on 18 April 2019 that she was upholding both the dismissal and the grievance outcome.

Facts relevant to Polkey/Contribution

44 Mr Horner made clear at the performance investigation meeting on 6 June 2018 that the claimant could come to him at any time and ask for time to do reviews etc. At the following performance review meeting on 13 June 2019 it was agreed that Mr Horner had refused to allow the claimant to complete paperwork on only one occasion, and there is no evidence that Mr Horner ever subsequently refused to give the claimant time to work on his next steps.

45 The claimant was permitted by Mr Horner to complete 7 hours' training in the office on 5 February 2019.

46 Whilst the claimant alleged on 1 February 2019 that he had asked Mr Horner many times for the link to complete training online, Mr Horner categorically denied having been asked. The claimant makes no reference in his extremely comprehensive witness statement to such occasions, and I find that the claimant did not previously ask Mr Horner for the online training link.

47 Once the claimant had been given the link by Mr Snook, he was able to undertake online training at home.

48 Ten of the fifteen holiday reviews the claimant was required to undertake were completed in January 2015. This was significantly later than when they should have been completed, resulting in issues for the respondent over untaken holiday hours.

THE LAW

Unfair Dismissal

49 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer.

50 Section 98 ERA provides:

> (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2) A reason falls within this subsection if it—*
> *(a) relates to the conduct of the employee,*
> *…*

(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality
…
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.
…

51 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

52 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee.' (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

53 '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 or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent. (per Lord Denning MR in **Alidair Ltd v Taylor [1978] ICR 445**).

54 Furthermore, Lord Bridge said in **Polkey v AE Dayton Services Ltd [1987] IRLR 503**:

> But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural," which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job

55 The question in each respect, and in respect of the sanction of dismissal, is whether the employer acted within the range of reasonable responses (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**); the Tribunal must not substitute its own view of what the employer should have done (**Iceland Frozen Foods Ltd v Jones [1983] ICR 17**). The dismissal process must be considered in its entirety. To that end, a defective appeal might in all the circumstances render unfair a dismissal which to that point had fallen within the range of reasonable responses (**West Midlands Co-operative Society v Tipton [1986] AC 536**); alternatively, the appeal might cure a dismissal which to that point had been unfair (**Taylor v OCS Group Ltd [2006] ICR 1602**).

56 It is not for me to go behind an earlier warning unless that warning was manifestly inappropriate (including it having been made in bad faith or without any grounds to make it) (**Davies v Sandwell MBC [2013] IRLR 374**).

57 Pursuant to s118 ERA, where a tribunal makes an award for unfair dismissal it shall comprise a basic award and a compensatory award.

58 The Tribunal may nevertheless reduce both basic and compensatory awards to reflect the employee's culpable and blameworthy conduct. In respect of the compensatory award, the conduct must have caused or contributed to the dismissal (s123(6) ERA), and in respect of the basic award the conduct must have occurred prior to dismissal or notice of dismissal (if given) and it must be just and equitable to make a consequential reduction (s122(2) ERA).

59 If an employee is unfairly dismissed by reason of a procedural defect, the Tribunal may make a reduction in compensatory award to reflect the chance that he would have been dismissed in any event, pursuant to s123(1) ERA and **Polkey v AE Dayton Services Ltd**.

CONCLUSIONS

60 Consequent to my findings of fact above, I have reached the following conclusions.

61 It is entirely clear that, when she made the decision to dismiss the claimant, Ms Lloyd had in mind the shortcomings in his performance well documented in the various performance reviews over the life of his SYP and his failure in her view to improve as required by those various reviews.

62 I have taken into account the claimant's own case that Mr Horner was using the SYP process to bully him and force him out of the business. I accept that there is some evidence of antipathy on Mr Horner's part towards the claimant and a feeling amongst some of their colleagues that Mr Horner was harder on the claimant than Mr Snook. However, I find that this was because of Mr Horner's views on the claimant's competence, which he believed was worse than Mr Snook's. Objectively, Mr Horner had good reason to place the claimant on SYP; the claimant himself accepts that the first performance warning was justified and that he was a 'miss' until January 2019. Whilst I find on balance that Mr Horner did say that he wanted to see if the claimant would sink or swim, this was at the time when he swapped the claimant's and Mr Snook's roles. Any suggestion that Mr Horner was looking for any way to get the claimant out of the business is rather undermined by the fact that it took over a year thereafter for the claimant to be dismissed and that Mr Horner permitted the claimant to remain on SYP for nearly a year (which I accept is a wholly exceptional period of time).

63 All in all, I am satisfied that Ms Lloyd was not Mr Horner's unwitting tool in removing the claimant but rather acted on her own knowledge and beliefs. In short, I accept that the respondent's reason for dismissing the claimant was a reason related to his capability.

64 Ms Lloyd gives as her first (and, I infer, principal) reason for dismissing the claimant the following: 'Your performance is still a "missed", 'There is evidence that next steps have not been met throughout the process.' However, it was the claimant's unchallenged evidence to Ms Lloyd that, by the time of the disciplinary hearing, and indeed within days of the investigation meeting with Mr Horner, he had completed all of the next steps set in the SYP. His completion of his role pack, reviews and training were discussed at the disciplinary hearing. No consideration was given at all to the claimant's management of his team's performance, and certainly it was not suggested that that was still inadequate.

65 I remind myself that I must not substitute my own view of the claimant's competence but rather must consider whether there were reasonable grounds for Ms Lloyd's conclusions, in other words whether she reached conclusions open to a reasonable employer. However, I find that she did not. No reasonable employer, failing to challenge the claimant's assertion that he had completed his next steps and role pack and failing to challenge the performance management of his team, could nevertheless reasonably conclude that the claimant had not by the time of the hearing done all that was asked of him.

66 Even if Ms Lloyd had had in mind that the claimant had failed to complete his next steps by the time of his final meeting with Mr Horner then, firstly, she did not say so and, secondly, she would have been acting procedurally in a way no reasonable employer could have fairly acted. I say that for the following reason. In the letter inviting the claimant to his formal performance hearing with Ms Lloyd, he was told that Mr Horner would continue to work with him to support his improvement. No reasonable employer could, in those circumstances, have ignored the claimant's improvement in the intervening time.

67 Neither of the issues I have found in the alternative above were 'cured' by Ms Green. The claimant's position that he had completed his next steps by the time of the disciplinary hearing was raised in his grounds of appeal, but does not appear to have been considered by her at all.

68 In conclusion, I find that the claimant's dismissal was substantively unfair; Ms Lloyd did not have reasonable grounds to come to the central finding upon which her decision to dismiss him was based. Even if the dismissal letter was unfortunately worded, the only finding reasonably open to Ms Lloyd which could have justified dismissal would have disclosed in any event a procedural unfairness.

Contribution and Polkey

69 That is not, however, the end of the matter. It is convenient, having heard all of the relevant evidence, to consider the extent to which any eventual award should be reduced to reflect culpable conduct on the claimant's part (contribution) and, in any event, whether (and when) the respondent could have dismissed the claimant fairly had a fair procedure been followed (per **Polkey v AE Dayton Services Ltd**).

70 As a matter of fact, the claimant was not performing all of the duties of his role from April 2018 until January 2019. Whilst the respondent was entitled to consider this evidence of the claimant's inherent ability to carry out his role, no small part of the delay in his finally completing his next steps was down to the claimant's failure to take advantage of opportunities to catch up and/or to properly prioritise his activities.

71 Mr Horner made clear at the performance investigation meeting on 6 June 2018 that the claimant could come to him at any time and ask for time to do reviews etc. Mr Horner had refused to allow the claimant to complete paperwork on only one occasion. The claimant accepts that he was given 7 hours in the office on 5 February 2019 for training, during which he completed his role pack.

72 The claimant did not at any point ask Mr Horner for the link for online training. As soon as he was provided with the link by Mr Snooks, the claimant was able to and did access online training and made progress on his role pack.

73 Had the claimant asked for time in the office as soon as it was made clear that time would be made available, he could have completed the outstanding legal training and new starter training and reviews considerably earlier. Similarly, had he asked Mr Horner for the online training link he could have completed his role pack well before January 2019.

74 As it was, despite having been set goals on 4 April 2018 to have completed by 15 May 2018, the claimant took until early February 2019 to complete them all. Most of the holiday reviews were undertaken in January 2019, causing the respondent significant problems in respect of employees' untaken holiday.

75 His failure to prioritise his time and ask if necessary for the opportunity to undertake paperwork and training in the office (or complete it at home) was not, I find, an inherent capacity issue outwith the claimant's control but rather culpable and blameworthy conduct which contributed significantly to his eventual dismissal.

76 In other words, whilst the claimant was dismissed by the respondent because he had failed in its judgment to demonstrate adequate performance, I find that he was capable of the necessary improvement but culpably failed to make the necessary effort within a reasonable timeframe. Doing my best to weigh up the respective failures of the claimant and the respondent, I find that he contributed 80% to his own dismissal and that it is appropriate to reduce both his basic and any compensatory award by that amount.

77 Alternatively, if Ms Lloyd dismissed the claimant because he had not by the time of the performance investigatory meeting on 1 February 2019 completed all of his next steps and therefore acted procedurally unfairly, it would still have been open to her fairly to dismiss him having taken into account the fact that he had since the performance investigation meeting completed his next steps. She would have been able still to take into account the culpable delay I have referred to above. However, it would not in the circumstances be just and equitable to reduce the compensatory award beyond the 80% reduction I have already made for that culpable conduct.

78 Remedy will be considered further at a future hearing.

Employment Judge O'Brien
Date: 27 May 2020