EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107082/2019

Held in Glasgow on 28, 29 and 30 October 2019

Employment Judge W A Meiklejohn

Mr C Devlin	**Claimant** **Represented by:** **Mr R Wood -** **Trade Union** **Representative**
British Telecommunications plc	**Respondent** **Represented by:** **Mr G Mitchell -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed by the respondent and his claim of unfair dismissal is dismissed.

REASONS

1. This case came before me for a final hearing on 28, 29 and 30 October 2019. Mr Wood appeared for the claimant and Mr Mitchell for the respondent.

Issue

2. The claimant was claiming that he had been unfairly dismissed by the respondent. The respondent admitted dismissal but denied unfairness, contending that the claimant had been fairly dismissed by reason of capability.

Applicable law
E.T. Z4 (WR)

3. The right not to be unfairly dismissed is found in section 94(1) of the Employment Rights Act 1996 ("ERA") –

"An employee has the right not to be unfairly dismissed by his employer."

4. Section 98 ERA provides as follows –

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do….

(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."

Evidence

5. For the respondent I heard evidence from –

- Ms K Little, Business Sales Manager
- Mr R Ferris, General Manager Business Development & Partner Solutions
- Mr Lees, Sales Director UK North Corporate Sales

Ms Little had been the claimant's line manager. Mr Ferris had been Ms Little's line manager and was the dismissing officer (and had subsequently left the respondent's employment). Mr Lees was the appeal officer. I also heard evidence from the claimant. I had a joint bundle of documents to which I refer by page number.

6. It is not the function of the Tribunal to record every piece of evidence presented to it and I have not attempted to do so. I have focussed on what I considered to be the matters most relevant to the issue I had to decide.

Findings in fact

7. The claimant commenced employment with the respondent on 10 February 1997. At the time of his dismissal which took effect on 8 March 2019 he was employed as a Business Development Manager ("BDM"). This was a desk based sales position. The claimant was one of seven BDMs in a team managed by Ms Little. A second team of five BDMs was managed by Ms S Thomson.

8. Each of the BDMs in Ms Little's team had a customer base of some 100/120 businesses and was expected to sell the respondent's goods and services which were divided across five *"bundles"* or *"towers"* (detailed on page 235). In respect of these bundles or towers there were field based specialists and it

was part of the BDM's job to create "opportunities" for these specialists to follow up.

Claimant's remuneration

9. The claimant was remunerated on the basis of basic salary and bonus/commission. His on-target bonus was 35% of basic salary (page 76). The commission arrangements applicable to the financial year to 31 March 2019 were contained in the respondent's Corporate Pay Plan (pages 125-135). So far as relating to the BDM role, there were three target measures –

- Sales Order Value Gross Margin ("SOV GM") with a weighting of 70%
- Earned Revenue with a weighting of 20%
- Customer Experience with a weighting of 10%

10. In simple terms SOV GM was new business and commission was payable as soon as 1% of the annual target was met. Earned Revenue was repeat business in the sense that the target was based on customers' previous year's spend and commission was payable once 85% of target was achieved. Customer Experience was based on (a) the percentage of responses against surveys sent to customers, with a threshold of 15% and (b) customer satisfaction scores.

Performance management

11. The respondent had a policy and procedure for managing performance. These were –

- Getting Back on Track – Our Improving Performance Policy (pages 247-249)
- Getting Back on Track – Our Performing Performance Procedure (pages 250-257)

12. Four stages were contemplated by the procedure (pages 252-254) –

(i) an informal stage involving an informal action plan with a review period of four weeks (or longer).

(ii) a first formal meeting at which the outcome might be either (a) an extension to the review period, (b) no action (if the necessary improvement has been achieved) or (c) an initial formal warning.

(iii) a second formal meeting at which the outcome might be (a) an extension to the review period, (b) no further action (if the necessary improvement has been achieved) or (c) a final formal warning.

(iv) a decision meeting at which the outcome might be (a) an extension to the review period, (b) no further action (if the necessary improvement has been achieved) or (c) dismissal. At this stage the procedure also provides for (i) alternative job search which *"may result in a change of terms and conditions"* and (ii) demotion.

13. The policy and procedure were both stated to be a *"guide" and "do not form part of your contract"*. Notwithstanding that, I was satisfied that there was an expectation on the part of both the respondent and the claimant that the policy and procedure would be followed in the context of managing the claimant's performance.

14. The procedure gave the employee the right to be accompanied at formal meetings and contained a right of appeal against any formal warning.

Claimant's past performance

15. Ms Little gave evidence about the claimant's past sales performance against target as follows –

- In 2012/13 the claimant achieved 38% of target
- In 2013/14 the claimant was put on a performance improvement plan by the end of which his performance had improved to 97% of target and so the plan was stopped
- In 2014/15 the claimant achieved 68% of target

- In 2015/16 the target was split to take account of the respondent's acquisition of EE; the claimant achieved 149% of target in the first half of the year and 49% of target in the second half

- In 2016/17 the claimant achieved between 60% and 70% of target; Ms Little did not provide an exact figure

- In 2017/18 the claimant achieved 40% of target which led to a discussion with Ms Little in August 2017; before any action was taken the claimant commenced a period of sickness absence in October 2017 and did not return to work until February 2018.

16. When the claimant returned after the period of sickness absence there was a six week return to work plan which continued to the end of March 2018.

Claimant's target for 2018/19

17. The respondent's sales targets were derived from their central finance function, agreed with their senior leadership/management and cascaded down to their sales teams. The claimant's SOV GM target for 2018/19 was £750k.

18. Performance of BDMs against target was monitored by their line manager on a monthly and quarterly basis. While the respondent looked to BDMs to achieve 100% of target, there was a threshold or minimum standard of 80% below which the line manager would consider an intervention by way of performance management. This was not uncommon – of the twelve BDMs managed by Ms Little and Ms Thomson, only two had not been subject to performance management.

Coaching & Development Plan

19. During April 2018 Ms Little put the claimant on a coaching and development plan (pages 119-121) with a start date of 24 April 2018 and an end date of 29 May 2018. This would have happened earlier had the claimant not been absent from work from October 2017. The plan recorded (at page 120) (a) that the claimant was currently achieving 12.9% of his 2018/19 Q1 target of

£187.5k, and (b) the expectation that he would achieve 80% by the end of May 2018.

20. The plan also stated (again at page 120) that the claimant *"should aim to have an average of 3 times the amount of pipeline he would require to achieve target in SOV GM ie. a target of £750k he should have opps in his pipeline for approximately £2.2m".* Mr Ferris referred to a BDM's pipeline being five times their SOV GM target but I was satisfied that the expectation of the claimant was as set out in the plan.

21. During the period of the plan Ms Little held 4 meetings with the claimant on 1 May 2018, 8 May 2018, 15 May 2018 and 22 May 2018. Ms Little was on annual leave on 29 May 2018. She held a further meeting with the claimant on 6 June 2018. The notes of these meetings were at pages 122-123 and I was satisfied that these were accurate.

22. During the plan period the claimant's SOV GM performance against target for the year to date ("YTD") rose initially to 66% but had slipped back to 37.91% by the end of the period.

23. Ms Little wrote to the claimant on 6 June 2018 (pages 136-137) inviting him to a first formal meeting under the Improving Performance procedure, to take place on 14 June 2018. The reason for the meeting was stated in these terms –

"SOV GM achievement was to be a minimum 80% YTD by end May and is currently at 38%."

She enclosed the Improving Performance Policy and Procedure, the Coaching and Development Plan and the claimant's latest achievement report (page 137a). The meeting was subsequently rescheduled to 15 June 2018 at the claimant's request.

Initial formal warning

24. The outcome of the first formal meeting was Ms Little's decision to issue the claimant with an initial formal warning. This was contained in her letter to the

claimant of 27 June 2018 (pages 140-142). It was apparent from her letter that Ms Little had some reservations about the claimant's pipeline of potential business.

25. A further outcome was that the claimant's performance against his SOV GM target was to be kept under review until a second formal meeting, to be scheduled on Ms Little's return from annual leave at the start of August 2018.

26. Ms Little's letter advised the claimant that he had the right to appeal and he did so. His appeal was heard by Mr Ferris on 20 July 2018. Mr Ferris upheld Ms Little's decision. The appeal outcome was recorded in Mr Ferris's letter to the claimant of 23 July 2018 (pages 144-145). In his letter Mr Ferris set out the claimant's reasons for appealing and his rationale for upholding the warning.

First formal action plan

27. A formal action plan was put in place covering the period 17 July to 31 August 2018. The "Required standard" was stated as *"SOV GM target to be minimum 80% YTD achievement by end August".* The plan involved weekly meetings referred to as "coaching sessions" between the claimant and his manager. The initial meetings were between the claimant and Ms Thomson as Ms Little was on annual leave. These were documented (pages 150-153).

28. Ms Thomson was proactive in trying to help the claimant to improve his performance. She advised him take a consultative approach with customers and to use the respondent's Future Voice proposition to do this. She provided the claimant with a spreadsheet to log his calls on a daily basis. She provided him with lists of accounts to focus on.

29. When Ms Little returned from annual leave she held weekly meetings/coaching sessions with the claimant in the same way as Ms Thomson had done, and these were similarly documented. Pages 159-171 covered the full period of the action plan. I also had notes of Ms Little's coaching sessions with the claimant on 8, 15, 22 and 28 August 2018 (pages 172-176) and on 4 September 2018 (pages 178-179) and I was satisfied that

these were accurate. Recordings of the coaching sessions were embedded in the action plan. In Ms Little's note of the session on 15 August 2018 there was a reference to the claimant requiring *"another £150k in SOV GM to take him up to 80% YTD".*

30. Ms Little wrote to the claimant on 11 September 2018 (pages 181-182) inviting him to a second formal meeting on 20 September 2018. Her letter stated the reason for the meeting in these terms –

"Current SOV GM performance is at 31.87% YTD"

With her letter Ms Little enclosed the Improving Performance policy and procedure, the performance plan (which I understood to be the same as the formal action plan) and the weekly reviews and coaching sessions.

Final formal warning

31. The outcome of the second formal meeting was Ms Little's decision to issue the claimant with a final formal warning. This was contained in her letter to the claimant of 15 October 2018 (pages 202-204). Her letter recorded that Ms Little had delayed her decision on whether to issue the warning until after a week's annual leave towards the end of September 2018, to see if four of the claimant's pipeline opportunities had been converted into sales. One of these was converted; the others were not.

32. The claimant was advised that his performance would continue to be reviewed.

33. The claimant was also advised that he had the right to appeal and again he did so. Mr Ferris heard the claimant's appeal on 6 November 2018 and wrote to the claimant on the same date (pages 205-206) upholding Ms Little's decision to issue the final formal warning. As with the first appeal outcome letter, Mr Ferris set out the claimant's reasons for appealing and his rationale for upholding the warning.

34. Within his rationale Mr Ferris included the following when dealing with the claimant's assertion that *"the targets were not achievable based on opportunity"* –

"I don't believe the targets are unachievable for this role. Current performance weighted over both teams is over 90% and this sales plan is asking Chris achieves above 70% vs his target."

35. Mr Ferris said that his reference to 70% had been a "typo" and should have read 80%. The claimant disputed this – while acknowledging that the all of the other documentation referred to 80% as the minimum level of sales required against his SOV GM target, he said that he had been told verbally that he needed to achieve 70%. I deal with this point below.

Second formal action plan

36. A further formal action plan was put in place covering the period 15 October to 30 November 2018. The "Required Standard" was the same as under the first formal action plan, ie a minimum of 80% YTD for SOV GM.

37. As with the first formal action plan, there were weekly coaching sessions between Ms Little and the claimant. These took place on 16, 22 and 29 October 2018 and on 6, 22 and 28 November 2018. Ms Little's notes of these sessions were at pages 189-200 (and I was satisfied that these were accurate) and recordings were embedded in the action plan (pages 185-188). Mr Ferris was present at the coaching sessions on 6 and 28 November 2018.

38. At the start of the action plan period the claimant's SOV GM performance was recorded as 36% YTD (page 185). In her note of a further coaching session on 3 December 2018 (page 201) Ms Little recorded that the claimant's performance was 67.64%.

39. The improvement was largely due to one sale with a value of around £160k which had been in the claimant's pipeline for some time. According to the claimant's own calculations (page 207) this took him to 71% YTD of his SOV GM target as at 16 November 2018. There remained concerns about the claimant's pipeline of opportunities which was found at one point to be

significantly overstated (pages 192-193, although the claimant did explain in evidence that this was the result of the same opportunity being logged by others).

40. Mr Ferris wrote to the claimant on 4 December 2018 stating -

"Your manager has reviewed and discussed your performance with you and it seems that you're no longer meeting the level of performance for your role, therefore you'll need to come to a decision meeting under the Improving Performance process."

41. The decision meeting was set for 13 December 2018. A copy of the formal action plan was enclosed with Mr Ferris's letter. The reason for the meeting was stated in similar terms as before –

"SOV GM target to be minimum 80% YTD achievement by end November"

Decision meeting

42. The claimant prepared a number of documents in advance of the decision meeting (pages 212-217). These reflected a number of points the claimant wished to address at the decision meeting, including –

- He had achieved £250k of sales in the previous three months which demonstrated his ability to achieve his target
- This placed him second compared with the six other BDMs in Ms Little's team for the plan period
- His pipeline for Q4 was £1.7m and he had an average win rate of 34%
- His YTD performance placed him fourth compared with the other BDMs in Ms Little's team

43. The decision meeting took place on 13 December 2018. The outcome was Mr Ferris's decision to dismiss the claimant with notice, expiring on 8 March 2019 communicated to the claimant by letter dated 14 December 2018 (pages 218-220). The reason for dismissal was stated as –

"…you failed to improve your performance even with the Improving Performance action plan and the support given to you to reach a satisfactory level for your role."

44. Mr Ferris referred to the claimant's failure to reach the 80% YTD performance minimum target. In his evidence to the Tribunal Mr Ferris said that he had *"never seen a sales person get as much coaching as the claimant received"*. It was clear that he did not share the claimant's optimism about his pipeline of prospective business. He did not accept that he should have waited until the end of the year (ie until 31 March 2019) to give the claimant a chance to achieve his annual target.

45. The claimant was advised that he was not expected to work during his notice period. Mr Ferris also stated –

"….we'll continue to look at any other alternative roles and keep you informed."

46. Mr Ferris accepted that he had not taken the claimant's length of service into account when deciding to dismiss.

47. Mr Ferris's letter advised the claimant that he could exercise his right of appeal by writing to Mr J Pollock.

Alternative roles

48. Mr Ferris delegated the task of looking for alternative roles for the claimant to Ms Little. On 11 December 2018 Ms Little sent an email (page 295) to the other business units of the respondent located within the same building as her own unit. She described the claimant in these terms –

- *"an experienced Sales team member who is reliable, flexible and experienced in a range of different sales or service areas and pricing operations"*
- *"very hard working, a fast learner and keen to develop his skillset by undertaking a challenging and rewarding role"*

- *"has an ability to quickly build strong relationships with customers, stakeholders and colleagues based on trust and effective communication"*

Ms Little made no reference to the claimant having been dismissed nor his having been through the Improving Performance process.

49. I was satisfied that neither Mr Ferris nor Ms Liddle considered casting the net wider in seeking an alternative role for the claimant. They did not consider approaching the respondent's call centre in Greenock, which would have involved the claimant in a journey to/from work only slightly longer than his current one.

50. Ms Little said that the departments which she approached seeking an alternative role for the claimant all said that they had no vacancies available. When asked about taking the claimant back (under reference to the claimant's preferred remedy of reinstatement or re-engagement) Ms Little said that she would not want to do so *"due to his lack of achievement".*

Appeal

51. The claimant exercised his right of appeal by sending an email to Mr Pollock on 20 December 2018 (page 292). Mr Lees was appointed as the appeal officer and wrote to the claimant on 24 January 2019 (page 221) to arrange the appeal meeting.

52. The appeal meeting took place on 21 February 2019. Pages 223-231 were the transcript; this was based on an audio recording of the meeting and I was satisfied that it was accurate. The claimant prepared a document (pages 222-222a) setting out 14 points of appeal. He gave Mr Lees a copy of this at the appeal. His appeal points echoed the contents of the documentation he had prepared in advance of his meeting with Mr Ferris on 13 December 2018 (pages 212-217).

53. The claimant also referred in his appeal points to the "job search" stating –

"In fact Kirsty Little told me to keep my phone on as she would be contacting me with alternative roles for consideration. This has not happened. I have never been called or offered a position."

54. Mr Lees wrote to the claimant on 5 March 2019 upholding the dismissal decision (pages 233-234). In summarising the claimant's reasons for appeal he omitted the job search point. His letter set out the rationale for his appeal decision. In relation to the minimum required performance, he recorded that the claimant had *"accepted that 80% was the required standard"*.

55. Mr Lees' rationale did not address the job search point. His evidence to the Tribunal was that this was *"just a statement"*, that it did not relate to the claimant's performance and that it was *"not something I investigated".* Mr Lees did speak with Mr Pollock and Ms Little before writing to the claimant; from speaking to Ms Little he satisfied himself that other BDMs in her team were being *"appropriately managed"* in terms of their performance.

Claimant secures employment

56. The claimant obtained alternative employment before his notice period expired and took up that employment with effect from 11 March 2019. The new job paid less than the claimant had been earning with the respondent. It was agreed between the parties that the claimant's net loss of earnings following his dismissal was £777.51 per month.

57. I had evidence from Ms Little and Mr Ferris that sales jobs were reasonably plentiful. The claimant was asked about various sales jobs which had been advertised (pages 270-291) and accepted that some of these might have been suitable for him; others were in sectors of which he had no experience. Looking at matters in the round I did not believe that the claimant had failed to mitigate his loss.

Submissions

58. Mr Mitchell submitted that the respondent had dismissed the claimant for the potentially fair reason of capability and that their procedure had been *"textbook"*. He reminded me that the Improving Performance policy and

procedure did not form part of the claimant's contract of employment and so placed the respondent under no legal obligation.

59. Mr Mitchell argued that Mr Ferris had been entitled to be concerned that the claimant's performance would not get better. The question was whether Mr Ferris had honestly and reasonably believed that the claimant was not competent; the Tribunal should not substitute its own view.

60. Mr Mitchell invited me to find that the respondent's witnesses were all credible and reliable. They had wanted the claimant to do well. Ms Little had tried to support him. He had been given a reasonable opportunity to improve. The respondent had been clear as to what was expected of the claimant – the claimant had accepted that he was required to achieve 80% of his SOV GM target. Dismissal was within the band of reasonable responses open to the respondent.

61. In relation to alternative employment, the respondent had complied with the relevant policy. A job search had been undertaken.

62. Mr Mitchell referred to the following cases –

- ***Taylor v Alidair Ltd [1978] IRLR 82***
- ***E C Cook v Thomas Linnell & Sons Ltd [1977] IRLR 132***
- ***British Sulphur v Lawrie [1978] IRLR 338***
- ***Steelprint Ltd v Haynes EAT/467/95***
- ***Williams v Pembrokeshire County Council ET/1602049/03***
- ***Gair v Bevan Harris Ltd [1983] IRLR 368***
- ***Awajobi v London Borough of Lewisham UKEAT/0243/16***
- ***Sondavi v Superdrug Stores plc ET/57554/94***
- ***Trust House Forte Leisure Ltd v Aquilar [1976] IRLR 251***
- ***British Leyland v Swift [1981] IRLR 91***

- ***Whitbread plc v Hall [2001] ICR 699***
- ***Hollister v National Farmers Union [1979] IRLR 238***
- ***Fuller v Lloyds Bank plc [1991] IRLR 336***
- ***Westminster City Council v Cabaj [1996] ICR 960***
- ***Taylor v OCS Group Ltd [2006] IRLR 613***
- ***Polkey v A E Dayton Services Ltd [1987] ICR 142***

63. Mr Wood reminded me that the claimant was seeking reinstatement or re-engagement. He had been passionate about his job with the respondent. Even though he had secured fresh employment starting immediately – in respect of which Mr Wood argued there had been no failure to mitigate his loss – the claimant wanted to return to the respondent's employment.

64. Mr Wood submitted that the respondent should have waited until the end of the financial year before deciding the claimant's fate. It was a sales job and sales fluctuate with good, bad and sometimes exceptional months. If the respondent had waited, Mr Wood suggested the claimant would have been back on target. It could not be right that others who had been performing worse than the claimant were still employed by the respondent. No account had been taken of his 22 years of service.

65. The respondent had not, Mr Wood argued, done enough to find an alternative role for the claimant. He accepted that this could have resulted in a change to the claimant's terms and conditions or even demotion. The evidence showed that all the respondent had done was to send one email; this was inadequate. The respondent was a blue chip company with tens of thousands of employees and multiple lines of business. They had substantial HR resources and it should not have been left to Ms Little to carry out a job search. In the dismissal letter Mr Ferris had told the claimant that the respondent would continue to look at alternative roles and keep the claimant informed. That had not happened. When the claimant raised this point at appeal, it was not addressed by Mr Lees.

66. Mr Wood referred to the case of ***Bonner v British Telecommunications plc ET/2105216/10***. The claimant there had 37 years' service and his dismissal was found to be unfair because (a) this was not adequately taken into account and (b) there was an inadequate job search. The parallels with the present case were obvious.

67. Mr Mitchell responded on two points. The *"should have waited longer"* argument came down to the respondent's concern about the claimant's pipeline of opportunities and their loss of trust in the claimant for having overstated his pipeline. It had been reasonable for the respondent not to trust the claimant when he asserted at the dismissal meeting that because he had brought in £250k in the three months of the improvement plans, he would achieve sales of £1m for the year.

68. Dealing with the *"alternative employment"* point, Mr Mitchell submitted that the facts in ***Bonner*** differed from the present case. Mr Bonner had unusually long service. He had been moved into a new role a year or so before his capability dismissal, having struggled with that new role. Due to a breakdown in communication he had not been told that his old role might still be available. That contrasted with the present case where the claimant had previously been subject to performance management. Even if there had been an obligation on the respondent to consider alternative employment, which Mr Mitchell did not concede, the issue was fact specific and a matter for the Tribunal.

Discussion and disposal

69. I found all of the witnesses to be credible and there was very little dispute about the facts of the case. That was not surprising given the detail in which the performance management of the claimant undertaken by the respondent had been documented. The claimant alleged that while the requirement to achieve 80% YTD of his SOV GM target was well documented, he had been given to understand that 70% would suffice. This was disputed by Mr Ferris whose evidence, which was supported by the documentation, I preferred on this point. I accepted that his one reference on 6 November 2018 to 70% was in error (although I speculate that if the claimant had managed to maintain his

sales performance above 70%, the dismissal meeting outcome might have been different).

70. I found that the respondent had shown that the reason for the claimant's dismissal related to his capability which was a potentially fair reason. The question for me was that posed by section 98(4) ERA – had the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant?

71. I reminded myself that the *"circumstances"* of which I should take account included the respondent's size and administrative resources and that I should determine the question in accordance with equity and the substantial merits of the case. I should not substitute my own view for that of the respondent; it was the fairness, or otherwise, of what the respondent had done which had to be judged.

72. For the respondent's decision to dismiss the claimant when they did to amount to reasonable treatment it had to fall within the "band of reasonable responses". As stated by the EAT in ***Trust House Forte Leisure Ltd v Aquilar*** –

"It has to be recognised that when the management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable managements might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible."

73. There were a number of factors which pointed to the conclusion that the respondent had acted reasonably in this case –

- The claimant's sales performance was below the SOV GM minimum requirement of 80% YTD.
- The respondent had invoked and followed their Improving Performance policy and procedure.

- The claimant's sales performance did not improve to the minimum standard required.

- While other BDMs were not achieving that minimum standard, I accepted Ms Little's evidence that they were also being performance managed.

- The respondent had lost trust in the claimant's ability to achieve target which was understandable given that (a) he had been subject to performance management before, (b) he had achieved target in only one six month period over the last six years and (c) they had concerns about his pipeline of opportunities.

74. There were also a number of factors which pointed to the opposite conclusion –

- No account was taken of the claimant's 22 years' service.

- Given that the claimant's performance against his SOV GM target had improved over the period of the action plans from 36% to 67.64% it might have been reasonable to delay a decision until the year end to see if that trend continued.

- The steps taken to identify suitable alternative employment for the claimant were inadequate and this point was overlooked at the appeal stage.

75. I reminded myself of what the Court of Appeal said in **Taylor v Alidair Ltd** –

"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."

76. The words "incapable or incompetent" feel harsh in the context of the present case but what they reflect is the need for an employee to perform to the standard reasonably required of him (or her) by the employer. There was no evidence before me to indicate that the SOV GM target given by the

respondent to the claimant for the year to 31 March 2019 was unreasonable. It was no doubt intended to be challenging but that was in effect recognised by setting the required minimum level of achievement at 80% YTD.

77. Latitude was allowed to the claimant and his any of his BDM colleagues who were not meeting the minimum required standard by means of the respondent's Improving Performance policy and procedure. An employee who was not achieving the minimum required standard would receive help in the form of an action plan and coaching sessions designed to improve their performance (albeit with the threat of further action if performance did not improve). The claimant was critical of Ms Little's coaching and her failure to follow up on the daily tracker which Ms Thomson had asked the claimant to complete but I did not consider that this was entirely justified. Based on the documentation it did appear that Ms Thomson was more proactive during the short period when she provided the claimant's coaching but I was satisfied that Ms Little did what the action plans under the Improving Performance procedure required her to do by meeting regularly with the claimant, discussing his sales performance and seeking ways to help him improve that performance.

78. I had to balance the matters which pointed towards the respondent having acted reasonably in treating the claimant's capability (ie his failure to achieve the required minimum standard of performance) as a sufficient reason for dismissing him against the matters which pointed in the opposite direction, as set out at paragraph 74 above.

79. I considered that the argument that the respondent should have waited until the year end to see if the claimant's performance continued to improve was answered by the *"band of reasonable responses"*. This was a situation where more than one view was possible. One reasonable employer might have waited until the year end while another reasonable employer might not have done so. Only if it could be said that no reasonable employer would have taken the decision to dismiss when the respondent did in the present case would that decision fall outwith the band of reasonable responses.

80. The other matters referred to at paragraph 74 above were significant. The respondent should have taken account of the claimant's length of service and they should have done more to find alternative employment for the claimant.

81. No explanation was offered for the failure by Mr Ferris to take account of the claimant's length of service when deciding to dismiss. However, surprisingly, this was not one of the claimant's appeal points. It also did not appear in the documents the claimant put together in advance of the decision meeting on 13 December 2018. In terms of assessing the weight to be attached to this I took into account that the key function of a sales job is to achieve sales and that length of service would not ultimately protect a sales person who was failing to perform to the required standard.

82. While I noted Mr Mitchell's point that the respondent's Improving Performance policy and procedure were stated to be non-contractual, I did not consider this to mean that the respondent was under no legal obligation to have regard to the policy and procedure when dealing with a matter covered by them. The existence of the policy and procedure created a reasonable expectation on the part of employees that they would be followed. While the respondent was free to change the policy and procedure without seeking employee agreement, I considered that there had been an implied term of the claimant's contract of employment that the respondent would act in accordance with its own policies and procedures when dealing with any matter covered by them unless there were exceptional or particular circumstances justifying a departure from them.

83. Turning to the alternative employment issue, I agreed with Mr Wood that the steps taken by the respondent seemed inadequate. Given the respondent's size and administrative resources, they could and should have done more. However, the only suggestion advanced in evidence was that the respondent should have investigated the possibility of a job for the claimant in Greenock. Mr Mitchell took that, I believe correctly, as confirming that the claimant wished to secure employment within reasonable commuting distance of his home.

84. Without some evidence of additional steps the respondent could have taken, it was difficult to assess how much weight to attach to the inadequacy of the job search. An Order requiring the respondent to disclose details of jobs which were available in their organisation at the relevant time within a particular radius of the claimant's home could have been sought, but was not. I noted the reference in ***Bonner*** to *"internal vacancy lists"* which, given that the respondent in the present case was also the respondent in that case, might have been of some relevance.

85. I came to the view that while the respondent had not taken the claimant's length of service into account when deciding to dismiss and had not done as much as it should to seek alternative employment for the claimant, these factors did not outweigh the factors which indicated that the respondent had acted reasonably (as set out in paragraph 73 above). The *"substantial merits"* of this case involved the claimant failing to achieve the minimum standard required of him against a sales target, the respondent taking reasonable steps to assist the claimant to improve his performance to the required standard and the claimant's performance continuing to fall short of that standard.

86. In these circumstances I decided the question of whether the respondent had acted reasonably or unreasonably in treating the claimant's lack of capability as a sufficient reason for dismissing him in favour of the respondent. It follows that the claimant's claim of unfair dismissal does not succeed.

Employment Judge: W A Meiklejohn
Date of Judgement: 08 November 2019

Entered in Register,
Copied to Parties: 11 November 2019