



EMPLOYMENT TRIBUNALS

Claimant: Mr J Smith
Respondent: Imperial Corporate Events Limited

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
By Cloud Video Platform

On: 28 and 29 September 2020

Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: Mr Bidnell-Edwards, Counsel

For the respondent: Ms Ibbotson, Counsel

JUDGMENT

After hearing the evidence and submissions of the parties the Tribunal orders that the claim is dismissed.

REASONS

Introduction

1. The Claimant (“Mr Smith”) brings a claim for unfair dismissal from his job as a Sales Accounts Manager on the grounds of poor performance. The Respondent (“ICE”) denies that the dismissal was unfair.

The hearing

2. Mr Bidnell-Edwards, Counsel, represented Mr Smith. Ms Ibbotson, Counsel, represented ICE.
3. I heard oral evidence from Mr Smith himself and, on ICE’s behalf, from Mr R Poutch (director) who dismissed Mr Smith and Mr G Foston (also a director) who dealt with Mr Smith’s appeal.
4. There was an agreed bundle of documents before the Tribunal and I have taken into account those documents to which I have been referred.
5. Each party has prepared written submissions. Each party in addition made oral submissions at the conclusion of this case. I have taken those into account as well.

Issues

6. The issues are
 - 6.1. Has ICE proven a potentially fair reason for dismissal, in this case capability?
 - 6.2. If so, did ICE honestly believe that the Claimant was incompetent or unsuitable for the job?
 - 6.3. If so, was that belief reasonable?
 - 6.4. If so, was the dismissal with the range of reasonable responses open to ICE assessed in accordance with the equity and substantial merits of the case.
7. The Claimant suggests that the following are the factors that render his dismissal unfair:
 - 7.1. The use of targets for sales based on the sales in the same month in the previous year,
 - 7.2. The removal of the Claimant's computer access,
 - 7.3. There were insufficient reasons given for the dismissal,
 - 7.4. Claimant was not provided with training or support,
 - 7.5. ICE did not have adequate regard for Mr Smith's 17 years of service, and
 - 7.6. He was given insufficient time to improve.

Findings of fact

8. After hearing the evidence of the parties and considering the documents in the bundle I make the following findings of fact.
9. ICE is a company that sells corporate hospitality packages for sporting and musical events both throughout the UK and internationally. It depends on cold-calling potential new clients and former clients to secure bookings from those clients for its hospitality packages. It employs approximately 70 to 75 people. It is run by 3 equal shareholders who are directors and by a Chief Operating Officer.
10. ICE employed Mr Smith latterly as a Sales Accounts Manager. He started his employment on 13 August 2002.
11. In his role as a Sales Accounts Manager, his job was to contact those potential and former clients and sell those hospitality packages. ICE expected him to build up a base of clients to whom he could go back and to manage his own client base.
12. Mr Smith has held other roles in ICE. Originally, he was employed as a Sales Executive. He was also responsible for ICE's information technology ("IT") systems. At some point ICE outsourced the IT systems and so removed responsibility for them from Mr Smith.

13. In 2011 he became a joint Sales Manager and was put in charge of the main sales office head to head with another person. That role ceased a year or so later.
14. In 2015 he was again put in charge of the office as a Sales Manager and again jointly with somebody else. As he said himself in evidence, he found it difficult to operate in the role set up that way. In either September or October 2016 ICE, removed the management role from him. He saw it as a demotion to the position of Accounts Manager.
15. There is a graphical representation of his sales value in absolute terms (that is, not adjusted to account for inflation etc.) for the whole of his employment. No-one disputes its accuracy. It shows that from 2003 until approximately 2007 his sales grew year on year. In 2007 to 2008 there was a slight decline and then a sharp decline from 2008 to 2009. I accept that this is because of the well-known financial crash of 2007-2009 because it coincides with the crash, its general effects are well known and it is plausible that the coincidence indicates the cause.
16. In 2009 through to 2012 his sales continued to decrease slowly. Between 2012 and 2014 there was a slight increase in his sales but from 2014 until the end of his employment his sales again decreased year on year.
17. As a general trend it shows from about 2007 onwards a general decrease year on year of his sales.
18. Up until about August 2018 ICE had no formal performance improvement programme and did not have an effective system of sales targets. ICE set sales staff informal targets but there was no monitoring and no sanction if they fell short of those targets.
19. Notwithstanding that, ICE did from time to time have formal discussions with staff whom they felt were not meeting expectations. This happened to Mr Smith.
20. For example, on 25 November 2014 Mr Smith met with both Ms Shaw and Ms Smith who represented ICE's management. They discussed his performance and his attitude. The meeting notes record (among other things):

"It didn't look like Mr Smith wanted to be a manager and that it appears that Mr Smith prefers to work towards his own target for early finishes. Mr Smith asked "who doesn't like that?""
21. The management at that point explained to Mr Smith that a manager should stay back to support his team even when his target is achieved.
22. Mr Smith replied

"there were numerous amounts of times when managers had gone home and their teams were still there".

23. ICE's management raised similar concerns in a meeting on 4 March 2015. The meeting's notes state that ICE was concerned that Mr Smith might leave and they wanted to avoid that. The meeting notes record:
- "Role change caused feeling. Need to discuss.
- "Responses highlighted emotional state which is concern.
- "Trying to get place as a positive.
- "Seem bad place re Imperial."
- "Took away management re performance. Seem to be just give up leading up felt, wasn't bothered. Absence final nail. Genuine felt before flat out. Constantly going to demotivate. Imperial said that "the call rate wasn't good enough."
24. In that meeting Mr Smith said he was always destined to fail and that it had been a "kick in the teeth" to lose the management position. ICE's management expressed concern that Mr Smith had love for neither his job nor for where he worked. ICE emphasised to him at that meeting that they wanted him to remain an employee.
25. A further meeting took place on 12 January 2016. Under the section "employee feedback", Mr Smith noted his mentality had improved tenfold from the start of the year. When asked
- "What does he feel he could improve further?"
- He replied
- "[He] doesn't see the point in breaking balls".
- He said that he didn't feel valued and that career wise he felt that he was "going backwards".
- The minute also records that he said that
- "sales bores life out of him/feels been frozen out. Doesn't feel there is any other avenue for him".
- When asked
- "[out of 100%] what percentage of capacity does he feel he works at on average?" he replied
- "10%".
26. The removal of the management roles and of the IT roles had a significant adverse emotional impact on him. The year-on-year sales figures show that. The comments above show that. Further he said as much himself in the appeals procedure where he said
- "Prior to having management stripped, I felt respected and useful. I used to run IT and be a key performing sales person, so motivated."
27. There were appraisals in 2016 which evidence that ICE felt that Mr Smith lacked motivation.

28. In particular on 1 September 2016, Mr P Frisby (Mr Smith's manager) appraised him and noted that motivation was an issue. He noted it was both a weakness of Mr Smith and was a threat to him achieving his targets.
29. I have concluded that these minutes demonstrate Mr Smith suffered a general lack of motivation and Mr Smith felt unable for whatever reason to commit fully to his job. Mr Smith's suggested that they simply showed he was saying something because he was expected to say something in the appraisals. I reject that. There is no supporting evidence that shows he was simply saying something for the sake of it. He could have left it blank. Furthermore there is an internal consistency to these appraisals and comments. They show repeated concerns about motivation, general attitude and disposition towards his job. They tally with and are consistent with his views about ceasing to be a manager (his "demotion") and removal of responsibility for IT. They also tally with the trend of his total sales.
30. For all that, none of this ever resulted in any type of formal action against Mr Smith.
31. During 2018 ICE became concerned about its profitability and its efficiency. Its management concluded that the lack of sales targets and of a performance improvement programme had meant that staff had become inefficient and were coasting. ICE believed it had provided them with no motive to try to sell more packages because whether or not they succeeded in selling anything did not affect their prospects of employment.
32. ICE decided it was going to refocus its efforts and reformulate the company to reduce this coasting and to improve efficiency. They implemented a number of measures to put this into effect.
33. Firstly, they set monthly targets for each sales person. ICE set each person's targets as being 10% higher than that which the sales person had achieved in the same month the previous year. For example, if in January 2018 a sales person had sold £10,000 worth of packages then in January 2019 the target would be £11,000 worth of packages. These targets were set purely by reference to the individual sales person's own performance in that month in the previous year. They were not set by reference to anything else.
34. Secondly, ICE formally introduced a capability procedure, the performance improvement programme.
35. Thirdly there was a reorganisation of the sales team, which was split into a number of tiers. At the top was the premier tier whose members were the best performing salespeople with the largest and most valuable portfolio of clients. Below them were tiers 1 (at the top) to 4 (at the bottom).
36. Fourthly they reorganised the salespeople's access to IT. Up until this point many members of staff had had access to IT with their own personal e-mail address and own computer that ICE provided. Though the system they could access the computerised records of the database and social networking services like LinkedIn. ICE decided only those in the premier

tier would have their own computer. Anybody else would have to use a shared computer when they needed to send e-mails or to receive e-mails. The other tiers would also have to rely on the data in the database being recorded on written A5-sized catalogue cards instead. The oral evidence and e-mails from July 2018 which discussed whether Mr Smith would continue to have a computer show that ICE had concluded that the sales teams should be focussing on making communications with potential customers by telephone. This reflected ICE's intended method of working. The availability of a computer distracted from that and allowed sales people to "hide" behind social networking sites or e-mail, instead of approaching a client or potential client and building up a rapport. In essence, ICE was going back to its roots as a cold-calling telesales operation. The July 2018 e-mails record Mr Foston's view that computers should be given only to premier tier staff as

"one of the perks of the job".

37. It was not just a perk however. I accept Mr Poulton's evidence that the availability of IT also reflected the nature of the job that the various tiers were meant to undertake. Those in the premier league were selling between £50,000 and £100,000 worth of packages each month. They had bigger deals and worked with bigger clients. The use of IT for them by then for their job was therefore not only a reward but to assist them to deal with the particular large clients and large sales that they were affecting.
38. The result was those in tiers 1 to 4 essentially went back to paper and phone. The A5 cards contained the same data as that on the computer database. Therefore, those who did not have access to a computer still had access to exactly the same information.
39. I accept this because it is inherently plausible and appears a reasonable approach and because there is no evidence to call into question the motive for the reorganisation. I accept that the A5 cards contained the same information as the database because I have seen nothing that credibly suggests otherwise and because I find it inherently implausible a company whose raison-d'être is sales would withhold potentially helpful information from its sales team. The tenor of the Claimant's evidence was not that there was a lack of information on the cards but that he had developed a preference for using IT and that the change in the system had caused an upset to him rather than to being given no information to carry out his employment.
40. Mr Smith had become reliant on using IT, especially by sending e-mails to try to secure sales. Therefore, it was a significant change for him to move from using IT to a shared computer to relying on the information cards.
41. He had however been making calls to potential clients. He had been employed as a salesman who sold packages by making calls. It was simply expected this would switch from the main method of contact to the sole method of contact. In essence his job did not change. Beforehand it was his job to sell to clients by telephone and to cold call potential new clients

and that was the situation after the changes were implemented. The change was not a radical difference from the job he had been employed to do.

42. ICE introduced the performance management policy in August 2018. The version put before the Tribunal dates from July 2019 but neither party has suggested that there is any material difference between the policy in the 2019 form or that to which Mr Smith was subjected. I have therefore presumed the policy of July 2019 is the relevant policy.
43. The policy provides as follows (so far as relevant)
 - 43.1. Clause 8 provides for an informal stage. It provides that if after informal discussions an employee meets the targets set, then the process ends. The review period at the informal stage is one month. If not, then there will be an assessment to decide if ICE should invoke the formal process.
 - 43.2. The formal procedure consists of 3 stages.
 - 43.3. Clauses 9 to 10 set out the general procedure for notification and procedure at formal performance management proceedings.
 - 43.4. The policy then goes on to identify the various stages.
 - 43.5. Clause 11 provides for the stage 1 hearing. It involves discussions between the employee and the manager conducting the meeting and involves setting out the required standards, allowing the employee to ask questions and to present evidence, call witnesses and respond to evidence, to establish the cause of the poor performance, to identify if there is any further measures such as additional training or supervision which may include performance, to discuss targets and time scale for review and if dismissal is a possibility to establish if there is a likelihood of any significant improvement being made.
 - 43.6. Following the stage 1 hearing if the employer is still of the opinion that performance is unsatisfactory there will be a first written warning. Clause 11.1 requires this to set out
 - “(a) The areas in which [the employee has] not met the required performance standards.
 - “(b) Targets for improvement.
 - “(c) Any measures, such as additional training or supervision, which will be taken with a view to improving performance.
 - “(d) A period for review.
 - “(e) The consequences of failing to improve within the review period or of further unsatisfactory performance
 - 43.7. Clause 11.3 provides that the warning will remain active for a period of 3 months.

- 43.8. If stage 1 does not result in improvement, then clause 12 provides for a stage 2 hearing. For all purposes material to this claim, it is a repeat of the procedure at stage 1. If at stage 2 performance is unsatisfactory, then the outcome is a final written warning that contains essentially the same type of information as the first written warning (clause 12.3) and is of 3 months' duration (clause 12.4).
45. Clause 13 provides for the stage 3 performance management hearing. If performance is still unsatisfactory then ICE can either redeployment at the same grade (or lower grade if the contract allows it) or dismiss the employee on notice.
46. At each stage there is a right of appeal and the appeal hearing can either confirm, revoke or substitute another outcome in place of the original decision.
47. ICE intended that the new tiers would be in place by November 2018. Before the new tiers came into effect, ICE gave Mr Smith an opportunity to demonstrate he should be placed in the premier tier. They did this because they wanted Mr Smith to succeed in the business and he would keep his computer too. To do this they set Mr Smith a reduced sales target of £40,000 worth of sales per month from August 2018 to October 2018. Mr Smith did not achieve this target.
48. As a result, when the tiers came into effect, he was placed in tier 1 and his computer access was revoked. From this point onwards he was expected to work from his record cards.
49. In January 2019, ICE set up a policy that an employee would be assessed on a month-to-month basis as to their performance. Therefore if an employee otherwise not on the programme (and not grossly negligent) fell short of their target in, say, February 2019, then that employee would enter the performance improvement programme at the informal stage described above.
50. It is quite clear from the evidence that Mr Smith found it difficult to adjust to not using his computer. He requested that Imperial provide him with record cards of his clients from the previous 2 years. There was a short delay doing this, but e-mails show that from the beginning of January 2019 and by 15 January 2019, a Ms H White was chasing up prints of these cards for him. I conclude he had this data that he requested by approximately the middle of January 2019. I come to that conclusion because in an appeal meeting against a first written warning between him and Mr Thompson (the manager who heard the appeal) on 29 April 2019 the following exchange took place.
- “Ms Ford (HR): Just out of interest, you know the back history of 2 years that you had, before we got the 6 years, when did you get that, can you remember?”
- “Mr Smith: Uh, when was that given to me? That would probably be the beginning of the year.”

“ ...

“Mr Thompson: That was all you had, and it is an absolutely fair thing to say, look I've not even got 2 years' worth here and that was fine, and then there was some problems in getting that information at the end of last year and then I am sure you had it in January this year because that is one of the things I was setting Emma. “Mr Smith: that sounds about right.”

51. Nowhere in the contemporaneous records does Mr Smith suggest he did not have those documents by mid-January. His memory is likely to have been better nearer the time events occurred than now and so it is more likely this exchange reflects the real situation.
52. Mr Smith's sales target for February 2019 was £67,780. He sold only £18,592 worth of packages.
53. In line with the new company policy that a poor performance in one month would trigger the informal stage of the performance management policy, an informal performance review meeting that took place on 4 March 2019. The objectives agreed at that meeting were that Mr Smith achieve sales of £50,000 in the next month and that is by the end of March to secure one new client. In March he only secured £44,986 worth of sales, therefore he failed to meet his target. He did secure one new client.
54. In accordance with the policy, ICE invited him on 1 April 2019 to a stage 1 hearing. The letter inviting him explained that while he had secured one new client, he had failed to achieve his sales target.
55. The meeting took place on 3 April 2019. A manager, Ms E Harrod chaired the meeting. She adjourned the meeting to investigate the issues Mr Smith raised. It resumed on 12 April 2019. I have set out below a composite of both meetings.
 - 55.1. Mr Smith expressed concern that those who had failed to hit their targets in January had not been subject to the formal process. After investigation during the adjournment Ms Harrod concluded it was because the policy was not yet implemented at that time. I accept that as an explanation. In any event the key problem here was that in February 2019 he did not achieve his target, nor did he achieve his revised target for March 2019.
 - 55.2. Mr Smith complained about no longer having access to his personal e-mail. Because he no longer had a computer, ICE had removed his e-mail too. After investigating the issue Ms Harrod concluded that his e-mail be passed through a centralised system and then passed on to Mr Smith internally. That meant that clients could still contact ICE by e-mail, but Mr Smith (like all other tier 1 sales people) would be dependent on the phone to communicate with clients as the first option, thus furthering ICE's aim.

- 55.3. Mr Smith complained about having access only to client data from his past 2 years. He wanted 6 years' worth. Ms Harrod investigated the issue and concluded that 2 years' data should have been enough for him to hit his targets but nonetheless agreed to provide him with the data going back over 6 years. That was done after the end of the adjourned meeting.
56. Ms Harrod issued Mr Smith with a first written warning for a period of 6 months. She set the following targets:
- 56.1. To achieve £33,650 in business written in April 2019,
- 56.2. To continue to improve his attitude,

56.3. To achieve agreed monthly targets thereafter, as set either by ICE or his line manager.

She set a deadline of 30 April 2020 and an aim to review matters on or about 5 May 2019.

57. Mr Smith requested that the information be provided to him on A4 sheets rather than being printed onto A5 cards. ICE did that for him.

58. Mr Smith appealed against the outcome of the stage 1 hearing and it was heard by Mr Thompson. I have referred to this meeting already. The appeal succeeded in that the warning's duration was reduced from 6 months to 3 months to reflect the policy.

59. As part of his investigation in deciding the outcome of the appeal, Mr Thompson looked into who Mr Smith's clients were and how frequently they had made bookings with Mr Smith. No client who was making bookings with Mr Smith was a client older than 2 years. I accept this is accurate. Mr Smith has given me no reason to call this finding into doubt. Therefore, it followed all the clients to whom Mr Smith was selling packages were listed in the 2 years' worth of data that ICE provided to Mr Smith in January 2019.

60. In April 2019 Mr Smith met his target.

61. In May 2019 Mr Smith failed to meet his sales target. His target was around £40,000 worth of sales. However, he made only around £3,500 worth of sales.

62. ICE therefore invited him to a stage 2 meeting. They sent him the invite on 5 June 2019. It clearly set out what the targets were that was agreed in April 2019 and how he had failed to meet those targets.

63. The meeting took place on 10 June 2019 and was chaired by Mr Thompson. The following exchanges took place during the meeting:

"Mr Thompson: Ok that's why it was adjusted then, as Emma did it over 2 months didn't she? So let's go to the facts, your main performance was the worst in the company since records, that's a fact, since anyone that's got the contract with the company that's the worst we have ever done. Is there a reason behind it?"

"Mr Smith: No not really. I honestly do not know. Whether it is just demotivation or what, we had the Champions League come through and I thought I was going to absolutely smash it and it's just, I hit everything but the target."

"Mr Thompson: OK.

"Mr Smith: I think it completely pisses the clients off, because I was chasing them with different packages, different prices, I think it just affected me mentally as well. I didn't get what I was expecting. I had spoken to so many clients before it happened when Liverpool actually qualified for the final, and it's like, I don't know they fell down like a deck of cards. It was so demoralising, other people were doing well that week, and I was so

expectant that I was going to have a storming, not only week, but was going to set me up for the month.

“Mr Thompson: Understood.

“Mr Smith: And it never happened. I think it was the knock-on effect from that, four days week, I got time off etc, it was a culmination of that more than anything else. Not so much what happened with the company or where my head was at, I think I was expecting so much business to come in as a result of speaking to my clients about the Champions League and it never came to fruition and I think it hits me in the head, I was expecting to get back into other events, other packages, other prices.”

64. Later in the meeting the following exchange happened:

“Mr Thompson: We all want you to be in the business. It doesn't benefit me, the Directors or Emma or anyone, if you don't work here anymore. It's going to make her life harder, it's going to make my life harder to hit the figures, it's going to make their life harder to make their 5 years figures. It benefits no one you not working here, however, I can't have someone doing a £3,500 month. Imagine if that was across the sales floor.

“Mr Smith: No, I get that.

“Mr Thompson: I can't even justify it.

“Mr Smith: “I know, it's a disgrace. I do not know how it happened, but no matter what I would have done on that phone, any differently, there is physically nothing I could have done. I don't know, that's how I feel.”

65. Mr Thompson's sentiment that ICE did not want to dismiss Mr Smith was genuinely held. It reflected the oral evidence I heard and it is clear that the process was no set up to ensure Mr Smith failed. There is no evidence of malice. Furthermore Mr Smith had been there for some time and there is no obvious reason why now ICE would seek to orchestrate a scheme to get rid of him. There is an obvious attraction to retaining experienced staff, which of course he was.

66. Mr Smith and Imperial agreed new sales targets and these were as follows:

66.1. June 2019, £34,167.

66.2. July 2019, £72,558.

66.3. August 2019, £17,289. An increase of £4,016.

66.4. September 2019, £81,319.

66.5. October 2019, £40,000 which is an increase of £7,957 on the original target.

66.6. November 2019, £51,608.

66.7. December 2019, £30,000. This was an increase of £26,700 on the original target.

67. ICE decided to increase each of those 3 months to ensure that by the end of the year Mr Smith had sold what he was meant to sell. The intended

effect was to spread out the shortfall that he had incurred up to his stage 2 meeting.

68. On 14 June 2019, ICE issued him with a final written warning of 6 months' duration.

69. The letter set the following targets for improvement against which he would be measured.

"Achieve monthly targets as discussed and set by Head of Sales and you line manager. Your target has been adjusted for the remainder of 2019 so that you may still achieve your annual target figure. These have been confirmed to you by your line manager Emma Harrod and monitored on a monthly basis.

"Continued improvement of your attitude."

70. On 18 July 2019 that 6 months was reduced to 3 months in line with the performance management procedures because ICE accepted that the 6 months had set in error.

71. Mr Smith met his June target.

72. He failed to meet his July target, selling only £24,323 worth of packages.

73. As to attitude, ICE concluded that the target was partly met that his general attitude in the office had improved. However they felt he was not showing drive and determination to hit targets because he left the office early whenever possible rather than stay behind to the end of the business day to try to achieve his targets.

74. On 7 August 2019 ICE invited Mr Smith to a stage 3 performance management hearing. The letter clearly set out what the targets were and how it was said they had been achieved or missed.

75. There were some issues setting the date for the meeting. It eventually took place on 27 August 2019. Mr Poutch chaired the meeting.

76. The notes of the meeting show it was a thorough meeting. I have set out below what I consider to be particularly relevant extracts.

76.1. Mr Smith confirmed again that he had received the 2 years' worth of client data in January. When asked about the shortfall in July Mr Smith said as follows:

"Yeah, exactly. I think initially, they had done, the shortfall that I have made up back in May, he had tagged on to my carryover for June and July anyway. I hit my June target, and then it's the July I fell short, but that was a huge month, whilst taking into account £35,000 worth of world cup football, which I couldn't replace."

76.2. Later, Mr Poutch asked him: "Have you struggled going back to more phone based calls and sales?"

Mr Smith replied:

“Yeah, massively. A lot of my clients will not answer the phone, it’s either a generic thing across the board, it’s not something that I have necessarily done to spoil the relationship because I text people or anything like that, or used to e-mail people, it’s nothing to do with that. I don’t know whether it’s just this GDPR thing, they won’t answer.”

76.3. During the meeting Mr Smith confirmed he had known the access to one’s own computer was going to be part of the tiering system in September or October 2018.

76.4. Later on in the meeting Mr Smith said: “It just feels like you are getting needled all the time and it’s just like a motivational thing, cold calling obviously requires discipline doesn’t it, and without that discipline and that motivation it’s hard to motivate yourself to do that. And at the end of the day to feel that a lot of stuff that has happened through Imperial over the years has been sort of aimed at me, for me, because of me, maybe, I don’t know. But it’s again another opportunity that the rug was swept from underneath me.”

Mr Poutch replied:

“I disagree it was swept away from you, because you were given quite a decent amount of notice and leeway to enable you to continue on that style of sales.”

Mr Smith then agreed with this Mr Smith then said that he never thought for a minute he would not achieve the sales. Mr Smith then went on to suggest that maybe price was a problem in securing bookings.

76.5. Discussions later turned to the issue of Mr Smith’s leaving work early. Mr Poutch said:

“I noticed specifically about you and about these two months there were two stages of performance management for this, of which the same issues have been happening and we know that the fact is that you are losing clients who won’t book at the prices we charge, or the medium or mode that you are contacting them. We knew that you needed new clients, new blood, you knew that some of your big numbers were being delivered by clients who were buying one off stuff, big events like the world cup. You needed new clients, and that was going right back to when you first knew that the computer was going to be leaving you. At no point during that journey have you thought to yourself, that the time is available to me, rather than going home, I need to spend in the office, trying to get new clients on board.”

Mr Smith replied:

“Fair enough Rob, but the way that the environment works is that without an atmosphere you are not going to get that.”

76.6. Mr Poutch asked Mr Smith what he would do to improve his situation and his sales. The following exchange took place:

“Mr Smith: Get more clients, which I am working on at the moment. It looks like [a particular member of staff] isn't coming back. Hopefully I will inherit that batch of her clients, and the fact that she has already booked a lot of business for the foreseeable with a lot of those clients, so they are not prepared to book anything at this moment in time, but I have still got business out of some of the others so you know talking the long term may be 6 months.

“Mr Poutch: So new clients, is one and the way you would get those is by utilising the other member of staff's clients. What about if the other member of staff comes back?

“Mr Smith: Then she has them back but I still have that business anyway.”

Mr Poutch pointed out that the clients were not going to be enough to get him back to the targets that he needed to achieve and asked him what his other plan was. Mr Smith replied he would rely on LinkedIn. Mr Poutch inquired further and, eventually, Mr Smith suggested calling clients would be part of his plan.

77. Mr Smith said he had been using LinkedIn to approach clients for about 12 months at least “solidly”. He agreed Mr Poutch could log into Mr Smith's profile and take a look at what Mr Smith had been sending. After doing so, this exchange took place:

“Mr Poutch: “So, you are not like smashing it out are you?

“Mr Smith: No. It is very rare. I would send it they requested it.”

78. This exchange leads me to conclude Mr Poutch is correct when he said that Mr Smith's LinkedIn profile showed that he had sent no messages seeking business.

79. Mr Poutch adjourned the meeting to carry out some of his own investigation into the issues Mr Smith had raised:

79.1. Mr Smith suggest sales in 2018 had been artificially high because of the football World Cup, and that big events like that distorted figures. Mr Poutch discovered that Mr Smith had sold £33,000 of packages specific to the World Cup in July 2018. He noted that Mr Smith had fallen short of his July 2019 target by £48,000. He observed even if he discounted £33,000 from his July 2019 shortfall to reflect the unique event of the World Cup in July 2018, Mr Smith would still have failed to meet his target. I also note his failure to meet targets was not unique to one month but repeated. I therefore accept ICE's was entitled to conclude that one-off sporting events did not explain Mr Smith's failure to meet his targets.

79.2. During the course of the evidence Mr Smith also suggested that another reason for the failure to secure sales was Brexit. He explained that when he did contact customers this was often an excuse that was used for not making purchases or placing orders or for bringing the call to an end. ICE contends this is just an excuse, and that a good salesperson would be able to overcome the excuse the (potential) client was advancing. I am satisfied ICE were reasonable to hold this opinion. It is notable that Mr Smith does not mention Brexit at all as an excuse for his failure to meet targets until the hearing before the Tribunal. It therefore appears as though it is a last minute, hastily thought of excuse. If Mr Smith genuinely believed that Brexit was a reason for him not meeting the sales I would have expected him to have advanced that in those meetings because it is clearly a relevant factor if the economic situation is such that people simply do not want to buy the packages. In any event it is undermined by other factors.

79.2.1. Firstly the evidence of both Mr Poutch and Mr Foston that any good salesman would recognise that the use of Brexit as an excuse was simply that, an excuse and that a good salesman would with many clients be able to get beyond that excuse and at least be able to secure a more detailed conversation and in many cases would be able to secure a sale.

79.2.2. Secondly that other people in the company who were working in the sales team for the most part appear to have been meeting their targets. It would seem an unlikely coincidence that Brexit affected only Mr Smith's client base.

79.2.3. In any event Brexit has been going on since 2016. His 2019 targets were based on his performance in 2018, when Brexit was still in the economic background. Therefore, it seems highly unlikely and highly improbable that Brexit has any role or explanation to play in what happened in Mr Smith's case.

80. On 30 August 2019 Mr Poutch sent his decision in a letter to Mr Smith. He decided to end Mr Smith's employment because of poor performance. The termination took place on notice and Mr Smith therefore was given his 12 weeks' notice pay to which he was entitled. He was also advised of his right to appeal.

81. In relation to the details and the reason for dismissal the letter says as follows:

"Your performance and attitude continue to fail to meet the required standard during the review period of the final written warning. The details of your unsatisfactory performance are as follows:

“Your sales performance did not meet the required standard. Following the final written warning issued on 14 June 2019 during July 2019 you fell £48,235 short of your £72,558 target. As such, by 31 July 2019, your year-to-date performance was £86,723 below your expected performance level of £293,700, and £60,023 below your year on year performance of 2018 for the same period.

“Your attitude did not meet the required standards. I felt that you had not made sufficient effort to improve your attitude given the serious nature of the final written warning issued to you at discussions which you have had as part of the performance management process. On the issues we discussed during the hearing was that you had taken willing advantage of team early finishes, rather than showing determination and drive to achieve your targets by working on gaining new clients.”

82. It has been suggested that the reasons for the dismissal are not clear. I disagree: They are perfectly clear.
83. Mr Smith lodged an appeal on 6 September 2019 on the following key grounds:
- 83.1. the penalty applied was too harsh,
 - 83.2. his length of service warranted a different outcome,
 - 83.3. the sanctions were unreasonable,
 - 83.4. he had not had his client base data for a period of this year which affected his ability to do his job,
 - 83.5. the new scheme was open to interpretation and had been subject to alteration actioned “pretty much on the fly”,
 - 83.6. he wasn’t getting the letters that were sent to him through an electronic portal. For my part I don’t understand this ground of appeal. All the documents demonstrate clearly that he engaged fully with the letters that were sent to him within a reasonable time. There is no evidence he had not seen any correspondence or been late dealing with it.
84. Mr Foston conducted the appeal. He sent out the invitation to the appeal hearing on 9 September 2019. Due to illness Mr Smith was unable to attend the appeal hearing and asked if instead it could be conducted by him making written representations by e-mail. Mr Foston agreed to that approach. He therefore rescheduled the hearing and gave Mr Smith an opportunity to send in details of his appeal by e-mail. Mr Smith did that.
85. Mr Foston considered Mr Smith’s e-mail. He had some questions and so he prepared a table in a word processor document (which a lawyer might recognise as a Scott Schedule). In the first column were the appeal points which were taken from Mr Smith’s appeal. Mr Foston in the second column then posed questions that he felt might be relevant to help him to understand those points in more detail. A third column was then provided for Mr Smith to type in his response.

86. He sent this to Mr Smith by e-mail and Mr Smith responded on 30 September 2019.
87. The information prompted Mr Foston to ask some more questions about the outcome Mr Smith was seeking. Mr Smith replied to them on 2 October 2019.
88. On 3 October 2019 Mr Foston send his decision in writing to Mr Smith.
89. The appeal outcome letter is a detailed letter that goes through what essentially are the 5 issues that have been raised. In summary the following points stand out:
 - 89.1. In relation to the question of process and harsh penalties Mr Foston noted that Mr Smith had failed to perform at the level that was expected of a tier 1 salesman.
 - 89.2. As to the non-availability of various packages in various years for example the football World Cup, Mr Foston noted that Mr Poutch had been very careful to consider the performance over the whole of 2019 and his longer term picture of Mr Smith's performance. There were many occasions when Mr Smith had failed to meet targets.
 - 89.3. Over an extended period of time he had failed to meet the expectations. Mr Foston noted that Mr Smith had been provided with 2 years' worth of client history he thinks in 2018 but I find as a fact it was January 2019 which Imperial had felt was sufficient. They explained that the reason it was sufficient was that if a client does not book for 15 months or more then that client is no longer allocated to the original sales person and, in colloquial terms, becomes "fair game" for any of the other sales team.
90. Mr Foston noted that even when ICE provided Mr Smith with 6 years' worth of his client's history as he asked, his performance did not improve. Mr Foston could find no evidence that unfair treatment by other members of staff was any relevant factor in Mr Smith's performance or dismissal.
91. Mr Foston dismissed Mr Smith's allegation that the performance management process had been the subject to alteration after its introduction which had made the process unfair. Mr Foston explained the duration of warnings had been reduced from 6 months to 3 months. He did not believe that was unfair. I cannot understand how it could be unfair to be subjected to a shorter warning that otherwise might be the case.
92. Mr Foston concluded that there was nothing wrong with adding shortfalls in sales to the following months. He concluded that it was in order to ensure that sales staff would return to expected performance as quickly as possible and achieve their yearly sales target (otherwise there would be a reduction in ICE's turnover). He however noted that in Mr Smith's case because there was such a large deficit, they did not feel it had been possible and therefore he had been spread over 3 months later in the year. He did not feel this was unfair.

93. Therefore, Mr Foston dismissed the appeal.
94. Having read the letter and considered the questions that Mr Foston asked of Mr Smith, it is quite apparent that he was aware of Mr Smith's employment history and performance history and of why ICE had dismissed Mr Smith in the first place. It clearly has in mind what was at the root of the Mr Smith's dismissal in the first place.
95. Finally, it is worth remembering Mr Smith was not the only salesperson. All of them were subjected to the revised targets. Only a few other members of staff failed to meet their targets. They were also put on the performance improvement programme. One of them resigned but I do not know why. Others appear to have improved to a satisfactory standard and came off the programme. Most sales staff do not appear to have fallen within the performance improvement programme's terms of reference. The fact that only a few members of staff were subjected to the programme and that the majority came off it after improvement supports my conclusion earlier that this was a genuine programme rather than a sham of some kind to secure Mr Smith's dismissal. It was genuinely aimed at improving performance.

Law

96. The **Employment Rights Act 1996 section 111** entitles a person who has been employed for a sufficient period to bring a claim for unfair dismissal
97. **Employment Rights Act 1996 section 98** provides (so far as relevant):
“(1) In determining ... 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—
“ ...
“ (b) 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, and
“(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.

“ ...”

98. The employer bears the burden of proving on the balance of probabilities that the claimant was dismissed for capability. If the employer fails to persuade the tribunal that had a genuine belief in the employee's misconduct, then the dismissal is unfair.
99. Guidance on determining whether a dismissal for capability is fair or unfair can be found in **Alidair Ltd v Taylor [1978] ICR 445 EWCA:**
 - 99.1. does the employer honestly believe this employee is incompetent or unsuitable for the job?
 - 99.2. are the grounds for that belief reasonable?
100. **Alidair** makes it clear that it is not necessary for the employer to prove that he is in fact incapable or incompetent.
101. It is for the employer to set the standard. The Tribunal cannot substitute its own view. The assessment is by reference to the job the employee was doing: **Plessy Military Communications Ltd v Brough UKEAT/518/84**. The standards can be found in express or implied terms of the contract, non-contractual policies or procedures or industry or local standards.
102. If a requirement is an obvious part of the job (e.g. for a pilot not to crash the plane), then there is no requirement that the employer should have told the employee (**Burns v Turboflex Ltd UKEAT/377/96**). Otherwise the employer must satisfy the Tribunal that the employee knew or ought to have known what was expected of him.
103. When it comes to reasonableness the burden of proof is neutral. The tribunal should consider all the circumstances including the employer's size and administrative resources. The tribunal has had regard to **British Home Stores Ltd v Burchell [1980] ICR 303 EAT**; **Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT**; **Foley v Post Office [2000] IRLR 82 CA** and **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA** and reminded itself that the question is whether the procedure that the employer followed within the "range of reasonable responses" open to the employer and whether the decision to dismiss summarily within the "range of reasonable responses" open to the employer.
104. The Tribunal is not entitled to substitute its own view for that of the employer.
105. The Tribunal is entitled to consider and measure the employer's conduct and decision against the employer's own disciplinary or conduct codes.
106. The **ACAS Code of Practice on Disciplinary and Grievance Procedures** in principle applies to dismissals for capability:

107. In paragraph 1 of the code it says:
“Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.”
108. So far as basic fairness is concerned the code identifies the following key steps in any disciplinary or capability procedure:
- 108.1. carry out an investigation to establish the facts of each case;
 - 108.2. inform the employee of the problem;
 - 108.3. hold a meeting with the employee to discuss the problem;
 - 108.4. allow the employee to be accompanied at the meeting;
 - 108.5. decide on appropriate action; and
 - 108.6. provide employees with an opportunity to appeal.
109. The **Trade Union and Labour Relations (Consolidation) Act 1992 section 207A** requires a Tribunal to have regard to the code for reasons explored below.
110. Despite the codes of practice and guidelines in the cases, ultimately each case must turn on its own facts and be broadly assessed in accordance with the equity and substantial merits of the individual case: **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12 EAT; Bailey v BP Oil Kent Refinery [1980] ICR 642 CA.**

Conclusions

Has ICE proven a potentially fair reason for dismissal, in this case capability?

111. Yes. On the facts found, it is apparent that ICE embarked upon a series of assessments by which Mr Smith was given clear, objective targets and his performance was measured against them.
112. The Claimant knew the standard that he had to meet. It is apparent that he did not meet the targets that ICE set.
113. While it may be arguable that “attitude” is subjective I do not accept it cannot be a relevant factor as part of a performance improvement programme. There is no suggestion his attitude could be described as misconduct. In any case it was clear to Mr Smith what ICE thought was wrong about his attitude and how he could meet their concerns. Furthermore, it is apparent it was not the sole or principle reason for his dismissal. Rather the sole or principal reason was his failure to meet his sales targets.

Did ICE honestly believe that the Claimant was incompetent or unsuitable for the job?

114. The answer to that is yes. His performance was measured by reference to objective criteria and he failed to meet those criteria. This supports the conclusion that ICE’s belief was honestly held.

115. Furthermore, ICE did not use the programme as a method to orchestrate his dismissal from the company. It is apparent throughout that ICE would rather he remained an employee than left.
116. In further support are Mr Smith's own admissions in the meetings that he had received the data he needed and that his performance was still inadequate.

If so, was that belief reasonable?

117. Yes. The data that ICE had supported the conclusion he was regularly not hitting sales targets. It is objective and easily measurable.
118. ICE had taken into account he had 2 years' worth of client data by midJanuary 2019 and 6 years' worth in April 2019 even though all of his extant clients were within the 2 years' grouping. In spite of this he still failed repeatedly to meet his targets.
119. ICE's assessment about his attitude was one that was open to it. Their conclusions are justified simply by reference to what Mr Smith himself said about his performance and attitude. Furthermore Mr Smith had left work early on a number of occasions by taking advantage of early leaving rather than stay at work to try to hit his targets. ICE was reasonably entitled to conclude this too demonstrated poor attitude. However, it is important to consider this was not the sole or principal reason for his dismissal.
120. ICE was entitled to conclude that one-off sporting events that might artificially boost sales in 2018 and so result in unrealistic targets in 2019 was not an explanation for his poor performance. If they were removed from any shortfall, there would still have been a shortfall.
121. ICE's reasoning that "Brexit" was an unacceptable excuse is a reasonable one for it to hold. It is reasonable to expect salespersons to be able to overcome hurdles that clients might put forward to avoid a purchase.
122. Neither the lack of one-off events nor Brexit appeared to have any general effect on other salespeople in the business. ICE is entitled to conclude that one would have expected there to be evidence of their effect across the company if Mr Smith's excuses bore some credence.
123. ICE set Mr Smith's targets based only on his own performance the previous year. This is a reasonable way to set a target because it is by reference to a person's own demonstrated abilities. It was therefore reasonable to measure his performance against that target.
124. ICE was entitled to conclude the removal of Mr Smith's personal computer access was not a factor in his poor performance. Mr Smith was employed to sell to clients by phone. There is no explanation from Mr Smith why a lack of computer would stop that. He had the same data that he would have been able to access on the computer but now printed instead. In any case ICE noted that Mr Smith had subscribed to LinkedIn when he did have his own computer but even then he had done little with it to secure sales.

If so, was the dismissal with the range of reasonable responses open to ICE assessed in accordance with the equity and substantial merits of the case?

125. In my judgment ICE's decision to dismiss was within the range of reasonable responses in accordance with the equity and substantial merits of the case.
126. I repeat what I have said already because I am satisfied it shows the decision was a reasonable one. In short he had missed clear and objective targets of which he had been clearly informed on a number of occasions. These were not just near misses but significant misses and presented a consistent pattern. He had lost his enthusiasm and drive and that appears to be the main theme underpinning all of these events.
127. I make the following additional observations.
128. The programme itself and the process ICE followed is fair and is within the spirit of the ACAS code of practice on disciplinary procedures. It provides transparent opportunity to improve and to make representations before any sanction is imposed and to present a genuine appeal. The hearings and appeals were approached openly by ICE and with a genuine concern to improve performance and avoid dismissal if possible.
129. Mr Smith had no obvious strategy to improve his performance. He had been a salesman at ICE for 17 years and so this is somewhat surprising. His main strategy appeared to be to take over the clients of a member of staff who was on long-term leave. It is reasonable for ICE to conclude that is not a viable or acceptable strategy.
130. The Claimant suggests that the following are the factors that render his dismissal unfair. I disagree with each of them.
- 130.1. There were insufficient reasons given for the dismissal: I disagree. The dismissal letter and the appeal outcome letter are clear enough to enable a reasonable person and Mr Smith in particular to understand why he was dismissed. Everything that happened during the performance improvement programme means it cannot realistically have been unclear to him why ICE had dismissed him.
- 130.2. ICE did not provide the claimant with training or support: Mr Smith has not been clear exactly where he felt he needed training or support even during the Tribunal hearing. It is not a big feature of his comments in the performance improvement programme. That suggests it is something he has thought of after the event to explain what happened to him.
- Mr Smith was in short being asked to do the job for which he had been employed using the data he had always had available to him and using the phone as the primary communication tool which was ICE's primary method of working. He had been doing the job for 17 years. It is reasonable for ICE not to pursue this line.

- 130.3. ICE did not have adequate regard for Mr Smith’s 17 years of service: I accept that it is not expressly mentioned in the dismissal or appeal outcome letters. However there is clear reference to the fact that Mr Smith had worked with ICE for some time and that they did not want to lose him. It is clear they set targets that he had reasonable chance of achieving (and did on occasions as noted above). ICE clearly had his long service in mind. His frequent failures to hit targets (sometimes missing by wide margins) meant ICE were entitled to conclude he could not do the fundamental part of his job: phone clients and sell. I do not see how long service could reasonably mitigate against this.
- 130.4. He was given insufficient time to improve. I disagree. He was given a reasonable time to improve. Besides the performance improvement programme did not suddenly happen out of the blue. He had a long history of sub-par performance and ICE had expressed those concerns to him in the previous years. The only way he could have been afforded more time was to introduce more stages or to ensure each stage (and so the period of any warning) lasted for longer. He did not argue that. There was nothing before ICE to suggest reasonably that more time would have resulted in any improvement.
131. Overall, the process was fair and transparent. In the circumstances, ICE was entitled to act as it did and to reach the conclusions it did.
132. The dismissal was fair. The claim is therefore dismissed.

Employment Judge Adkinson

Date: 15 October 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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