



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4112999/19

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Held on 4, 5 & 6 November 2020

Employment Judge J M Hendry

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Ms. Adriana Marchese

**Claimant
Represented by
Mr. N MacDougall,
Counsel,
Instructed by:
Mr. F H Lefevre,
Quantum Claims**

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Sparrows Offshore Services Limited

**Respondent
Represented by
Ms. J Ferrario,
Counsel,
Instructed by:
Ms. E Johnston,
Pinsent Masons**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Application for a finding of unfair dismissal not being well founded is refused and the claim for unfair dismissal is dismissed.

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E.T. Z4 (WR)

REASONS

1. The claimant in her ET1 contended that she had been unfairly dismissed from her employment as a Senior Project Engineer with the respondent company. The respondent opposed the claim arguing that she had been fairly dismissed on the grounds of capability. The case progressed to a merits hearing.

Issues

2. The claimant argued that the process by which her capability had been assessed by the respondent was unfair particularly having regard to a) a lack of training particularly in “hands-on” processes, b) that she had worked without any adverse comment for a number of years as a Senior Project Engineer and c) her role had only recently changed from acting for one client dealing with the same type of work for some years to now being required to carry out *ad hoc* work requiring practical experience.

3. The Tribunal heard evidence from the claimant and also from the following witnesses from the respondent company namely:

- Steven Gregg, Senior Applications Engineer;
- Michael James Gibb, General Manager, Engineering;
- Matthew W J Corbin, Regional Operations Director

The Tribunal also considered the Joint Bundle of Documents lodged by parties (JB1-117).

Facts

4. The claimant worked in various roles as an Engineer prior to joining the respondent on 14 November 2011 as a Senior Project Engineer within the Engineering Services Department. The role was a senior one which carried both greater responsibility and an expectation of competence than that

expected of a unpromoted Engineer. As part of the role the claimant would oversee the work of other less qualified staff. It also came with an expectation that the claimant would familiarise herself with the differing crane types inspected and repaired by the company.

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5. The claimant received a Statement of Terms and Conditions of Employment (9JB11) which she signed on 3 November 2011. The claimant also received a Job Description in June 2016 (JB13). The claimant was subject to the respondent's various policies including their Grievance Policy (JB5), Bullying and Harassment Policy (JB9) and the Capability- Managing Performance Policy (JB6,7,8).

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6. When the claimant joined the respondent company they were very busy. The claimant was not deployed offshore. Many of the respondent's engineers are not deployed offshore. Because of her previous experience the claimant was asked to act as a co-ordinator principally dealing with one major client namely "Transocean". Her work consisted principally of Crane Condition Evaluation ("CCE") work. She would receive reports from experienced supervisors who visited cranes/lifting gear installed on rigs and platforms in the North Sea. They would go through a thorough checklist of crane components and prepare comments on their state and when they needed repair or replacement. The claimant was responsible for taking this information and preparing a report for the client recommending work and suitable timescales. If the work was instructed she would then be involved in arranging for the work to be carried out and the general administration, including billing, involved. She was the 'focal point' in the company for this client. This was an important and demanding role which she appeared to fulfil well.

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7. The respondent specialised in providing specialist lifting (cranes and handling services) globally to the oil industry. They employed approximately 200 hundred staff at their offices in Aberdeen where the claimant was based.

8. The claimant's salary was latterly £57,000 together with associated benefits.

9. Following her recruitment the claimant passed her probationary period. She was an enthusiastic member of staff working in a team of engineers. She would look after graduate engineers who joined both supporting and mentoring them.
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10. The claimant received a yearly assessment review in 2013 in which she was held to meet expectations. The writer of the review, Scott Fraser, noted the claimant was: *“well organised and supports graduates well as would be expected in a senior engineer role. Handles a large workload when required but on occasion delegates these CCEs that need most work to others without considering her senior role and the set hours available to complete them. On occasion does not take negative feedback well”* and later (JBp72) *“that the claimant ‘works well’ within the limits of her own knowledge. As Senior Engineer the expectation is on the individual to manage her continuing professional development and will be looking for Adriana to further develop her technical knowledge through workload and the EDS in the coming year. This would improve by running with or supporting a technical engineer work scope which would broaden her knowledge and development.”* EDS was an internal computer learning system.
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11. The claimant was issued with a new job description in June 2016. It included some technical duties that were not contained in the original job description. The claimant was concerned about the changes but took no action to object.
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12. The respondent company lost the Transocean contract in about June 2016 although some legacy work remained. At this point the claimant began to be given other work unrelated to Transocean. Because of a downturn in the oil industry the respondent had to take on any work available. The claimant was involved working out the procedures to be used for carrying out various types of crane related work and delivering it on budget.
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13. The claimant became concerned about the attitude and behaviour of a colleague, Grant Anderson. She e-mailed her Line Manager Steven Gray on

12 April 2017 asking to meet him about work being assigned to her and Mr Anderson. She outlined a particular problem had arisen when he had been looking after some work for her. She described his attitude towards her as disrespectful. She asked not to have any work passed to her by him. She also wrote: “..there always seems to be some misunderstanding and insufficient instructions..”

14. Mr Gray acknowledged the email. Mr Gray responded by e-mail on the same date confirming that he would set up a meeting with the claimant to discuss the complaint on his return to the office the following week. This he did. He considered her concerns and spoke to Grant Anderson about the allegations. He told him that he should treat all staff with respect. Mr Gray understood that the issues had been resolved through this informal process.

15. 15. The claimant was interested in further developing her career. In the summer of 2017 she requested that she should be considered by the respondent for taking the offshore survival renewal course and offshore medical in order to allow her to be deployed offshore and gain experience there. This was declined by the claimant’s Line Manager Steven Gray in 2017 despite the claimant offering to meet the fees involved. The claimant on a number of occasions asked for workshop/offshore exposure but these requests were denied because the respondent was busy and the Transocean contract important to them.

16. Throughout the summer of 2017 the claimant noted that Mr Gray seemed to be informally supervising her work more closely than before. She worked alongside a number of engineers and technical support staff in an open plan office. Unknown to the claimant Mr Gray had developed concerns about the claimant’s performance throughout the summer of 2017. In particular problems with three contracts the claimant had been involved in had been noted by him. The first related to work on a winch turntable. He had gone over the drawings with her. His view was that the claimant had a lack of understanding of the job. He was surprised that she did not know the difference between a Nyloc nut and a Nordlock washer which are two

common components on cranes. She was unable to identify the 'Earth Boss' on the winch. He was concerned that she did not recognise the terminology being used. The second related to maintenance of a crane owned by "Bluewater" and her seeming lack of familiarity of where to access the crane manual on the computer system or appreciate the difference between using solid weights and water weights for testing that equipment. The client had requested solid weights and the claimant had provided for water bag weights which could not be used because of space constraints. Using the wrong type of weights would be costly and embarrassing for the company. Thirdly the claimant had worked on a job for Noble Drilling involving the installation of latchways where she had copied procedures from a previous similar job but not realised that the previous installation provided for a horizontal system and not as required for the new contract a vertical one. If the issue had not been noted in the office then she would have provided the wrong instructions for the contractors doing the work. It would have been an embarrassing and potentially costly mistake.

17. Issues again arose with Mr Anderson's behaviour towards the claimant causing the claimant to e-mail Mr Gray on 7 December 2017 (JBp85) raising a grievance against him. This related to the contract for Bluewater where he was critical of the lack of detail provided by the claimant.

18. Mr Gray was an experienced Manager. He arranged to meet and discuss the issues he had with the claimant's work with an HR Adviser Greg Birnie. He was advised that the informal discussions he had had with the claimant throughout the summer of 2017 satisfied the respondent's capability policy requirement for an informal process and that he could now proceed with an formal process. The terms of a PIP were discussed and preparations made to meet the claimant. On 12 December Mr Gray emailed the company's HR department confirming the terms of the meeting he had with Mr Birnie (JBp85).

19. Mr Gray decided in January to commence a formal capability process. His actions came as a surprise to the claimant who had no prior warning he was considering this course of action.

Stage 1 formal performance meeting

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20. By letter dated 11 January 2018 the claimant was invited to attend a formal Stage 1 performance meeting on 16 January 2018 (JB19). The purpose of the meeting was to discuss concerns regarding her performance and if appropriate agree a performance improvement plan (“PIP”). The claimant was notified of her right to be accompanied and provided with a copy of the policy (“management performance policy”) (“MPP”). The letter did not identify any particular performance issues or give the claimant advance notice of what was to be discussed.

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- 15 21. Mr Gray conducted the meeting with an HR Adviser, Mr Birnie, present. The claimant attended with her representative. The shortcomings with the three contracts were discussed namely the supply of the turntable winch, the “Bluewater” job and the Noble Drilling “latchways” installation. In relation to the latter the claimant was also criticised for not making arrangements in good time or to identify the correct equipment to be sent to the platform. The claimant was aware of these matters and the concerns the respondent had through her discussions with Mr Gray.

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22. During the meeting the claimant complained that she had been put straight onto the formal PIP process despite only ever having one performance appraisal in six years. She accepted that performance issues had been dealt with informally. She was asked what the respondent could do to support her. The claimant responded that she had finished the Engineering Development Scheme (“EDS”). Her position was that there was nothing to aid her development other than technical support. The claimant was asked what she needed as help or support and she responded that she needed more technical support but was unsure about what area. Mr Gray noted that there would always be scopes that staff don’t have experience in but that the

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expectation was that the staff member would take the initiative and learn the job. (JBp91). At the end of the meeting Mr Gray issued her with her first capability warning in conjunction with six PIP objectives to be achieved over the following six to eight weeks. The PIP had been prepared in advance and its requirements reviewed by two other managers.

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23. The outcome of the meeting was confirmed to the claimant by letter dated 22 January 2018. A copy of the Minutes (JBp89-93) was enclosed. The claimant was advised that the first capability warning would remain live for six months and a detailed PIP was put in place and enclosed for her reference. She was offered the right of appeal but did not exercise it.

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24. The claimant was absent due to sickness from 26 January to 26 April 2018. She was unwell because through work-related stress.

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25. The claimant felt that she had had insufficient warning of the meeting on 16 January. She thought about what had been discussed and sought to add points to the Minutes although they were not raised by her in the meeting.

The claimant's formal grievance

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26. By letter dated 26 February 2018 the claimant raised a grievance about Grant Anderson's conduct towards her during April and December 2017 (JBp118).

27. The claimant's hearing was arranged for 28 March 2018. The hearing was delayed because the claimant was unwell and on sickness absence.

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28. The respondent's managers liaised with the Occupational Health provider to ensure the claimant was fit to attend the grievance hearing. It was chaired by Steven Gray. The claimant set out the issues she had had with Grant Anderson on two occasions including his alleged abrupt approach to her when she said he was shouting and angry. The first allegation related to April 2017 and the second to an incident in December 2017 surrounding the "Bluewater job". She was asked how she felt about going back to working

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with Mr Anderson and she indicated that a meeting between her and Grant Anderson would assist. This was put in place. The claimant met Mr Anderson to discuss her concerns.

5 29. The respondent as part of an investigation required to speak to a number of possible witnesses who were offshore or on holiday before issuing the final outcome of the grievance. Statements were taken and reviewed by Mr Gray.

30. The claimant commenced a phased return to work on 30 April 2018.

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31. The respondent had taken advice from their Occupational Health provider about the claimant's return. This was the catalyst for a discussion that was held on the 8 May and recorded in a file note (JBp145) agreeing the terms of a phased return.

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32. The grievance outcome was issued by letter 15 June 2018. The report found there had been a breakdown in the relationship between the claimant and Mr Anderson. Parties agreed that they were willing to work to resolve their difficulties. The grievance was dismissed and the claimant was notified of her right to appeal.

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Follow up stage 1 formal performance outcome

25 33. By e-mail dated 29 June 2018 the claimant requested that the Minutes of the PIP meeting of 16 January, outcome letter of 22 January 2018 should be amended to include her notes. This had previously been refused on the basis that the Minutes were designed to keep a record of what was actually discussed and the respondent's position was that the majority of the requested additions were not raised or discussed during the meeting. The respondent later agreed to include the claimant's comments as an addendum to the Minutes (JBP108-122) which were kept for future reference.

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34. The claimant resumed full duties on 18 June 2018. She began work on the objectives set out in the PIP. She was supported by Mr Gray who met her periodically to discuss progress.
- 5 35. A PIP review meeting was due to be held on 29 June 2018 but was postponed at the claimant's request to the 4 July 2018. That meeting was also cancelled at the claimant's request as she said she felt stressed and wanted to be accompanied by her trade union representative.
- 10 36. The PIP review meeting took place on 27 July 2018. The claimant attended with her representative. Mr Gray had an HR Adviser present. The six objectives set in January 2018 were explained once more in detail together with the expectations in performance required. The anticipated end date of the review period was 26 September 2018.
- 15 37. The first review was held on 29 August. The claimant had prepared a Powerpoint presentation (JBp168-193) which she spoke to. Greg Birnie and Mr Gray were present as was Mr Uwe Kari who was a senior manager and technical expert. After the presentation he asked most of the follow up
- 20 questions. The claimant had made some errors which they thought were elementary errors. She had to complete a mock assignment but chose the wrong type of crane. She found it made errors identifying parts of the engine that was pictured as part of her presentation. She struggled to explain why a crane should be isolated before work is carried out. She did not appreciate that hydraulic hoses on her example were oil filled and not operated through
- 25 compressed air. The claimant had problems explaining a load chart. They assessed the claimant did not answer sufficiently well to demonstrate she had a good knowledge of cranes. They were surprised at some of her answers including her lack of knowledge of the concept of 'luffing'. Mr Gray later
- 30 checked that this was referred to in the offshore crane operator handbook which the claimant had said she had read. As a consequence, the respondent's managers found that she had not met objective 1 as she had not demonstrated comprehensive knowledge of different crane types despite in their view having supported her by providing additional training.

38. The claimant confirmed her disagreement with this decision by e-mail dated 3 September 2018 (JBp229). She complained that it was unfair and the questions were "*inappropriately in depth*" and not in line with what Mr Gray had set out in his instructions. She had prepared a presentation not to last longer than thirty minutes but with questions it had lasted 90 minutes. She complained that no structured training had been given nor sufficient hands on exposure. She wrote: "they need to provide a structured training and exposure matrix to support us and give us the opportunity to discuss our training and exposure plans over regular performance reviews." She complained that she had only ever had one performance review during 7 years employment.
39. The claimant was held to have met objective 2. The respondent advised that objectives 3 and 4 would be assessed on the 6 September. Objective 3 was partially met and further reviews for objectives 3, 4 and 5 were held on 17 September 2018.
40. The fourth and final review was held on 27 September 2018 in order to assess objective 1 only. At the end of this final meeting the claimant was advised she had not met the objective and that a further meeting would be set to discuss this. She was told that she had failed to demonstrate comprehensive knowledge and understanding of technical aspects of her role as would be expected from a Senior Engineer. She was advised that a further PIP would be prepared and new objectives set.

Stage 2 formal performance meeting

41. By letter dated 28 September 2018 (JBp212) the claimant was invited to a stage 2 capability meeting to be held on 5 October 2018. The meeting was minuted (JBp232-242). The purpose of the meeting was stated to be to review her performance to date measured against the objectives in the PIP. In particular the discussion centred around her presentation given at the earlier meeting. There was a review of the six objectives on the basis of the feedback

Mr Gray had received. The claimant was held to have failed to meet the first and fifth objective but had completed the others satisfactorily. In relation to the fifth objective which was to demonstrate an ability to prepare a procedure for completion of a task offshore it was assessed that she lacked an understanding of some of the technical aspects. She had created the procedure for the wrong type of crane and had been unable to identify a king post type of crane. The claimant had not heard of the concept of 'luffing' as it applies to cranes despite it being a relatively common issue and referred to in Offshore Crane Operator Handbook which she had referred to. The claimant had also made other errors. It was agreed that the claimant could go through each line of feedback and comment which she did (JBp233-240). The claimant complained that she had not had exposure in carrying out such procedures. She also complained that she was nervous at meetings and this caused her mind to go blank.

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42. After consideration of the claimant's comments made during the PIP Mr Gray still had concerns about her technical ability. He therefore decided to issue the claimant with a final capability warning with a revised PIP. The claimant was advised that she would be assigned a mentor with technical and operational experiences to assist her in achieving a newly set of objectives. This was done. She agreed to have access to the enduring development scheme modules. She was informed of the outcome and was advised of her right of appeal.

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25 43. A letter confirming the stage 2 capability meeting outcome was forwarded to the claimant on 11 October 2018 in response to the claimant's comments made during the meeting on 5 October about:

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1) not having been provided adequate training and exposure. The respondent's position was that she had attended a number of engineering development scheme presentations and a crane

appreciation course and had access to policies and procedures which aided the development of technical knowledge understanding;

2) not having offshore exposure; it was confirmed that this was not essential and most of the respondent's engineering team learned about offshore experience;

3) only having had one performance review – this was acknowledged although it was confirmed that a new appraisal process had been launched;

4) the PIP process that was confirmed had not been instigated because the claimant had raised a grievance;

5) informal discussions had been held previously with the claimant to address her interactions with others and any performance concerns.

44. The claimant was issued with a final capability warning which would remain live for 12 months. A copy of the revised PIP was proposed. The letter advised the claimant that failure to reach the required performance standards might result in further action including dismissal on the ground of capability. The claimant was advised of her right to appeal.

45. The revised PIP objectives were set as follows:

- Objective 1 – identify key crane components;
- Objective 2 – demonstrate your understanding of stripping down and inspecting a typical reduction gearbox;
- Objective 3 – identify a single point of failures existing within a typical reduction gearbox;
- Objective 4 – identify and explain two different maintenance strategies available for crane maintenance;
- Objective 5 – identify and explain the forces that go through a crane base on a typical load chart.

46. After setting these objectives Mr Gray took no further part in the process. It was handed over to the claimant's new line manager Mr Mike Gibb. He applied certain weightings to the objectives (JBp334).

5 47. The claimant was due to have a meeting with the respondent on 18 October to discuss the revised PIP however it was cancelled due to her appeal.

Appeal against stage 2 formal performance outcome

10 48. The claimant appealed against the final capability warning and further PIP by letter dated 16 October 2018. Her grounds of appeal were:

- she had carried out her duties adequately, despite not coming from a crane/lifting background;
- there was a lack of regular performance reviews;
- 15 • the majority of the technical objectives set during the PIP process were not covered in the engineering development scheme presentations;
- she had not been given adequate training/exposure to compliment her duties despite having asked for this;
- 20 • she had met 4 of the 6 objectives at the stage 1 capability stage;
- the global head of technology was less active as a chair in the process rather than a witness; this referred to Mr Carry's involvement;
- no informal capability reviews were carried out;
- 25 • there were no significant complaints from clients;
- employees with less engineering experience were given preference in terms of technical training/exposure;
- she was the only engineer in her team not given the opportunity to gain offshore exposure despite requests from her.

49. An appeal hearing was held on 26 October 2018 before Tim McKelvey, Contract Services Group Manager with the support from a Ms S Dickson, Lead HR Business Partner. The meeting was minuted (JBp322-328). The claimant was accompanied by a Unite representative. The hearing was
5 adjourned in order that the appeal hearing could consider what had been said, reflect on the documentation and conduct further investigations. The Minutes of the appeal were sent to the claimant by letter dated 27 November 2018.
50. The appeal hearing was reconvened on 28 October. The claimant was invited
10 to present her appeal which she did. The history of the matter was canvassed at length. Mr McKelvey adjourned to make further investigations and consider the documentation further.
51. The claimant responded with comments on the minutes of the appeal hearing
15 which were incorporated.
52. The outcome of the appeal hearing was sent to the claimant by letter dated
20 December 2018. This had been delayed as Mr McKelvey was away on business directly following the meeting. The letter confirmed that the appeal was dismissed. The letter also indicated that the PIP timescale of
20 approximately 2 months was reasonable.

Stage 2 formal performance outcome

- 25 53. The claimant's Line Manager changed to Mike Gibb, Engineering and Project Services Group Manager in early November 2018. The revised PIP had not been finalised by Mr Gray before he moved to take up another role. Mr Gibb reviewed the documentation. On 7 January 2019 the claimant asked a number of questions which she followed up with her appointed mentor.

54. Mr Gibb had decided to amend the format and method of assessment. He decided that it should be a "closed book" written assessment or 'exam'. The assessment was prepared. He discussed it with colleagues and invited comments to assess whether it was at the correct level of difficulty for a senior engineer. A further PIP meeting was held on 7 February 2019. The anticipated end date of the PIP was 29 March 2019. The claimant was given details of the objectives (JB334-336). The claimant was given assistance in preparing for the assessment. She was given two hours per week to prepare during working hours. She had access to the respondent's database of work.
55. The claimant challenged the use of a formal assessment. She wrote to Mr Birnie on the 11 February (JBp340) raising issues about the process. She also raised these matters at a meeting on the 20 February which were addressed by Mr Birnie (JBp337-339) by letter dated 22 February.
56. The date of the assessment was put back to 17 April. The claimant sought help from Mr Gibb by letter dated 28 February (JBp342) about unrelated problems at work.
57. By email dated 1 March 2019 Mr Gibb informed the claimant there were two possible dates in which she could attend a further crane appreciation course during March 2019 and also a lunch event covering hydraulic fluid cleanliness. She attended the crane appreciation course on 7 March 2019. That course was a general introduction to cranes used for anyone joining the company not just engineering staff.
58. On the 10 April Mr Gibb met the claimant to review her progress. He noted that she had made good progress and research into tasks but had not been able to arrange training about a 'splitter gearbox' strip down and discussion on single point failures. She was told to use previous job cards and to speak to a Mr Thackery and revert to Mr Gibb if she needed further assistance.

59. The claimant undertook her technical assessment on 17 April 2019.

60. The claimant commenced sickness absence on 23 April.

5 **Stage 3 formal performance process**

61. By letter dated 5 June 2019 the claimant was advised by Mike Gibb that she had failed the technical assessment. She had achieved a score of 26 out of 56. A weighted total was applied. This was 44.71%. The claimant was given
10 feedback. The PIP requirement was that she should achieved a score of 75% or more.

62. In his letter Mr Gibb stated that although the claimant was currently unfit to attend work as the process had been ongoing since May 2018 he proposed
15 a resolution was reached and provided the claimant with a choice of two options. The first Stage 3 performance capability meeting could be arranged which she could attend with representation either in person or via Skype or telephone conference call or Mike Gibb could review the facts and evidence gathered to date and decide how to proceed and the claimant would be
20 informed in writing.

63. Mr Gibb confirmed that the three possible outcomes were:
25 1) to extend the final capability warning;
2) consider redeployment; or
3) terminate employment on grounds of capability.

He requested that a response be provided by the claimant by 12 June 2019 failing which option 2 set out at paragraph 35.2 above would be followed. The claimant did not respond.

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64. After further correspondence and the telephone discussion on 16 July the claimant was invited to a Stage 3 capability meeting. The respondent's

Occupational Health provider had indicated that the claimant's stress condition would not resolve until the matter had been dealt with. The claimant failed to attend the hearing. She did not pick up or return the respondent's calls and it was re-arranged for the 22 July. Once again, she did not attend the re-arranged meeting despite the respondent's manager's attempts to call her.

65. Mr Gibb reviewed the facts and evidence gathered from the beginning of the PIP process. There were no vacancies to which the claimant could be redeployed. By letter dated 22 July 2019 (sent by e-mail on the same date) Mr Gibb confirmed his decision to dismiss the claimant with immediate effect and make a payment in lieu of notice.

Appeal

66. The claimant appealed against the decision to dismiss her by letter dated 24 July 2019 on the grounds of what she described as a "unfairly construed capability process". She alleged that the capability process had been triggered by her grievance. She stated that she believed that it was unfair that the respondent did not await for her return to work before making a final decision on her employment.

67. An appeal hearing was arranged and heard by Mr Mathew Corbin, Regional Operations Director on the 22 August. It was minuted (JBp448-451) Prior to the hearing he had read the PIP process documentation He invited the claimant to present her appeal which she did. She said that she had not been given adequate training or sufficient practical experience. There had been a lack of proper appraisals. She spoke about the PIP process and what she regarded as insufficient training and support.

68. He then adjourned to consider his decision. Mr Corbin reviewed the papers and dismissed the claimant's appeal (Jbp452-453). He held that the process had been fair and robust.

Witnesses

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69. I found the claimant generally a credible and reliable witness who gave her evidence in an honest and straightforward manner. The respondent's witnesses also gave their evidence in a clear, straightforward and professional manner. Accordingly, I found them all to be generally credible and reliable witnesses whose evidence I could accept apart from one aspect of Mr Gray's evidence which I did not find convincing.

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Submissions

15 70. Counsel for the claimant first of all set out what he regarded as being the law in relation to the dismissal by referring to the 1996 Act (particularly section 98). He accepted that capability could be a fair reason for dismissal. There were two legal issues which the tribunal had to determine the first being did the dismissal relate to the claimant's capability (section 98(2)(a)) ("the Capability Issue") and secondly, if it did, whether dismissal was reasonable (section 98(4)) ("the Procedural Issue"). An employee's alleged incapability must relate to the work of the kind which the employee was employed to do.

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25 71. He observed that normally, any inability to perform the key tasks of a job would be picked up during the early stages of employment, often during a formal probationary period. It may therefore be difficult for an employer to establish a sound basis for dismissing a long-serving employee on the ground of capability unless there has been a material change of circumstances.

30 72. If the employer chooses to go down the capability route, part of a fair dismissal procedure that would normally entail providing an opportunity to improve. In the absence of specific timescales set out in a formal capability procedure, the quality and length of the employee's past service, as well as

the extent of the underperformance, may be relevant factors in assessing the overall fairness of any subsequent decision to dismiss.

73. The Tribunal must apply the two- stage test set out in **Alidair Limited v Taylor** 1978 ICR 445 to decide what reason for dismissal is and once the reason for dismissal has been established, the question of whether the dismissal was fair or unfair in the particular circumstances of the case.
74. In accordance with that test, in the context of capability dismissals the tribunal will consider not only what steps a reasonable employer would have taken when faced with an employee who does not come up to scratch, but also what steps the employer should have taken at the very start to minimise the risk of poor performance and to create the conditions that allow an employee to carry out his or her duties satisfactorily such as training.
75. Employers must follow a fair procedure before dismissing an employee for incapability (**Lewis Shops Group v Wiggins** 1973 ICR 335, NIRC — approved by the EAT in **Littlewoods Organisation Ltd v Egenti** 1976 ICR 516, EAT) Providing the employee with an opportunity to improve was identified by Lord Bridge in **Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL, as being necessary in the great majority of cases if the employer is to act reasonably by dismissing for capability. The ACAS Code stated that a warning should set out what improvement in performance is required, together with a timescale (para 21). In **Evans v George Galloway and Co Ltd** 1974 IRLR 167, ET, , a man with six years' service was thought to deserve six months, rather than five weeks, while in **Winterhalter Gastronom Ltd v Webb** 1973 ICR 245, NIRC, three months was thought suitable for a sales director with two years' service. In **Clark v Johnson** EAT 484/78 the EAT extended a long-serving butcher's improvement period from one to nine months.
76. In **Sibun v Modern Telephones Ltd** 1976 IRLR 81, ET, the employment tribunal thought that important factors in determining a reasonable period

were length of service, performance during that service and extent to which the employee's results were falling below the expected. An additional factor might be how long the employee had known of the employer's dissatisfaction before a formal warning was given (Leighton v British Industrial Fastenings Ltd COET 1161/202).

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77. The claimant's position was that the respondent did not have an honest belief she was either incompetent or unsuitable for her job. In order to test this proposition the tribunal was invited to consider the originating grounds for the respondents' claimed belief being the Performance Issues. In the first place, the Performance Issues related largely to simple mistakes which were rectified at the time of their occurrence. The tribunal only heard evidence about the claimant making three mistakes during her entire six year employment. It was submitted the lack of evidence of any other mistakes, performance issues or any other issues for that matter is compelling.

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78. In the second place, the Performance Issues all happened in July 2017. From that time the claimant was closely monitored and there was no evidence of any further issues with the claimant's performance or ability to do her job. This reinforces the point made above; the evidence in front of the tribunal points towards the claimant being a competent and capable employee rather than against it.

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79. In the third place when assessing an *honest* belief, is the relation in timing between the claimant emailing Mr Gray raising a grievance about a colleague and the capability process being commenced. Mr Gray gave evidence to the effect there was no link between the two. The tribunal is invited to reject that evidence as incredible. Mr Gray accepted that instigating a capability process was an important and serious step for a line manager to take. However, he could not provide any evidence that there was a trigger event which prompted him to instigate the process in December some five months after the Performance Issues occurred but only five days after the email was sent.

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80. By the time of her dismissal the respondent, taking the evidence at its highest, could have only had three concerns about the claimant's capability the first related to the Performance Issues; secondly, the fact that two of the objectives in PIP 1 were failed; and thirdly, the fact that the academic assessment for PIP was failed.
81. It was submitted that these concerns, neither individually or cumulatively, could found a reasonable basis for a belief that the claimant was incapable of doing that which she was employed to do. The nature of the Performance Issues was discussed at length during evidence. The claimant would seek to categorise them as either simple errors or oversights each of which were rectified during the checking process. After these issues in July the claimant continued to work on her normal workload and perform her usual duties. There were no further or related issues arising with her performance during that time. It was not reasonable to form the view that the claimant was incapable of performing her duties because of the Performance Issues. Only two out of six of the objectives in PIP were failed.
82. The Tribunal heard evidence from the claimant in relation to Objective 1 that Head of Global Technology led a technical line of questioning in what was otherwise supposed to a short presentation. The other objective which was failed related to an offshore task; something which the claimant did not have any experience in or had formed part of her duties to date. No recognition appears to have been given to the fact that the claimant passed the other four objectives which the respondents chose to set for her.
83. The Tribunal also heard evidence that the content of the technical assessment in PIP 2 bore no relation to the claimant's day to day duties. Mr Gibb gave evidence confirming he set the test on the basis of what he *expected* the claimant to know. However, the respondents' expectations should not form the basis of a capability review which should be related to the claimant's ability to perform her employment. PIP 2 did not contain any form

of assessment which directly related to the claimant's employment. Mr Gibb accepted as much in cross examination. The claimant did not pass cannot form a reasonable belief the claimant was incapable of doing *work of the kind which he was employed by the employer to do*; that is an essential component of section 98(2)(a).

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84. Counsel noted that the procedural requirements of the respondents' capability procedure were set out in section 2 of the policy document. The first stage was referred to as the 'informal resolution' stage. Albeit it was titled 'informal' there was a prescribed format and formal procedure that the respondents should have applied. The Tribunal was invited to find that no informal procedure was carried out. The claimant had been clear and consistent in her position throughout the entire process and giving her evidence that no informal procedure was carried out. Mr Gray sought to label discussions he had with the claimant regarding the Performance Issues as being carried out in compliance with the informal procedure. However, he accepted that the did not follow all of the bullet points shown in page 43 of the joint bundle and he did not confirm what was discussed or the application of the procedure in writing.

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85. The Tribunal, he submitted, should find there was a further procedural breach at stage 1 of the Formal Procedure. The first paragraph requires the respondent to notify the claimant of its concerns and the basis of those concerns. The letter sent by the respondent did neither. The claimant gave evidence to the effect that she was unaware of why the capability process was being instigated going into the meeting. She did not have fair notice and would not have been able to properly prepare for it. The respondent had already prepared PIP 1 and issued it during the stage 1 meeting. The policy made it clear that the purpose of the first meeting is supposed to be inquisitorial; the line manager should explain the way in which the required performance has not been met and seek to identify the reasons for that. Any further action should be taken 'Following the meeting'; not during it. He invited the tribunal to find that the respondent did not use the first formal meeting as it should and that the outcome of the meeting had already been

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predetermined. The policy also required positive support and training to be provided. The only evidence of such support arose at the stage 2 process when the respondent assigned the claimant a mentor. These procedural failings were of fundamental importance to the fairness of the procedure. The process was escalated to the formal stage from the very outset. That denied the claimant the opportunity to improve and avoid the need for a formal process altogether. Importantly, dismissal is only available once the formal procedure has commenced. That being so, the claimant's employment was at risk from the outset. In itself, that would apply considerable stress and pressure in a procedure which is designed to assist employees.

86. Counsel concluded by submitting that the capability process was a sham and completely unwarranted. Given the manner and nature of the respondents conduct of the capability process the tribunal is invited to make an uplift in the compensatory part of the award of 25% for a systematic and unreasonable failure to adhere to the ACAS code [*Bethnal Green and Shoreditch Education Trust v Jeanne Dippenaar* [2015] WLUK 550].

87. The respondent's Counsel submitted that her client's primary position was that they honestly believed that the claimant was incapable of carrying out the role of a Senior Engineer. They had provided her with training, encouraged self-learning and had a legitimate expectation that she could carry out the duties set out in her job descriptions (on the basis that she had signed it).

88. She had relied upon others for their technical knowledge despite having been responsible for checking technical reports. By her own admission she had carried out a '*superficial*' role and accepted that her technical knowledge had not been tested until the Transocean contract had concluded. Ultimately, she had cruised along in her senior role without actually fully carrying out that role and this had gone undetected until 2017 because only one performance review had taken place. In that one review, issues relating to her technical knowledge had been raised but were not followed through. It was entirely reasonable to suggest that had regular performance reviews been carried

out, that the respondent would have identified the lack of technical knowledge much sooner than they did.

5 89. Once the claimant was allocated new work from September 2016, it became apparent to Mr Gray that she had significant gaps in her technical knowledge. He did not write to her setting out the concerns that he said he had discussed with her during informal performance meetings in 2017. It is clear however that during the first capability meeting, the claimant was aware of the issues to be raised. The Tribunal was invited to infer from this that informal
10 discussions did take place concerning these 3 jobs (page 84) but these concerns were not put in writing. The claimant raised a number of issues both during and subsequent to the meeting and at no time did she allege that she had been taken by surprise.

15 90. Ms Ferrario continued that neither did the claimant raise during the course of the process that she had been set up to fail. Perhaps this explains why this was not pleaded (p11) but was raised only during the hearing by her Counsel. The respondent invites the Tribunal to find that the objectives in both PIPs were achievable, that the claimant believed this to be the case at the time and
20 that despite the support put in place she was unable to demonstrate the standard of technical knowledge required for the role. The Tribunal was told that when she sat the assessment on 17 April 2019, she incorrectly labelled the components (p 350) despite having refreshed her memory during the Crane Appreciation Course of this approximately one month earlier.

25 91. The claimant was provided with ample opportunity to satisfy her employers of her technical ability. She also had ample opportunity to state any objections that she may have had to the substantive objectives or how they were to be measured. When she raised an issue with the measurement element of the
30 second PIP, the respondent took this on board and made amendments with which the claimant was satisfied at the time.

92. There was, she said, no evidence to corroborate the claim that Steven Gray along with others instigated and continued with the formal process in order to

discredit the claimant on account of her complaint regarding Grant Anderson. To the contrary the claimant told the Tribunal that Mr Gray took her complaint seriously and that she had every confidence that he would address it properly (which he did). In all the circumstances, the Tribunal is invited to find that the respondent had a genuine belief that the claimant was incapable of fulfilling her role. It was a belief that they regretted but one which was reached purely on her performance from September 2016 (when she was allocated new projects) and beyond. The Tribunal is also invited to conclude that it was reasonable for them to arrive at the decision to dismiss. The PIP assessments had produced a finding that the technical knowledge was not of the standard required for her role. This finding was within the range of reasonable responses for an employer having regard to the circumstances.

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93. The respondent maintained that a *proper and adequate* investigation was carried out. The focus in this regard will most likely be upon whether the respondent followed an informal process and whether there was justification for proceeding to the formal process. The respondent submits that for a procedure to be proper and adequate, it must be fair. Whilst they did not write to her with their concerns it should be of significance to the Tribunal that she was not taken by surprise when she attended her first capability meeting, neither did she later raise this as a concern. The claimant was not averse to raising issues. Had she felt ambushed at any time, the Tribunal, was invited to conclude that she would have more likely than not raised this as an issue.

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94. Once the formal process was instigated, there could be no suggestion of any detraction from the capability process. The claims of an unfair process appear to relate only to the informal aspect until the appeal meeting at which time the claimant claims that she had not received adequate training to achieve the objectives. The respondent disputes this and refers the Tribunal to the training record (page 456) and the evidence of Mr Gray in this regard. As for exposure, the respondent maintains that she was exposed to using her technical knowledge during the Transocean contract in that she was

responsible for the final checking of the technical reports (which she admitted) but instead she carried out a superficial role (her description) and relied upon her sub-ordinate colleagues to produce the technical knowledge that she did not have. It was pure good fortune on her part that there had been no technical errors during the contract. In all the circumstances, the respondent invites the Tribunal to find that a fair investigation had been carried out, the test in paragraph 43 above is satisfied and the claim ought to fail in its entirety.

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95. If (which was denied), the Tribunal find that there was a procedural defect in the process, consideration ought to be given as to whether the claimant would have still been dismissed had a fair procedure been followed: **Polkey v A E Dayton Services Limited** (1988) ICR 142. Where the Tribunal decides that the claimant would have been fairly dismissed had an adequate procedure been followed it ought to reflect this by reducing the normal amount of compensation by a percentage. It was submitted that where the Tribunal finds that the respondent genuinely believed the claimant to be incapable of performing her role, and that this belief was entirely reasonable – it ought to follow that any compensation payable should be reduced significantly. Where the Tribunal confines the procedural flaw to the informal element of the process, and finds that the claimant was not taken by surprise, it is submitted that the percentage reduction should reflect this and attract a high figure (of reduction).
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96. The Tribunal was also invited to consider (where unfair dismissal is found) whether the claimant contributed or to any extent caused her dismissal by reason of her own conduct (Sections 122 (2) and 123(6) of the ERA 1996).
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97. The claimant did not raise a formal grievance regarding either PIP pursuant to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. She was well versed in raising formal grievances but chose not to adopt the formal grievance process for being performance managed. The Tribunal

are invited to consider whether this was unreasonable in the circumstances and if so, whether any compensation (where unfair dismissal is found) ought to be reduced by up to 25% accordingly.

Discussion and Decision

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98. A dismissal on the grounds of capability is a potentially 'fair' ground for dismissal (Section 98 of the Employment Rights Act 1996.). The burden of proof is on the employer to demonstrate that capability was the principal reason for dismissal. If they are able to do so then the Tribunal must consider if the dismissal is fair or fair applying the statutory test of fairness contained in Section 98(4) of the Act. (Capability is defined as their capability assessed by reference to skill, aptitude, health or any other physical or mental quality...Section 3.)

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15 99. Section 98(4) is in the following terms:

“(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)—

20 *(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*

25 *(b) shall be determined in accordance with equity and the substantial merits of the case.”*

100. The band of reasonable responses test applies to any capability dismissal. They should be analysed using the test laid down in **Mcphie and McDermott v Wimpey Waste Management (1981) IRLR 316, EAT:**

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(a) Did the respondent honestly believe that the claimant was technically incapable of doing the job?

(b) If so was that belief held on reasonable grounds?

(c) In forming such a belief did the respondent carry out a proper and adequate investigation?

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101. In **Alidair Limited v Taylor (1987) CA** it was said that a fair procedure should include proper training, supervision and encouragement. An employer should set realistic targets or standards, hold meetings to discuss the employee's performance and give appropriate warnings. As the claimant's Counsel set out in his submissions what is often referred to as performance management has been a feature of capability dismissals which has often come before Tribunals. It has been recognised that employers should follow a fair procedure before dismissing an employee for incapability (**Lewis Shops Group v Wiggins 1973 ICR 335, NIRC** ,**Littlewoods Organisation Ltd v Egenti 1976 ICR 516, EAT**) and that this process requires an investigation into the employee's performance and warnings on the failure to improve over an appropriate period for improvement.
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102. The opportunity for an employee to improve their performance was referred to by Lord Bridge in **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**, as being necessary in the great majority of cases if the employer is to act reasonably by dismissing for capability.
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103. The first issue the Tribunal has to determine is whether the respondent had demonstrated that capability was the principal reason for dismissal. This was not a matter that was straightforward in this case. The thrust of the claimant's position was that Mr Gray had initiated the performance management because of her email complaining once more about Mr Anderson with whom she alleged he was friendly. She was to ne 'managed out'. Mr Gray's position was that the matters were unrelated and that he did not access the claimant's email dated 7 December until the 13 December by which time he had coincidentally met Mr Birnie to discuss putting the claimant on a PIP.
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104. The nature of the difficulties the claimant had with Mr Anderson appear work related and there is a strong suggestion that Mr Anderson did not think highly of the claimant's technical abilities. She wrote in her email in April that he was complaining about her work. He did not give evidence. This had caused her to complain to Mr Gray about Mr Anderson. In relation to the later complaint in December there was no evidence to contradict Mr Gray's assertion that he accessed the email on the 13 December but I find it difficult to accept that if there had been another problem between Mr Anderson and the claimant given his relatively small team (about twelve individuals, who work in the same open plan office) that he would not be likely to have become aware that further issues had arisen between them. The evidence also seems to suggest that Mr Anderson also had issues about the claimant's technical ability mirroring Mr Gray's. I find it very difficult given these circumstances to accept that there was no connection or that these difficulties did not play some part in his thinking when commencing the process.
105. There are other circumstances which lend some support to this view. It was noteworthy that the claimant had made some mistakes in the middle of the year and had not repeated them so the question is why did the matter now proceed with a PIP in December. The likelihood is that the incident with Mr Anderson was the prompt to have the discussion with Mr Birnie to explore whether the 'informal' part of the performance management process could be held to have been satisfied. That does not mean, however, that the claimant's ultimate dismissal by another Manager amounts to managing her out or that the dismissal is unfair but it does mean that the process then adopted requires careful scrutiny.
106. It was also submitted that the fact that the claimant had not committed further errors since July 2017 also suggested a lack of honest belief in her lack of competency. I will return to that matter but it must be recalled that it was not Mr Gray who ultimately dismissed the claimant.
107. A matter of some further concern was the decision made by Mr Gray and supported by Mr Birnie to hold that the informal process envisaged by the

respondent's policy had been satisfied though Mr Gray's actions namely by him monitoring her work and speaking to her about his wish for her to broaden her experience and take on more complex work. I would observe at this point that the claimant appears to perhaps not done herself any favours as her own
5 evidence shows that she was conscious of lacking offshore experience and hands on experience and tried to stick to less challenging work in turn allowing Mr Gray to form the impression that she avoided work that was more challenging and outside her to 'comfort zone'. That is not the entire picture however as the claimant did ask to get the necessary accreditation to go
10 offshore where she would have been likely to have got more hands on experience which in turn would have helped her write procedures for carrying out remedial work.

108. The respondent company have a Capability Procedure. The purpose of the
15 policy is set out in the first paragraph and states that "All employees should be made fully aware of the performance standards they are required to meet' (JBp41) The informal process requires for discussion of performance and regular feedback from line managers. During the informal period support and assistance should be provided to allow the employee to 'achieve the required
20 standard' (JBp42) There was also a responsibility on the employee to ask for assistance in they were struggling with work. In the event that informal action does not work then formal action can be begun. The policy is silent on long the process should last but it can be inferred that it is long enough to give the employee an opportunity to improve with assistance. Part of this background
25 was a failure to appraise the claimant since November 2013.

109. Looking at this first stage it is difficult to understand Mr Birnie's acceptance
30 that the Informal process had been satisfied. He doesn't seem to ask himself the question of whether the claimant had been aware it was being used or if it had followed the requirements of the policy. There seems to be only one reason to proceed to a formal process and that would be that the claimant failed to achieve satisfactory results after this intervention had been used. It was argued for the respondent that the claimant knew her work was being scrutinised and assistance was given to her both by Mr Gray discussing

issues with her and the fact that she was sitting with an experienced colleague to help her. This seems to miss the important point that if someone is subject to the informal process they need to know they are. Part of the process is to explain the concerns and set out standards of performance which require to
5 me met under the threat of proceeding to a formal process. In simple terms the employer says this is what we need from you. As the claimant had not made any significant errors since July the question was whether she was entitled to believe not only were her employers satisfied with her performance but if they were not they would be likely to employ the informal policy before
10 taking matters further. That said it seems clear that the claimant was in fact aware of her own technical deficiencies describing her supervision of the technical reports she was given as 'superficial'. She could have taken on more challenging work to expand her knowledge during this period or asked for more technical assistance but chose not to do so.

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110. The fault at this early stage is not one sided. During the alleged informal process Mr Gray could have insisted that the claimant broaden her experience by taking on more challenging work. He seems to have chosen not to do this. Rather he just seems to have observed her work noting that
20 she tried to keep to work she was more comfortable with and not acted to tell her he was dissatisfied with her overall level of knowledge. The suspicion is that it took a little time for him to come to that conclusion and it was only though his interactions with her for example in relation to the so called 'winch job' that his concerns crystallised. In summary the informal process was an
25 important step which would have allowed the claimant some months to gain more experience, supported by her line manager, in areas of work and using knowledge not previously required of her but that opportunity was lost.

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111. In considering these matters it is important not to forget that the claimant is a professional person who applied for and worked for some years in a senior position. She had been employed for almost seven years before the first issues arose with her work and this we have seen coincided with a change in

the type of work available the company being hit with the loss of the Transocean work at the same time as work reducing globally because of the downturn and the remaining work being of low margin and bid for in a highly competitive market.

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112. As part of a response to the more competitive market conditions staff including the claimant were given a revised Job Description (JB p77) The claimant indicated that she had concerns about it at the time but nevertheless signed it. This seems unusual as she was not slow at other times to raise matters formally with her employers.

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113. In that document she would have noted under Technical Duties a requirement to be able to 'Identify and specify complex mechanical components and tooling as required' The claimant had joined the respondent company who specialised in cranes and lifting gear. This was a clear warning to the claimant that if as she said she had no previous experience with cranes before joining the company and had restricted exposure to actually examining them in real life and identifying components then she must have known that getting this experience would be crucial or at some point she would be asked to do work that would betray her lack of knowledge.

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114. There was some force in the submission that the claimant was aware throughout of the underlying issues that she lacked technical expertise. This was apparent from the Minutes of the Stage 1 Capability meeting. Leaving aside her complaint that she had not been challenged about the particular problems that had arisen in July more generally she accepted that she lacked technical expertise having not come from a "crane business" (JBp111) It is recorded that: "she stated that she needs more technical support"(JBp111) She commented that she had exhausted the internal EDS programme as a way to develop but was unsure of what exact support she needed. Mr Gray's response was: *"that there will always be scopes that people don't have*

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experience in, but there is an expectation that an individual will take the initiative to lean about the job”.

5 115. The upshot of that meeting was the start of a PIP process which lasted until the claimant’s final assessment 14 months later. The imposition of the process was not taken well by the claimant who began suffering from stress as the respondent’s occupational health providers noted in their report dated 9 February (JBp115). This led to a significant period of absence.

10 116. The first part of the process was to set the claimant Six Objectives the first being to deliver a presentation to demonstrate ‘a comprehensive knowledge and understanding’ of the various crane types. The claimant is recorded as stating that she thought the objectives were achievable in the three-month time period set. She did not appeal the imposition of the process. Overall the process appears to be conducted carefully with appropriate feedback, reviews and support but I need to address the particular issues the claimant believes arose which made this part of the process unfair.

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Grievance against Grant Anderson

20 117. The claimant raised a formal grievance against Mr Anderson by letter dated 26 February (JBp118) relating to his behaviour in April and December 2017. A hearing took place at the end of March. As part of the process Mr Anderson was interviewed. He denied any wrongdoing. Other witnesses were interviewed. It is perhaps noteworthy that Mr Ryan a Contract Support Engineer who was interviewed recalled an incident the claimant had mentioned around a job for Petrofac and that the claimant “*had the equipment going the wrong way*” He denied that Mr Anderson had raised his voice or acted badly. Another witness was ‘*shocked*’ that the claimant had raised a grievance. He also recalled a discussion about ‘*life jackets being sent the wrong way*’ Another witness commented on the way Mr Anderson had given

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feedback to the claimant commenting that he didn't think he would have spoken the same way to him and that it was "*slightly*" excessive (JBp152).

5 118. While the claimant did not agree with the outcome the evidence suggests a careful and reasonably thorough investigation which was not assisted by the passage of time and the transient nature of events).

10 119. The claimant was given the outcome of the grievance by letter dated 15 June 2018. By that point she was back at work. It is unfortunate that it took so long to conclude. The grievance was not upheld but difficulties in the claimant's relationship with Mr Anderson were recognised. It was recorded that both agreed to work together to improve their relationship.

PIP process

15 120. It was August before the claimant was asked to report on the Objectives set in January. No further issues had occurred at work. Not only was Mr. Gray present at this meeting but also Mr. Uwe Kari the Global Head of Technology firstly described as a witness and later as a technical adviser. The claimant had been asked to make a short presentation (30 minutes) but the objective was as we have seen to have a detailed knowledge of cranes. She was deemed to have failed the Objective. Whilst I agree that the respondent could have emphasised that there would be questions from Mr. Kari the claimant was aware of the terms of the Objective that she would be questioned on her knowledge. She was perhaps lulled into a false sense of security by the fact that the presentation was to be short. The original PIP was clear that after the presentation there would be a question and answer session (JBp111).

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30 121. The claimant complained that the questions were 'inappropriately in depth' (JBp213). The position taken by the respondent's witnesses both at the time and in evidence was that the questions should have been well within her capacity to answer. There was no evidence why any particular question was untoward. The meeting did not go well for the claimant and she seems to

have made errors many of which seem relatively simple errors. For example, for a mock assignment she had to complete a procedure for a boom hoist but picked the wrong crane type. On another occasion she struggled with the idea of isolating machinery before starting the proposed work. In relation to load testing although the claimant had not carried out these procedures in practice she had referenced the respondent's own Guidance but did not have a full understanding of it.

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122. The danger for a Tribunal when considering such issues is to substitute its own views for those of the employer in how these matters should be treated. As noted before the claimant led no evidence from any qualified witness, other than in general terms herself, that the sort of questioning used was overly technical. It did not seem to be such and was certainly not regarded as being unduly probing or technical by the managers whose evidence I accept on this matter.

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15 123. It was suggested in the assessment given by Mr Gray that the claimant had attended a Crane Appreciation Course as part of her training and should therefore be acquainted with the components. This evidence was a little misleading as it was not challenged that the course was a relatively simple course designed for all new employees including staff who were not engineers. I accept the claimant's evidence that this alone would not have equipped her to answer detailed questions about components but she had both experience with the company and other sources of information available to her. This is however a minor matter and does not detract from the robustness of the assessment.

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25 124. I have carefully read the Minutes (with the claimant's later comments) in full on several occasions and while there were undoubtedly some mitigatory elements that a reasonable employer would have regard to the overall process appears broadly fair. In their letter dated 11 October Mr. Gray sets out the position in a reasoned and careful manner recording correctly the claimant's points of disagreement and mitigation (JBp287-289) The claimant was held not to have successfully completed Objectives 1 and 5 but

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completed the others and was issued with a Final Warning. The decision was appealed. I am not going to rehearse the reasons for appeal but broadly the claimant pointed to the lack of historical appraisals, the lack of any structured training and offshore experience. The appeal was dealt with by the Contract Group Services Manager who had not been involved in the process beforehand. He rejected the appeal giving detailed grounds for that rejection (JBp288). He concluded that the objectives were reasonable and *'having reviewed the qualification you hold, I am satisfied that the core content covers the basis engineering principles that would allow you to transfer skills and knowledge to your role.'* He also found that the objectives were focused on *'aspects of your job that are absolutely critical'* He forewarned the claimant that the next stage was an assessment based on an entry level graduate.

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125. Another issue raised was that in December a post as a became available in the company that the claimant wanted to apply for. She was required to seek permission to do this given the continuing PIP process and this was refused on the basis that the post involved supervising other engineers and required the same level of technical knowledge as her current post. This was not seriously challenged and I accept the respondent's position that they had to be sure that the claimant had the necessary technical ability to supervise correctly. I noted that she was not prevented from applying for other positions where she was able to demonstrate the appropriate competence (JBp305).

126. The new manager met the claimant and discussed the objectives after she had written seeking clarification of the proposed technical assessment process. It was to take place in April. The claimant received five new objectives to be assessed with different weightings. The claimant challenged the new objectives and why they had changed since the original objectives in October. The respondent's position was that in response to issues raised by the claimant they had been altered to make it clear the different areas of technical knowledge required. The claimant had been allocated two hours per week to prepare. She was told she could go on another Crane Appreciation course access to internal policies and guidance, EDS presentations and in addition outside working hours an Engineer was running training sessions for

other staff that she could attend. It was also proposed that the claimant could take part in practical demonstration of stripping down a splitter gear box to identify single point failures. This was delayed partly because the person doing the demonstration had been offshore and for other reasons.

5 127. The claimant sat the assessment on the 17 April. She struggled to identify many of the crane components that needed to be identified and with the other areas of assessment. The claimant scored 44.7 % She was absent from work though stress from the 24 April. Mike Gibb the person carrying out the assessment wrote to the claimant with detailed feedback (JB p413-416).

10 128. The claimant was dismissed on the 22 July by Mr Gibb. At that point considering the evidence he had before him both the most recent assessment and the previous failure to achieve two crucial objectives. This was not a case of a couple of historic errors. They were simply warning that the claimant struggled with some important aspects of the job. The fact that the claimant
15 had not made any further errors is to an extent beside the point.

129. To argue that the lack of any further errors points to her competence whilst acknowledging that she was given technical support and her line managers had closely overseen her work is a submission I do not accept. The issue was whether she was competent in the role as a Senior Engineer without such
20 support. The respondent's managers were entitled to expect a level of knowledge about how cranes work as that is their business. There could be no guarantee that there would always be someone on hand to assist if a problem arose. I accept that he held the honest belief that she was not competent and that the first test in *Alidair is satisfied*. He came to the
25 conclusion that the claimant was not competent to fulfil her role and he made the decision untainted as it were by any suggestion that it was driven by the difficulties the claimant had experienced with Mr Anderson. His decision was made after a lengthy process, which although was not perfect in parts, had overall had given the claimant taring and support and time to improve her
30 detailed knowledge of cranes and associated processes required by her role as a Senior Engineer.

130. The second ground that the claimant's Counsel relied on was that the belief was not reasonable. It is correct that the concerns revolved around the Two objectives that had not been met. The first objective, however, is a crucial one for someone in a senior and supervisory position namely to understand
5 literally the 'nuts and bolts' of the job she is doing.
131. I would record that I did have some sympathy with the position the claimant ended up in. To an extent she was a victim of circumstances particularly the change in the type of work she had to do. Her relative lack of knowledge might not have come to light had the Transocean contract not ended. However, it
10 seems that she was in some ways lucky that her lack of expertise had not been identified earlier. It was also apparent that she had not followed the route that many of her colleagues, by no means all, followed by being given a more detailed induction followed by hands on work offshore. But she had some years office experience dealing with inspection reports and supervising work
15 to become more acquainted with cranes which after all was the business she had joined. I take some of the comments made in evidence that her lack of knowledge was below that of a graduate as being perhaps hyperbole but some of the errors she made appear very simple ones and clearly surprised her managers.
- 20 132. Finally, I considered the procedural issues raised by the claimant. In general, no process is likely to be without some criticism but it is the essential fairness of it that must be considered. It seemed a robust and overall fair process. It was suggested that the lack of a proper informal process as provided for by the policy rendered the dismissal unfair. It was also argued that the claimant
25 had no notice of the issues that were to be discussed at the first stage competency meeting. I am critical of the decision to hold that the informal process was satisfied. Nevertheless, there was a realisation by the claimant that the work was being more closely supervised and that issues had arisen about her understanding of the work she was doing. The claimant does seem
30 to have recognised that she did not have the detailed knowledge she needed (hence her request for offshore work) and was able to discuss fully the problems that had arisen with the three contracts.

133. I was not convinced that overall any unfairness occurred. The claimant had numerous opportunities to discuss these various matters and put forward mitigatory factors as both she and her Trade Union representative did. This was not some rushed process but one that took some months and which gave her an opportunity to learn the necessary technical aspects of cranes and lifting gear. She passed most of the objectives set and seemed confident at the outset she could pass them all. The process provided for an appeal which was exercised. The claimant may have been caught off guard by Mr Kari's questions at an early stage but as noted earlier, I am not convinced that they were either overly technical or the sort of questions she would know she was expected to be able to answer as a Senior Engineer. Even if these criticisms of the early stage of the process were material and not cured by the later process and appeal, which I believe they were, I am not convinced that the result namely dismissal would have been any different. The claimant had the resources and opportunity to improve her technical knowledge throughout what was an extensive period and did not do so to the satisfaction of her employers.
134. In these circumstances the dismissal on competency grounds was within the range of reasonable responses open to the respondent, was not unfair and the application is dismissed.

Employment Judge

James Hendry

Dated

18th of February 2021

Date sent to parties

19th of February 2021