# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Paul Castleton

**Respondent:** Workforce Software Limited

**Heard at:** **Watford Employment Tribunal (Remote hearing via CVP)**

**On:** 12 March 2021

**Before:** Employment Judge Hanning (sitting alone)

**Appearances**

For the claimant: In person

For the respondent: Ms D Stockley (HR Rep)

**COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

# JUDGMENT

1 The claim for unfair dismissal is not well-founded; the claimant was not unfairly dismissed. Therefore the claim is dismissed.

# REASONS

Claims and Issues

1 There was no dispute that the Respondent dismissed the Claimant on the grounds of conduct/capability issues. The Claimant claimed the dismissal was unfair because procedures were not applied properly, he was treated differently to others who demonstrated the same conduct issues as were levelled against him and that, across the board, he felt that the process was pre-determined.

2 Against that background then the issues to be determined are as follows:

2.1 Did the respondent have reasonable grounds to believe that the claimant was guilty of the alleged misconduct?

2.2 Was the dismissal within the range of reasonable responses open to the respondent?

2.3 In that context, did the respondent comply with the Acas Code of Practice?

3 If the claimant's claims are upheld then the appropriate questions to be determined would also be what financial compensation is appropriate in all the circumstances and should any award of compensation be reduced on the grounds of conduct or, following the case of *Polkey v AE Dayton Services Limited*, which allows a reduction where dismissal might have followed in any event and, had the claimant mitigated his loss

Evidence

4 In terms of evidence today the claimant attended in person and gave evidence. The respondent was represented by Ms Debbie Stockley, HR Representative. I heard evidence from Mr Rien Sach and Mr Neil Rigby.

5 I have been provided with pre-prepared statements for Messrs Sach and Rigby but not by the claimant. The respondent did not suggest any prejudice in this respect as the claimant's case was well and articulately set out in the ET1.

6 An agreed bundle run into 100 pages was also provided to me.

7 From that evidence and the documents, I record the following findings of fact.

Findings of Fact

8 The claimant began work for the respondent in February 2017. After about 10 months he was put onto a Performance Improvement Plan and he met those targets.

9 In September 2018 he was put on to a second Performance Improvement Plan but again, he met those targets. He was warned at that time that further lapses would result in disciplinary action because this was the second time he had had to be subjected to one.

10 In April 2019 there were further concerns which led to disciplinary proceedings which in turn led to a final written warning.

11 In July 2019 concerns were raised again and action initiated which led to the dismissal on 10 July 2019.

12 The claimant appealed against that dismissal, but his appeal was rejected.

13 A common theme of those concerns, about performance that is, and specifically in the context of the final written warning and the process which led to dismissal, was that the concerns related to three items. To shorten them slightly from what is in the documentation these were:

13.1 Lack of productivity,

13.2 Time management, and

13.3 Lack of communication

14 The claimant accepted some of the criticisms levelled against him but considered other allegations were being exaggerated and overstated. He also argued he had not been given sufficient notice of the disciplinary meeting and that the process itself was flawed because when he met Mr Sach for the first time it transpired that only some of the allegations had been investigated, not all of them, and that was a breach of the policy.

15 He also argued that he had been treated differently to others who were themselves frequently late but had not been dismissed. He cited 3 particular comparators. The respondent has dealt with those comparators and answers with an explanation, which I accept, that 2 of the 3 had informal flexible working arrangements which permitted the tardiness the claimant had noticed, while the third had been the subject of formal action to deal with the issue.

16 The claimant complained this was still inconsistent because he had been told that the meetings for which others were late were mandatory but that rule was clearly not being applied to them and, in any event, he had not been offered flexible working. The respondent pointed out that the claimant had never requested flexible working.

Law

17 The respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) ERA. If the respondent fails to persuade the Tribunal that it had a genuine belief in the reason and that it dismissed the claimant for that reason, the dismissal will be unfair.

18 If the respondent does persuade the Tribunal that it held that genuine belief and that it did dismiss the claimant for one of the potentially fair reasons, the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of that dismissal, applying section 98 (4) ERA.

19 Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

20 In considering the question of reasonableness of a dismissal, an Employment Tribunal should have regard to the decisions in *British Home Stores v. Burchell* [1980] ICR 303 EAT; *Iceland Frozen Foods Limited v. Jones* [1993] ICR 17 EAT; *Foley v. Post Office*, *Midland Bank plc v. Madden* [2000] IRLR 827 CA and *Sainsbury's Supermarkets v. Hitt* [2003] IRLR 23 ("Sainsbury")

21 In summary, these decisions require that an Employment Tribunal focuses on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged and whether it had a reasonable basis for that belief, having carried out as much investigation in to the matter as was reasonable. A

Tribunal should not however put itself in the position of the respondent and decide the fairness of the dismissal on what the Tribunal itself would have done. It is not for the Tribunal hearing and deciding on the case, to weigh up the evidence and substitute its own conclusion as if the Tribunal was conducting the process afresh. Instead, it is required to take a view of the matter from the standpoint of the reasonable employer.

22 The function of the Tribunal is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses. This band applies not only to the decision to dismiss but also to the procedure (including the investigation) by which that decision was reached.

23 The question of inconsistency can be a legitimate factor. If others in the same situation have been treated more leniently this may persuade a Tribunal that the treatment was unfair. However, it is critical to be sure that the circumstances are genuinely the same (see *Hadjioannou v. Coral Casinos Ltd* [1981] IRLR 352)

Conclusions

24 There is no dispute and it is accepted by all concerned, that the reason for the dismissal was conduct/capability and it is, in my judgment, entirely reasonable for the respondent to have reached that decision. It was reasonable for those concerned to believe that the claimant was not meeting the mark.

25 The claimant had accepted some of the criticism and the respondent did investigate all of the allegations.

26 The claimant was critical of the time allowed to him to answer the allegations. But when he raised that he was given extra time and he had the benefit of an appeal. So, I consider that any prejudice which might initially have been suffered, was remedied. He was given an fair opportunity to answer everything.

27 The claimant was critical that not everything had been investigated before the first meeting. It is clear from the evidence that the respondent had enough to warrant the meeting in any event and it was to the respondent's credit that Mr Sach adjourned to make sure everything was fully investigated before a decision was reached.

28 So, it was reasonable to believe the issues were there, was it reasonable to dismiss? I have explained it is not my function to reconsider this and substitute my own opinion. The question is, was this within the band of reasonable responses? In my judgment, clearly it was. This was the fourth time the claimant's performance had been found to be wanting within the space of about 2 and a bit years and it was only 3 months after a final written warning had been given.

29 The claimant today tried to suggest that he did not entirely accept the issues which arose at the time of the final written warning but I cannot reopen that enquiry nor could the respondent even if he had sought to challenge it at the time of the dismissal.

30 The claimant felt that some of the issues and complaints levelled against him had been exaggerated and were not, to not to put too fine a point on it, over egged, in

order to prejudice him. But, in my judgment, it is a matter for an employer to determine the severity of allegations and that is particularly the case where things have to be taken in context. So, what might otherwise be trivial if it was a one-off, takes on a more significance if it is part of a pattern of behaviour as discerned by the employer.

31 The question of consistency was legitimately raised because there were questions to be asked. But, in my judgment, it does not help the claimant. It is clear 2 of the 3 had different working arrangements so were not in the same boat. I take the claimant's point that he was not offered flexible arrangements but there is no evidence that he did ask for those nor what the outcome of any such request might have been.

32 The third comparator was subjected to a formal process. It may well be that, that did not lead to dismissal, as it did in the case of the claimant, but the critical point here is that first of all, that process may have resolved the issue from the respondent's perspective, so no further action was required, whereas here, this was the fourth time performance was considered to be failing. In any case, the concerns raised by the respondent about the claimant's performance went further than just timekeeping so we are still not comparing like with like.

33 All told then, as much as I empathise with the claimant's position and can understand why this may have seemed harsh to him, I am satisfied that the respondent had a valid reason to dismiss and that the decision to do so was within the band of reasonable responses. So, it was not an unfair dismissal.

34 It follows that I do not need to consider the question of compensation.

Employment Judge Hanning

7.5.2021
Sent to the parties on:
17.05.2021
…….
For the Tribunal Office:

THY
……..……..