



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4106676/2017**

5

**Held in Glasgow on 12,13,14,15,16,19 November 2018 and 24,25,26 June and  
31 October 2019**

10

**Employment Judge: I. Atack  
Tribunal Member: H Boyd  
Tribunal Member E Borowski**

**Craig John Bennoch**

15

**Claimant  
Represented by:  
Ms M Dalziel -  
Solicitor and  
Mr S John -  
Barrister**

20

**Scottish Power Limited**

**First Respondent  
Represented by:  
Mr K Gibson -  
Advocate**

25

**Scottish Power Renewable Energy Ltd**

**Second Respondent  
Represented by:  
Mr K Gibson -  
Advocate**

30

**Scottish Power UK PLC**

**Third Respondent  
Represented by:  
Mr K Gibson -  
Advocate**

35

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is:

1. That the claim against the First Respondent Scottish Power Limited, having been withdrawn during the course of the Hearing is dismissed.

**E.T. Z4 (WR)**

2. That the claim against the Third Respondent Scottish Power PLC having been withdrawn during the course of the Hearing is dismissed.
3. That the Claimant was not unfairly dismissed by Scottish Power Renewable Energy Ltd and that his claim of unfair dismissal is dismissed.

5

## REASONS

### Introduction

1. In this case the claimant claims unfair dismissal. The respondent admits dismissing the claimant but alleges that the reason was for some other substantial reason and that it was reasonable to dismiss in the circumstances.  
10 In the alternative, the respondent argues that the dismissal was by reason of conduct and again was fair.
2. The claim was originally brought against Scottish Power Limited, Scottish Power Renewable Energy Limited and Scottish Power UK PLC. During the course of the hearing the claimant accepted that the correct respondent was  
15 Scottish Power Renewable Energy Limited and that the claims against the other respondents be withdrawn. They will be formally dismissed in this judgment.
3. The claimant was initially represented by Mrs. Morag Dalziel but unfortunately she was taken seriously ill after six days of the hearing and was unable to  
20 continue representing the claimant. Mr. John, barrister, was instructed to represent the claimant for the last three days.
4. The respondent was represented throughout by Mr. Gibson, advocate.
5. The tribunal heard evidence for the respondent from Gavin Green, the claimant's line the manager, from Richard Britton, who at the relevant time  
25 was Head of Development UK Offshore, from Stuart Mason, Onshore Project Delivery Director, from Francis Monaghan, who at the relevant time was Health and Safety director for the respondent, from Ross Henderson, General Services Director, from Alan Hannah, Project Services Director, from Paul

Stearns, Head of Offshore Construction and from Kenneth Peberdy the Managing Director of the Onshore business for Scottish Power Renewables.

- 5 6. The parties produced a joint bundle of documents which, including documents admitted as a supplementary bundle during the course of the hearing, extended to 996 pages. Reference to the documents will be by reference to the page numbers.
7. From the evidence which we heard and the documents to which we were referred we found the following material facts to be admitted or proved.

### Material Facts

- 10 8. The claimant was employed by the respondent as a Senior electrical engineer from 5 March 2012 until 25 August 2017 when he was dismissed.
9. The respondent is engaged in the renewable energy market. This mainly relates to wind power both on and off shore.
10. The claimant was employed in the team which dealt with the offshore side of the respondent's business.
- 15 11. The claimant's major duty was to support the lead electrical engineer in supporting the Development Operations and commercial Teams in delivery of large-scale offshore wind projects.
12. The claimant's contract of employment was dated 20 January 2012 and is contained at pages 62 - 77.
- 20 13. In terms of paragraph 11.1 the employer's disciplinary procedure does not form part of the claimant's contract.
14. The claimant's line manager was Gavin Greene.
15. The management structure adopted by the respondent was a "matrix structure".
- 25 16. The claimant provided his services as a senior electrical engineer to other teams for which he was assigned to do work in the respondent's business.

Those teams had their own project managers for whom a large portion of the claimant's substantial day-to-day work was done.

17. The managers for those other teams were John Rush, Mikel Hermosa and Helen Walker.
- 5 18. The respondent operates a performance management process which is contained at pages 77A - 77 I. Under that process an employee draws up, discusses and agrees their goals and behaviours with the line manager at the start of the year. There is a midyear performance review and at the end of the year a year end review.
- 10 19. At the year end review the employee's performance is assessed. The possible scores are as follows:
- 5 Exceptional
  - 4 Superior
  - 3 Fully Competent
  - 15 2 Partially Competent
  - 1 Unsatisfactory
20. In assessing performance, the respondent takes into account not only the delivery of the set objectives or goals but the behaviours exhibited in achieving those objectives. The behaviours that an employee displays when
- 20 working towards their goals are just as important as the deliverables themselves, page 77F.
21. In 2012, the year in which he commenced employment the claimant was scored as a 3.
22. In 2013 he was scored 2. In 2014 he was scored 3 and in 2015 he was scored
- 25 4.
23. The grading of 4 was achieved because Mr. Greene took the view that the claimant had in fact scored 3.5 and he had upgraded that to a 4 because the respondent's system of scoring does not permit of fractional scores. He did that to incentivise the claimant.

24. In 2016 the claimant and Gavin Greene agreed the claimant's goals for that year. These are shown at pages 128 - 138. These goals were as follows:
1. Providing general electrical design support and project engineering within the EA1 project focused on supporting electrical interfaces within the wind farm and the wind turbine the package.
  2. Providing electrical design support and project engineering within the EA1 array cable package.
  3. Providing electrical support to EA1 N and EA2 future projects:
    - i. Managing the ModApp applications and grid agreement.
    - ii. Providing input to the project design statement and development process.
  4. Providing a general coordination of electrical team R & D activities.
25. Gavin Greene met the claimant for a midyear review in 2016. Mr. Greene considered the claimant was experiencing difficulty in in meeting his goals. Mr. Greene advised the claimant that the first goal would be removed from him and given to another employee. The claimant was told that he should focus on goals 2 and 3.
26. Mr. Greene informed the claimant that if he performed his work competently against these two objectives he would be deemed competent in the end of year appraisal. That would have resulted in a score of 3.
27. At the end of 2016 and in early January 2017 Mr. Greene assessed the claimant under the respondent's performance planning system. He had three meetings with the claimant. These took place on the 5,9 and 11 January 2017.
28. Mr. Greene advised the claimant that he had assessed him as "Partially Competent" which merited a score of 2.
29. The claimant did not accept that score and appealed against it, pages 139 - 146.
30. The appeal was heard by Richard Britton. The claimant agreed to the appointment of Mr. Britton to hear his appeal.

31. Mr. Britton heard the appeal on 31 January 2017. The typewritten notes of that hearing are contained at pages 161-164.
32. Mr. Britton concluded that a rating of "Partially Competent" was appropriate for 2016.
- 5 33. He reached that conclusion primarily based upon the behavioural competencies that the claimant should have attained. He considered the claimant struggled to provide him with a clear view of what his objectives were and what success in achieving them would look like, page 144.
- 10 34. Mr Britton also took into account emails from John Rush, Mikel Hermosa and Helen Walker which were expressed in negative terms regarding the claimant's performance.
35. The claimant did not accept Mr. Britton's decision and appealed under stage 2 of the respondent's process. The basis of his appeal is contained at pages 179-231.
- 15 36. The appeal was heard by Stuart Mason.
37. The claimant was not entitled to have his appeal heard by a performance management forum, as he alleged, as that process is only open to employees of Scottish Power companies who are part of collective bargaining arrangements with a trade union. The respondent was not subject to such arrangements.
- 20 38. The respondent's performance management process states that there are two stages to the appeal process and the decision from the appeal process is the final stage of the performance management appeal process and that the same issues cannot be raised through another company procedure, page 82.
- 25 39. The second stage appeal hearing before Mr. Mason took place on 3 March 2017.
40. Mr. Mason did not uphold the appeal. His decision is contained at pages 240 in which he made various recommendations.

41. A copy of Mr Mason's decision was sent to the claimant on 20 March 2017. The claimant did not accept the decision. He engaged in correspondence with Lizbeth Brown who had assisted Mr. Mason at the second stage appeal, page 519-520
- 5 42. Mr. Mason considered the comments the claimant had made regarding his decision but did not alter his opinion. He offered to meet the claimant if the claimant considered that to be of benefit but specifically advised that would not change the outcome of the performance rating, page 284.
43. The claimant did not accept Mr. Mason's offer to meet.
- 10 44. During the meeting with Mr. Mason the claimant did not raise specific allegations of bullying and harassment against Gavin Greene.
45. On 3 April 2017 Sarah Young, case consulting manager, wrote to the claimant advising that the appeal process had been concluded and there was no further right of appeal, page 281 .
- 15 46. On 7 April 2017 the claimant submitted a bullying and harassment complaint, page 277.
47. Frank Monaghan was appointed to investigate the bullying and harassment complaint.
48. The respondent's bullying and harassment procedure is contained at pages  
20 298 - 302.
49. On 10 April Sarah Young emailed the claimant to advise that the grievance process was not to be used for matters which have already been dealt with under another process and that it was not possible to raise a grievance on matters that related directly to the performance appeals, page 279.
- 25 50. Mr. Monaghan met the claimant on 2 May 2017 to discuss the claimant's complaint. The minutes of that meeting are contained at pages 307 - 326.
51. Mr. Monaghan did consider the claimant's allegations that Mr. Greene was trying to drive him from the team by bullying and harassing behaviour.

52. Following the meeting Mr. Monaghan conducted an investigation with Gavin Greene, page 327-339. He also spoke to Ana Rodriguez, whose name had been mentioned by the claimant at the appeal, pages 346 - 347.
53. Mr. Monaghan prepared his report, pages 372 - 378. He concluded that there was no evidence of bullying and harassment and made various recommendations, page 377. That report was sent to Paul Steams who was Gavin Greene's line manager.
54. Mr. Monaghan wrote to the claimant on 15 June 2017 setting out his decision and the reasons for it pages 379 - 383. In that letter he referred to having mentioned mediation with Mr. Greene and encouraged the claimant to participate in such mediation "to rebuild trust and re-establish a working relationship with Gavin".
55. On 29 June 2017 Paul Steams requested an informal meeting with the claimant. Initially the claimant did not want to meet but did so. At that meeting the claimant was not willing to accept his performance rating.
56. On the 30 June 2017 the claimant appealed the outcome of the bullying and harassment complaint, page 385. The basis of the appeal was set out at pages 386 - 392. He raised further procedural points in an email dated 17 July 2017 page 395 - 396.
57. Ross Henderson was appointed to hear the claimant's bullying and harassment appeal. He invited the claimant to an appeal hearing.
58. On 19 July 2017 the claimant sent an email to Ross Henderson, page 397 stating that the performance rating given by Gavin Greene was related to his bullying.
59. The appeal hearing took place on 20 July 2017. The minutes of that appeal hearing are contained at pages 434 - 453.
60. Mr. Henderson prepared a report, pages 544 - 552. His conclusion was that the allegations of bullying and harassment were not well founded.



61. On 11 August 2017 Mr. Henderson sent a letter to the claimant setting out his findings and explaining his decision not to uphold the complaint of bullying and harassment, pages 554 - 559. In that letter he strongly advised the claimant to participate in mediation in order to try to repair the working relationship between himself and Mr. Greene. He also advised the claimant that the process was now closed.
62. The claimant refused to meet with Gavin Greene to conduct a midyear review in 2017. He advised Sarah Young of that in an email 24 July 2017, page 542.
63. The claimant had by this stage exhausted the appeals process in relation to both his performance assessment and his complaint of bullying and harassment.
64. There was no collusion between his line the manager and any of the persons conducting the various appeals. All were independent.
65. There was no complaint of partiality against any of those persons hearing the claimant's appeals at the time.
66. There was no agenda to get rid of the claimant.
67. There were no concerns raised by the claimant about any behaviour of Gavin Greene prior to the 2016 appraisal.
68. The relationship between the claimant and Gavin Greene had broken down.
69. The claimant sent an email to Hamish Watson, the UK HR director for Scottish Power on 14 August 2017, pages 582 - 585. This was an attempt to resurrect the complaints about his grading and of bullying and harassment.
70. Mr. Watson replied on 18 August, page 582, that the points raised by the claimant in his email had already been considered and responded to within the processes. He stated the processes had been implemented fully and correctly and were now exhausted. There was no basis on which to reopen matters.

71. The claimant did not accept Mr. Watson's response and set out his views in an email of 21 August, page 581 - 582. Mr Watson responded that there was no basis on which to reopen matters either informally or via a subsequent grievance.
- 5 72. On 14 August 2017 Paul Stearns sent an email to the claimant requesting a meeting with him, page 561 .
73. The purpose of that meeting was to discuss the claimant's performance evaluation and how he could be assisted to improve his performance; to discuss the recommendation from the bullying and harassment appeal to  
10 participate in mediation and to try to repair the working relationship between the claimant and Gavin Greene and to discuss any support the claimant needed to become a fully effective member of the electrical team.
74. That meeting took place on 17 August. During the meeting the claimant repeatedly stated that he would not accept the grading awarded in the  
15 performance appraisal, engage in a performance improvement plan and move on.
75. Mr. Stearns concluded that the claimant would not accept the 2016 performance score and did not accept the outcomes of the bullying and harassment process.
- 20 76. On 18 August Paul Stearns sent an email to the claimant, page 562, summarising what had been discussed the previous day. He set out what the purpose of the meeting had been and that he considered the claimant continued to reject the 2016 performance evaluation and the outcome of the appeals against that and the outcome of the two bullying and harassment  
25 investigations. He also expressed the view that the current situation "is it rapidly becoming completely untenable for all parties" and noted that the claimant was unwilling to enter into any meaningful dialogue on any aspect of his performance or his relationship with his line manager.
77. On 22 August 2017 Alan Hannah, operations director, wrote to the claimant  
30 inviting him to attend a meeting on 24 August, page 567.

78. The purpose of that meeting was stated to be to consider whether or not the respondent could continue to employ the claimant.
79. The claimant was advised of his right to be accompanied.
80. On 23 August the claimant sent an email to Keith Anderson, the respondent's chief corporate officer, asking him to look into various issues which he alleged had not been handled correctly, page 571 - 579.
81. On the same date the claimant responded to Alan Hannah's letter. He advised Mr. Hannah that he had emailed Keith Anderson and declined to meet with Mr. Hannah and was waiting Mr. Anderson's response, page 569.
82. In that letter the claimant raised the matters of the performance review and the bullying and harassment complaints. He also alleged Mr. Hannah was not independent.
83. Also on 23 August the claimant sent an email to Hamish Watson seeking to raise issues again regarding his performance rating and the bullying and harassment complaint.
84. Mr. Watson replied on the same date advising that the procedures had reached their conclusion and there was no basis upon which to reopen them, page 580.
85. Mr. Hannah replied to the claimant's email of 22 August on 23 August, page 568 advising him that his attendance at the meeting was a requirement and if he did not attend a decision would be made in his absence, page 568.
86. The meeting between Mr. Hannah and the claimant took place on 24 August 2017. The minutes of that meeting are contained at pages 586-591.
87. The claimant attended the meeting without being accompanied. At the outset of the meeting the claimant confirmed that he was happy for Alan Hannah to chair the meeting.

88. The claimant was advised of the purpose of the meeting, namely to consider whether or not the respondent could continue to employ him. He was advised that the previous formal procedures would not be discussed.

5 *"You have raised several issues through the formal Scottish Power procedures (two-stage appeal process against 2016 performance rating, bullying and harassment complaint and appeal), none of which have been upheld*

10 *You refused to accept the outcomes of these procedures and have attempted to extend these by raising a formal grievance to the HR director and Keith Anderson, CEO*

*You have a dysfunctional relationship with Gavin Greene, your line manager refusing to recognise his authority or his judgment on your performance*

15 *My view is that your performance is not at the standard we require and this has been backed up by outcomes of the two-stage appeal process in which two impartial managers reviewed your performance against 2016 goals.*

*You have repeatedly asked to be moved, however given your specialist role, I have nowhere else to place you and given that your performance is an issue, it would not be appropriate to move you into another role within Offshore. "*

20 89. It was explained to the claimant that the purpose of the meeting was not about revisiting past processes; the outcomes had been delivered and the procedures had been completed.

90. The claimant did endeavour to revisit the outcomes of the formal procedures during the hearing.

25 91. The meeting concluded with Mr. Hannah advising he would speak to Paul Steams and Gavin Greene before making his decision. The meeting was adjourned until 25 August.

92. Mr. Hannah spoke to Paul Steams and Gavin Greene.

93. Thereafter he advised the claimant that he believed his continued employment was untenable and that he would be dismissed. He advised the claimant of his right of appeal.
94. On 29 August Mr. Hannah wrote to the claimant confirming the outcome of the meeting and that the claimant would be dismissed with immediate effect being paid three months in lieu of notice, page 595 - 599.
95. The claimant had a specialist role with the respondent. There was no suitable place to move him to in the respondent's business.
96. Mr. Hannah set out the reasons for the claimant's dismissal as being his continued refusal to accept his performance rating, the outcome of the processes and the relationship with his manager which Mr. Hannah believed had deteriorated to such an extent that it was dysfunctional and irrevocable, page 599.
97. On 28 August the claimant sent an email to Hamish Watson raising issues again with regard to his performance management process and concerns regarding the hearing before Mr Hannah, pages 916 - 917.
98. Mr. Watson responded on 29 August, page 915, advising the claimant that all the processes and procedures which he had been involved in had been implemented fully and correctly. Mr. Watson accepted that the claimant disagreed with the outcome of the processes but stated they had reached their normal conclusion and there was no basis on which they could be re-opened either formally or informally.
99. The claimant appealed against the decision of Mr. Hannah. The basis of the appeal is contained at pages 614 - 701.
100. On 7 September 2017 Kenneth Peberdy, Managing Director - Onshore, invited the claimant to a meeting on 14 September to discuss his appeal. The claimant was reminded of his right to be accompanied, page 702.
101. The appeal hearing took place on 14 September 2017. The claimant was not accompanied. The notes of that meeting are contained at pages 758 - 767.

102. At the hearing Mr. Peberdy advised the claimant he would not be reviewing the Performance Management and the Bullying and Harassment claims but that he appreciated they were linked. He advised the claimant that his main focus would be on the claimant's response to Mr. Hannah's dismissal notice and the reasons for appealing the dismissal which were contained in sections 7 and 8 respectively of the claimant's appeal document.
103. The claimant stated during the meeting that if the appeal overturned the decision to dismiss him but that his performance rating of 2016 remained as "partially competent" that he would not consider that to be an acceptable outcome.
104. The claimant continually refused to accept his performance rating.
105. Mr. Peberdy wrote to the claimant on 21 September dismissing his appeal, pages 746 - 747. He concluded that the dismissal was wholly as a result of the claimant being unable to accept the findings of four senior managers, believing that the processes undertaken were flawed. He also concluded that the relationship between the claimant and his manager had irrevocably broken down resulting in a lack of trust and confidence. He also noted there appeared to be a relationship breakdown with a number of colleagues whom the claimant believed had colluded against him.
106. The claimant wrote to Mr. Peberdy on 27 September raising issues about the appeal hearing and the decision, page 768 - 770. The claimant did not accept the outcome of the appeal hearing and requested Mr. Peberdy to reconsider his decision.
107. Mr. Peberdy responded to the claimant on 13 October, pages 787 - 788. He advised the claimant that the respondent now considered the matter to be closed.
108. Mr. Peberdy prior to the appeal hearing asked Gavin Greene to provide a summary of the processes followed relating to the performance review process. Mr. Greene provided such details, pages 73 - 76.

109. Mr. Peberdy requested information from Richard Britton, pages 707 - 708, and received his response on 7 September, page 707.
110. Mr. Peberdy requested information from Stuart Mason, page 712 and received a response page 711.
- 5 111. He asked for information from Frank Monaghan, page 709B and from Ross Henderson, page 730 and received responses from each of them at pages 709A-709B and 729 - 730 respectively.
112. He sought information from Paul Steams, page 735. Mr. Steams responded on 12 September, page 734.
- 10 113. He also sought information from Alan Hannah, page 732 and received his response on 12 September, page 731.
114. The purpose of Mr. Peberdy in seeking this information was because these persons had been named in the claimant's appeal document. No new evidence came to light as a result of these investigations.
- 15 115. The claimant was not dismissed under the respondent's disciplinary procedure.
116. The claimant was dismissed for some other substantial reason namely that he had refused to accept his performance rating, the outcome of the performance appraisal and related appeals and outcome of his bullying and harassment complaint and appeal and the fact that the relationship with his  
20 line manager had broken down irretrievably.

### Submissions

- 25 117. Both parties produced lengthy written submissions which they had exchanged and had been able to comment on each other's submissions. We do not intend to set out in full the submissions of either party but simply refer to the main points made by them. In view of the decision which we have reached, as set out below, we have not referred here to any submissions relating to remedy.



*Respondent*

118. The respondent's position was that the reason for the dismissal of the claimant was Some Other Substantial Reason or alternatively was by reason of conduct. In either event they argued that the dismissal was fair. They  
5 accepted that the claimant had been dismissed but argued it was for a fair reason in terms of section 98 (4) of the Employment Rights Act 1996.
119. The performance management procedures and appeals were carried out fairly. There was no unfairness in not having the case heard by a forum and the evidence relating to the use of a forum by the respondent's witnesses was  
10 unchallenged.
120. The claimant pursued his bullying and harassment claim as a means of challenging the score in the performance process. Those procedures were also carried out fairly. Both Mr. Monaghan and Mr. Henderson considered as a question if Gavin Greene had a plan to drive the claimant from the team.
- 15 121. Mr. Hannah was entitled to rely on both procedures having been carried out correctly and to treat them as being closed and to insist that the claimant engaged with the business and moved forward. The claimant would not move forward and did not even agree to disagree.
122. The claimant did not engage with the performance planning and the appraisal  
20 process in 2017. He refused offers of assistance to repair the relationship with Gavin green.
123. The choice facing Mr. Hannah was letting the situation drag on unresolved and with the claimant not engaging in the performance process and having extremely poor relations with his manager or dismissing him.
- 25 124. There were no alternative roles in the part of the business in which the claimant worked. Even if there were, moving him would not resolve the issue of addressing poor performance in any new role. Mr. Hannah was entitled to dismiss and that decision was within the range of reasonable responses.



125. Mr. Peberdy was entitled to uphold the decision on appeal. Both Mr. Hannah and Mr. Peberdy considered what had happened in the prior processes before reaching their respective decisions.
126. The respondent was entitled to offer the claimant a professional improvement plan. That was in the policy but was non-contractual. It was a tool designed to facilitate improvement and is not intended as a sanction as the claimant perceived it. It was perfectly proper to suggest that the claimant took part in such a process.
127. The claimant was not as he alleged in a no man's land when he argued that he was not allowed to raise bullying and harassment allegations in the performance appeal process with Mr. Mason, and not permitted to raise the impact of bullying and harassment on the performance score in the bullying and harassment process.
128. There was no bullying and harassment but, if there was, the claimant's argument was wrong on the evidence. Both Mr. Monaghan and Mr. Henderson did consider if Gavin Greene had acted in a way which involved a plan to drive the claimant from the team.
129. The score of two was justified and supported by the evidence not only from Gavin Greene but from Mr. Hermosa Mrs. Walker and Mr. Rush.
130. Mr. Mason also spoke to Joe Dunn, as suggested by the claimant, and his view generally supported that of Mr. Greene and the other three managers.
131. The respondent was entitled to regard the performance appraisal and appeal procedures as conducted properly and fairly. The claimant did not raise allegations of bullying and harassment with Mr. Mason as he claimed, but made only weak accusations of Gavin Greene being unprofessional.
132. If the reason was conduct the claimant was entitled to a fair procedure. The respondent did not engage their formal disciplinary procedures but what was used was a fair procedure. The claimant knew what the problem was and was given a chance to present his case at the subsequent hearing before Mr Hannah. Thereafter he exercised his right of appeal.

133. The procedure utilised by the respondent substantially followed the acas code of practice on disciplinary and grievance procedures.

134. Mr. Gibson submitted that the **Burchell** (below) test was fully satisfied. There was no procedural unfairness and the claimant's case should be dismissed.

5 135. Mr. Gibson referred to the following cases: -

- **Coleman v Magnet Joinery Ltd** [1975] ICR 46
- **BHS Ltd v Burchell** [1980] ICR 303
- **Timex Corporation v Thomson** [1981] IRLR 552
- **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17
- 10 • **Polkey v AE Dayton Services Ltd.** [1988] ICR 142
- **Port of London Authority v Payne** [1984] ICR 555
- **Boys and Girls Welfare Society v McDonald [1997]** ICR 693
- **Foley v Post Office; HSBC Bank pic** (formerly Midland Bank pic v Madden) [2000] ICR 1283

15 *Claimant*

136. For the claimant Mr. John submitted that in summary the claimant's case was that his end of year 2016 performance rating was unfair in that it did not reflect his actual performance against agreed objectives; it didn't take any or sufficient account of the amount or type of work he was set and what he  
20 achieved; it didn't take account of acknowledged understaffing in his department; and it focused on two isolated events which in fact were not the issues they were made out to be and which had material mitigation and fault could not reasonably be apportioned to the claimant.

137. He submitted that the performance rating and subsequent appeals heard by  
25 Mr. Britton and Mr. Mason were unfair. Mr. Britton had focused on behavioural issues in the performance and before that little or nothing been set against behavioural objectives in the performance review system. No problems been highlighted with behavioural matters before. He submitted that neither Mr. Britton nor Mr. Mason properly understood or engaged with the claimant on  
30 his arguments as to how he had complied with his set objectives. Each appeal

stage was effectively a rubberstamping of the last and at no point was there any evidence of the respondent engaging with or properly investigating the claimant's position.

- 5 138. At the disciplinary hearing and after the appeal neither Mr. Hannah nor Mr. Peberdy engaged with the earlier findings but took those earlier findings at face value.
139. At no stage did the respondent take into account comments made by Gavin Greene to the claimant showing negativity and hostility towards him which was relevant to the fairness of the performance rating.
- 10 140. The respondent dismissed the claimant for conduct being a failure to accept performance and review processes. The significance of the respondent seeking to argue some other substantial reason is that they did not comply with their disciplinary procedures which they would require to do if this was a conduct dismissal.
- 15 141. The procedures which they followed was not fair. There was a failure to investigate the claimant's challenge to his grading, his challenges regarding the motives and behaviour of Gavin Greene, which was bullying and harassing and a failure to consider the grievance lodged by the claimant and shutting out any consideration of his challenges to the processes at the  
20 dismissal and appeal hearing.
142. The respondent was reluctant to look at or have any regard to the claimant's legitimate counterpoints to the criticism made of him which was said to warrant his downgrading. They failed to fully investigate by interviewing appropriate witnesses and in failing to put the claimant's counterpoints to the  
25 witnesses presented by management. That meant that a full and balanced understanding of the issues for which the claimant was being criticised and downgraded was not obtained.
143. These concerns were not considered at the dismissal hearing as the respondent took the existing process "as read". The respondent wished to  
30 categorise the dismissal as some other substantial reason rather than conduct

as conduct would require them to follow their own procedures, that is to say to conduct investigations and their own interviews to establish the facts.

144. The dismissal was procedurally and substantially unfair.

145. The respondent did not consider any alternative positions or change of line manager for the claimant despite such being recommended following the  
5 bullying and harassment procedures. They were simply seeking to be rid of the claimant.

146. It was not accepted by the claimant that the relationship with Gavin Greene was irrevocably dysfunctional.

10 147. If the claimant had had a fair consideration of his case and the scoring was found to be justifiable he would have accepted it and would have worked with it. It was not fair to portray the claimant as not willing to accept the scores.

148. The non-accepting of the outcomes of flawed procedures could not be categorised as misconduct. Some other substantial reason has been used as  
15 a means to avoid the level of investigation required of a conduct dismissal.

149. In any event dismissal was not within the range of reasonable responses.

150. Mr. John referred to the same cases as had Mr Gibson in relation to the merits of the case.

### Decision

20 151. In reaching its decision the tribunal began by considering the terms of section 98(1) of the Employment Rights Act 1996 (ERA) which makes it clear that it is for the employer to show the reason for dismissal which should be one of the potentially fair reasons set out in section 98 or some other substantial  
25 reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. If an employer can show that the reason for the dismissal is one falling within the scope of section 98 the tribunal must then go on to consider whether the dismissal is fair or unfair. This will depend on whether in the circumstances (including the size and administrative resources of the undertaking) the employer acted reasonably or unreasonably

in treating the reason as a sufficient reason for dismissing the employee and is to be determined in accordance with equity and the substantial merits of the case.

5 152. The tribunal throughout was mindful of the fact that it must not substitute its own decision for that of the employer. Rather, it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case - ***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439. The tribunal bore in mind throughout what this test means in practice. In a given set of circumstances  
10 one employer may decide that dismissal is the appropriate response while another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of the case.

15 153. In this case we were satisfied that the reason for the dismissal of the claimant was because he had refused to accept his performance rating for 2016 and had refused to accept the outcome of the two stage appeal against that process and the outcome of his claims of bullying and harassment against his line manager. We were satisfied that the relationship with his line manager had indeed broken down irretrievably.

20 154. It was clear to us from the evidence that the claimant did not accept his performance rating for the year 2016. He appealed against that decision. We considered that Mr. Britton had carried out a thorough appeal and accepted his view that the claimant had failed to explain to him in precise terms what his goals were or how he had achieved them. The claimant did not accept that  
25 the behavioural competencies were as important as the goals themselves but it is clear from the respondent's processes at page 77F that they are indeed just as important. Mr Britton was entitled to reach the view which he did.

30 155. At the midyear review in 2016 Mr. Greene considered that the claimant was struggling to achieve his goals and removed one of them from him and advised him that the fourth one would not count towards his end of year score. At that stage he considered the claimant would be likely to achieve a grading

of “fully competent” at the end of the year. That is to say, a grading of 3. That in itself was lower than the year before.

- 5 156. The claimant did not accept Mr. Britton’s findings and appealed his performance rating to Mr. Mason. We were satisfied that Mr. Mason correctly followed procedures in reaching his conclusion to dismiss the claimant’s appeal. In terms of the respondent’s procedures that was an end of the matter of the performance rating challenges.
157. The claimant however did not accept that was an end to his complaint and indeed continued to argue the point up until the time of his dismissal.
- 10 158. The claimant brought claims of bullying and harassment against Mr. Greene but no such claims had been made prior to the disputed performance rating.
159. We were satisfied that Mr. Monaghan followed the respondent’s procedures in considering the complaint of bullying and harassment and although the claimant did not like or accept the outcome it was in our view an outcome which Mr. Monaghan was entitled to reach.
- 15 160. The claimant appealed Mr. Monaghan’s decision to Mr. Henderson. Again, we were satisfied that Mr. Henderson had followed the respondent’s procedures and was quite entitled to reach the decision which he did which was to dismiss the claimant’s appeal. The claimant did not accept that outcome and continued to complain and refused to accept that outcome until his dismissal.
- 20 161. Mr. Stearns held two meetings with the claimant with a view to resolving the problems which the claimant’s refusal to accept the outcomes was causing. The claimant did not engage with Mr. Stearns and specifically stated that he was not prepared to accept his performance appraisal grading, engage in a performance improvement plan and move on. Mr. Stearns had offered to help the claimant in the process of moving on and trying to repair the relationship with Gavin Greene but the claimant was not willing to engage in any such process.
- 25



162. The claimant refused to engage with Mr. Greene regarding the midyear review for 2017. We were satisfied that there was a breakdown in trust and confidence between the claimant and Mr. Greene. It was the actions of the claimant which caused that breakdown; those actions being his refusal to accept the outcomes of the procedures. The claimant was simply not willing to engage with Mr. Greene and continued to assert that he had been bullied and harassed notwithstanding that his initial complaint and appeal about that matter had been rejected. As a result of the claimant's conduct in refusing to accept the outcome of the hearings Mr. Greene was not able to manage the claimant.
163. Mr. Greene's evidence was that the complaints made against him had caused him stress. He said that the claimant was not willing to engage with him as his manager.
164. We were satisfied that the respondent had endeavoured to deal with the problem presented by the claimant's refusal to accept his grading and the outcome of his appeals and complaints of bullying and harassment.
165. Mr. Steams had tried to resolve the matter informally and when the claimant failed to engage with him Mr Hannah called the claimant to a meeting the purpose of which was to consider if they could continue with his employment. At that meeting the claimant again refused to accept the outcomes of the previous procedures and clearly indicated that he was not prepared to move on and put the past behind him. Faced with that intransigence there was nothing further the respondent could do. We considered that the respondent had lost trust and confidence in the claimant and that the working relationship between him and his colleagues had irretrievably broken down. He was not willing to engage with Mr. Greene or take part in the midyear review for 2017.
166. Whilst it was accepted by the respondent that they did not follow their own disciplinary procedures with regard to the claimant it was their position that they had followed a fair procedure. We were not persuaded that the respondent had failed to follow a fair procedure. We were satisfied that the procedure followed by the respondent was a fair one and that it substantially

followed the ACAS Code of Practice on Disciplinary and Grievance Procedures.

5 167. They had carried out an investigation into the facts of the case. They had informed the claimant of the problem as they saw it and what might be the outcome. They invited the claimant to a meeting and advised him of his right to be accompanied at that meeting. They held a meeting with the claimant. They decided having heard what was said to dismiss the claimant. They provided him with an opportunity to appeal.

10 168. For these reasons we considered that the dismissal of the claimant by the respondent was for some other substantial reason.

169. The next question which we had to consider is whether it was fair in terms of section 98 (4) ERA to dismiss the claimant for that reason.

15 170. As noted above it is not for us to substitute our view for that of the employer but rather to consider whether any reasonable employer could reasonably have dismissed the employee in these circumstances.

20 171. The claimant was refusing to accept the grading or score given to him and that the various procedures he had been through had been completed. He did not accept the outcome of the performance review process or of the bullying and harassment complaint. It was these refusals to accept the outcome of procedures that led to the breakdown of the relationship. The claimant refused to cooperate with Gavin Greene in the performance review procedure for 2017. He refused to engage with Mr Greene. The respondent was not able to manage him. Even after his appeal against dismissal he refused to accept that those procedures had been exhausted and wrote to Mr. Peberdy asking  
25 him to reconsider his decision.

30 172. The claimant has argued that the performance score for 2016 was wrong. He was not dismissed because of capability but because he failed to accept that the respondent's procedures had been completed and as a result the relationship with his manager had become untenable. At the hearing in this case a considerable amount of evidence was led regarding the scoring



process but what we have to look at is the reason why the respondent dismissed the claimant. We accepted that there were no notes of the meetings with the claimant in 2016 flagging up any concerns about his performance, but that really is not the issue. We were satisfied the appeals relating to the scoring were fairly conducted. It was not his performance which led to his dismissal but his failure to accept the score he was given and that all his avenues of appeal had been exhausted. We considered that the claimant was intransigent.

5  
10 173. We were not persuaded that the scoring was manipulated by Gavin Greene out of malice and were satisfied that Mr. Britton and Mr. Mason were entitled to reject the claimant's appeals regarding the scoring.

174. The claimant's score had been 4 in 2015 but he was aware by the mid-year review in 2016 that he was likely to score a 3 in that year.

15 175. We were also satisfied that the previous year's score of 4 had been in fact a score of 3.5 which was increased by Gavin Greene to incentivise the claimant. Mr. Greene could simply have rounded down the score to a 3 as there was no requirement for him to have rounded it up to a 4. We did not consider that a rounding up the score to a higher figure for the purposes of incentivising the claimant was the act of someone who wished to drive him out of the business.

20 176. The respondent had reached the point with the claimant that he could not be managed. He was refusing to accept the score given to him for 2016 and the results of the processes which followed his failure to accept that score. He had rejected Paul Steams approaches to help him to move on and had refused initially to meet Mr. Hannah, despite the clear terms of the letter requesting him to attend a meeting to discuss his continued employment. He continued to re-raise the same issues. The claimant made complaints about the impartiality of those chairing the various hearings he took part in. Even at the appeal held by Mr. Peberdy he refused to accept a score of two if the dismissal was rescinded.

25  
30 177. At the disciplinary hearing with Mr. Hannah the claimant was aware of the problem his attitude was causing to the respondent. He could have accepted

the position that he had objected to his scoring even if he did not accept the actual score and move on. He did not.

- 5 178. There was no other role which could be given to the claimant. We accepted that he had a specialist role and that there was no suitable position to move him to. Further, we accepted that the claimant's refusal to accept his grading meant the performance issue, as seen by the respondent, was unaddressed and for that reason it would not be appropriate to move him even if a place or role had been available.
- 10 179. We considered that the dismissal of the claimant in all the circumstances was fair. It could not be said that no reasonable employer in the circumstances would not have dismissed the claimant. The dismissal was within the range of reasonable responses open to a reasonable employer.
- 15 180. We were satisfied that the reason for dismissal was some other substantial reason and that the dismissal for that reason was in the circumstances of this case fair.
181. The respondent has argued that if the reason for dismissal was not some other substantial reason then it was for conduct and was also fair. Had we reached the conclusion that the dismissal was by reason of conduct we would also have found it to be fair in terms of section 98 (4).
- 20 182. If this had been a dismissal by reason of conduct then the three legged test set down in ***British Home Stores v Burchell*** [1978] IRLR 379 would have to be satisfied. It would be necessary for the tribunal to decide whether the respondent entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is a three stage test and the employer must establish firstly, the fact of the belief, secondly that  
25 and they had in their minds reasonable grounds upon which to sustain that belief and thirdly, at the stage at which they formed that belief on those grounds, that they had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

183. Although we have found the reason for dismissal to be some other substantial reason, had we found it to be by reason of conduct we would have found that the **Burchell** test had been satisfied. The misconduct would have been the failure of the claimant to accept the grading for 2016 and that the outcomes of the procedures were final and his continuing to argue the same issues. We were satisfied that the respondent did believe that the claimant was guilty of that misconduct.

184. We also considered that they had reasonable grounds to sustain that belief. The claimant continued to assert in the bullying and harassment process that his performance score was wrong and he asserted the same in various emails. In his discussion with Paul Stearns he refused to accept the score and to move on and even in the final discussion with Mr. Peberdy he would still not accept that the matters were closed. He stated to Mr. Peberdy that he would not regard it as an acceptable outcome of his appeal if the dismissal was rescinded but the score of two remained unaltered. We were satisfied that the respondent had reasonable grounds to sustain that belief.

185. We were also satisfied that the respondent carried out reasonable investigations into the misconduct. They had spoken to the people mentioned by the claimant and given him every opportunity of explaining his position. The claimant refused to accept that the procedures were at an end. We were satisfied that all three legs of the **Burchell** test were satisfied.

186. We were also satisfied that the procedures followed by the respondent were fair. They did not follow their discipline procedure in respect of the claimant but we noted that procedure is not contractual in terms of the claimant's contract of employment. We considered that the process which they did follow was fair. The claimant was advised of the conduct which was leading the respondent to consider dismissing him in advance of the meeting and was allowed an opportunity to be accompanied. The claimant was given every opportunity to explain his position at the disciplinary hearing and did so. He appealed the decision, as was his right, and set out in considerable detail his case. That was fully considered by Mr Peberdy. We considered that the procedure followed by the respondent was in all the circumstances fair. Had

we found the dismissal to have been by reason of conduct we would also have found it to be fair as given that the conduct penalty of dismissal was, in our view, well within the range of reasonable responses open to a reasonable employer in the circumstances.

5 187. For the reasons set out above the claimant's claim is dismissed.

Employment Judge: I Atack  
Date of Judgment: 24 November 2019  
Entered in register: 27 November 2019  
and copied to parties

io