EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106852/2017
Held in Glasgow on 25 and 26 June and 17 and 18 July 2019
Employment Judge L Doherty

Mr C McLuskey	**Claimant** **In Person**
Crown Office & Procurator Fiscal Service	**Respondent** **Represented by:** **Ms Smith -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed, and the claim is dismissed.

REASONS

1. In a claim presented on 13 November 2017, the claimant brought claims of unfair dismissal and disability discrimination. The disability discrimination claim is no longer proceeding, having been dismissed in February 2019, and therefore the claim which is before the Tribunal is one of unfair dismissal only.

2. It i s said that the reason for the dismissal is capability, principally in relation to performance, but there is also a capability reason in relation to attendance.

3. The claimant does not accept the reason for dismissal, and therefore this is the first issue for the tribunal.

4. Thereafter there is an issue in terms of section 98 (4) of the Employment Rights Act 1996 (the ERA) as to the fairness of the dismissal. It is said that the decision to dismiss fell out with the band of reasonable responses open to the respondents in the circumstances.

5. The remedy sought by the claimant is compensation.

6. The claimant's pre-dismissal earnings are agreed at £293.28 net per week, however there is no agreement other than that in relation to the quantification of the claim. The claimant provided a schedule of loss, and the respondents produced a counter schedule.

7. For the respondent's evidence was given by Ms Strang, the dismissing officer,

and Ms Fallon, the appeals officer.
8. The claimant gave evidence on his own behalf, and evidence was given by Mr Cameron, his trade union representative who attended with him during the course of the dismissal process.

9. The Tribunal also had an Agreed Statement of Facts.

10. Parties lodged a joint bundle of documents. Documents were added to this bundle at the commencement of the hearing by the claimant, with no objection from the respondent.

Findings in Fact

1 1 . From the evidence before it the Tribunal made the following findings in fact.

1 2. The respondents are The Scottish Ministers. The Crown Office and Procurator Fiscal Service (COPFS) are an agency of the respondents. Staff of COPFS are employees of the Scottish Ministers. The COPFS deals with, amongst other things, the prosecution of crimes at all levels, across Scotland.

13. The claimant, whose date of birth is 4 December 1990, was appointed by the respondents on a fixed term appointment as a modern apprentice.

14. The claimant's contract of employment is produced at page 61 to 71 of the bundle. It states at paragraph 6;
'You will be on probation for a period of nine months from the date of your appointment. If your adherence to the Training Agreement, attendance, conduct and/or any other aspect of your work during the probationary period are not satisfactory, your probation may be extended and/or your appointment may be terminated. '

1 5. The respondents have a number of policies and procedures in place for the management of staff. These include a policy for the fixed term appointments (page 281 to 283 in the bundle). That policy states among other things, under the heading *'end of fixed term appointments' the* following:
Although fixed term employees may not have worked the minimum qualifying period to acquire the right to claim unfair dismissal, COPFS normal dismissal procedures apply to them, since a tribunal claim could be raised on the grounds of less favourable treatment. The non-renewal or expiry of a fixed term appointment is counted as a dismissal, and it would be unlawful to end one fixed term appointment and immediately replace this with another fixed term appointment covering the same job. Fixed term employees - regardless of whether they were employed through fair and open competition - must:
(i) be given five weeks' notice of the contract being terminated;
(ii) be invited to a meeting to discuss the date that the contract is due to end;
(Hi) be invited to an employee meeting; you have the right to be

accompanied at this meeting and you have the right of appeal. '

16. The respondents also have a probation policy (287 to 295 of the bundle). This provides at clause 2 under the heading *'Duration of Probation Period'* the following:
'The normal probation period for employees in COPFS is 9 months. In certain circumstances, the probation period can be extended to a maximum period of 12 months. However, where it can clearly be evidenced, that the probationer's performance, conduct or attendance is unlikely to improve, the probation period may be cut short. In either of these instances, the line manager must seek advice from HR before taking action.
In calculating the length of probation the following conditions apply -
(i) Annual leave and paid special leave will count towards the normal nine months of probation;
(ii) Unpaid special leave will not count;
(Hi) Paid of maternity, paternity or option leave will not count. '
When the periods of leave described above do not count, then the probation will be frozen (for example during a period of unpaid special leave) and restarted once the probationer has returned to work'.

17. Point 7 of the policy sets out 7 key stages to assess progress, and sets out timescales of two weeks, six weeks, three months, six months and nine months for assessment of progress.

18. Nine months is said to be the normal final review stage, but there is also provision for twelve months, which is an extension review stage. After nine months, the policy provides: *'an HR advisor must be consulted at this stage if the probation is likely to be extended or if the line manager is considering dismissal. '*

19. The policy provides at this stage, under the heading *'line manager action'*
'send copy of written notes of meeting to HR advisor with completed probation report or line manager consults with HR before deciding to extend probation or to dismiss probationer'.
20. At the twelve-month extension stage, the policy provides *'this is usually the maximum length of time that COPFS probation period will last. When an extended probation period results in a satisfactory outcome, full details of the improvements must be sent to HR.*
When no improvements are made and the recommendation is to dismiss the probationer, HR must be consulted before any action to dismiss is taken. '

21 . The policy provides under the heading 'HR support': *'if at any point during the probation period it appears as though the probationer does not meet the required standards of performance, conduct or attendance, the line manager must inform and consult with their HR advisor in order that any formal action can be recorded on their personnel file and the correct procedure is followed. This is particularly important if there is a potential probation period will be extended or if a probationer could be dismissed'.*

22. Clause 9 of the policy provides under the heading *'performance conduct or attendance' the* following: *'probationary employees are expected to meet the highest standards of performance, conduct and attendance that is set by COPFS for all employees. '*
'Line managers should ensure that probationers have the opportunity to read

and understand the rules or performance (e.g. competency framework and applicable standard objectives), attendance and conduct set out in the staff handbook. '

'9. 1 - Poor performance

In every case where the agreed performance objectives are not being met, the line manager must, before taking any action, and at the earliest opportunity, fully investigate the reasons for poor performance. See also the COPFS poor performance policy for more information.

Informal action

Probationers should be given specific examples of the poor performance and given the opportunity to explain if there are any underlying issues or reasons for the performance issues.

It is essential that constructive feedback is given informally at the earliest opportunity in order to give the probationer a chance to improve and in order for the necessary support, for example further coaching or training, to be put in place to assist the probationer.

Formal action

Where the probationer's performance does not improve sufficiently after informal feedback and support, formal action will usually be required.

It is important that formal meetings are held at the time at which it becomes clear that the probationer's performance is not at the required level. This may mean meeting with probationer on a formal basis outwith the key stage meeting. If the line manager waits until one of the key stage meeting, then there may not be sufficient opportunity for the probationer to improve their performance.

Probationers can expect that formal 'improvement notices' will be given to them when their performance falls short of what is expected. Improvement notices are a warning to the probationer that their performance needs to improve within a specified period of time. It must be clear to the probationer that if there is no improvement than the contract of employment could be terminated.

At any meeting where there is a possibility of an improvement notice could be issued, the probationer has the right to be accompanied by a fellow worker must be represented by a trade union representative and must be given at least five days notice of the meeting.

First improvement notice

This is equivalent to a warning and can be issued at any point in the probation period and shall not be held back until the next key stage meeting. The timescales held within the improvement notice will depend on the level of present performance and the nature and complexity of the job. However, as a general rule, 2-3 months would be considered a reasonable period of time to see improvement. It is a good idea to have a shorter review of timescales within the overall improvement period.

Final improvement notice

This is equivalent to a final warning and can be issued at any point during the probation period whether it is not sufficient improvement following the first improvement notice. Timescales will vary depending on the nature of the performance issues and it may be necessary to extend the probation period beyond nine months in order to give the probationer a full opportunity to improve.

Probation periods should not be extended beyond twelve months therefore it is important to ensure that any poor performance is identified and tackled at the earliest possible stage. '

23. Albeit the respondents policy refers to improvement notices, these are not

commonly issued. The respondents as a matter of practice, issue Performance Improvement Plans (PIPs)

24. The policy provides at 9.3 under the heading *Absence: 'Probationers are subjected to the COPFS Attendance Management procedure. For the purposes of considering formal action, the absence trigger point for probationary employees are fewer than those for employees who had already been confirmed in post. The trigger points are eight working days absence (pro rata for part time employees) or three occasions of absence in the nine month period.*

25. Clause 1 1 of the policy provides for an appeal process and provides that probationary employees have the right to appeal against the decision of the line manager following formal meetings in relation to conduct, performance, or attendance.

26. The respondents also have a policy for managing poor performance (COPFS Managing Poor Performance Policy and Procedure), which is produced at page 392 of the bundle. That policy provides under clause 1 that; *'This policy applies to all COPFS employees who have completed their probation. Probationary employees with performance issues must be dealt with in accordance with the probation policy. '*

27. When the claimant commenced his employment, he was allocated to the Hamilton office, and assigned to the initial processing unit (the ICP unit). He commenced work on 1 7 August 201 5.

28. In terms of his probationary checklist, the claimant was scheduled to have a meeting on 15 September 2015, which was six weeks after the commencement of his employment. This meeting did not take place. His line manager however completed a probationary report conforming that all aspects of the claimant's performance were satisfactory at that time (page 75).

29. The claimant was absent from work from 9th until 21st October due to ill health. When he returned to work, he had reached the trigger point for absence during probation.

30. The claimant's three-month probationary report was generated on 11 November 201 5 (1 03 to 1 04). This report was signed by the claimant's then line manager, Linda Skinner, and the claimant was assessed as satisfactory in the categories of performance, attendance and conduct.

31. The report noted that the claimant had shadowed his colleagues on the processing of complicated Reduction to Summary Cases, and he had taken notes on this and had attempted to tackle such cases with the help of an experienced member of staff. The report noted that the claimant was still being trained on this process. Ms Skinner concluded in the report ;

32. *'I would conclude that Craig's 3 month assessment within COPFS is satisfactory and his training and development is in line with the timeframe.*

33. *I have noted that Craig is keen to learn and develop and has shown interest in other tasks within ICP unit such as processing Custody's. This is seen to be positive for Craig's future development with COPFS.*

34. The report also noted that due to the claimant's illness and disclosure to management that work related stress was a factor in his health deterioration, it was recommended that the claimant was referred to OH and that he receive a workplace assessment.

35. On 24 November 201 5, an occupational health work station assessment was carried out at the claimant's office in Hamilton, which stated there was no benefit in suggesting any kind of equipment for the claimant. It was recommended that the claimant take regular breaks and that was provided with a replacement chair.

36. A referral was made for occupational health, and on 20 November 2015 an interim report was produced, with the OH report being produced on 1 st December 2015 (pagel 17/1 18). It confirmed that the claimant was currently fit for full duties but stated that when he had an episode it significantly impacted on his functioning and this results in sickness absence.

37. In December 2015, the claimant was moved from the ICP unit team in Hamilton, to the warrants team. The claimant was absent from 2nd to 3rd

February 2016.
38. The claimant's six-month probation period report was produced by Linda Miller, the claimant's then line manager. The date of the meeting which generated the report was said to be 3 February 201 6; the claimant was absent due to ill health on that date, however a meeting did take place at a later date.

39. The claimant's performance, attendance and conduct were all assessed as satisfactory. The report contained a number of positive statements in relation to the claimant's performance, however it also states, *1Craig can lack concentration and can very easily become distracted from his work however I would expect that these deviations from his tasks would improve through maturity'.*

40. The report also noted that Ms Skinner's advise to the claimant was that he continue to take copious notes for any new task on which he was trained. It stated that the claimant had undergone intensive training on Warrants.

41 . The claimant went on annual leave on 4 April 201 6.

42. During his absence, it was brought to the attention of his line manager that there appeared to be important documents/mail/copy search warrants, and F1s within the claimant's desk drawer.

43. The claimant had an informal meeting with Ms Skinner on his return to work; the meeting took place on 7 April 2016. The minutes of this meeting are signed by the claimant and are produced at page 125 of the bundle. At the meeting, Ms Skinner went through each of the documents with the claimant. He provided explanations for some of the documents; for other documents, he said he could not remember.

44. Ms Skinner asked the claimant to provide a written explanation for the paperwork which was found in his drawer, which he did. This is produced in the bundle (page 1 26); the note with the along with the manager's comments is produced at 127 to 131. In his note the claimant apologised for what has

occurred.

45. Ms Skinner spoke to the claimant about the fact that a set of papers had been found in his drawer on a previous occasion, and he had been told that this was not acceptable. Ms Skinner emphasised the importance to the claimant of not keeping paperwork within his desk drawer and told him that he should try to concentrate on his work.

46. Ms Skinner asked the claimant if training was an issue and she discussed the fact that she considered that he was very distracted. The claimant said he had lots of support and training and spoke about personal issues which were causing pressure and worry outside of work.

47. Ms Skinner took the decision to remove the claimant from Warrants back to ICP. She told him that she intended to extend his probation, as his 9-month report was due in early May.

48. The claimant was then absent from work from 4 May until 1 9 December 2016. He submitted fit notes explaining the reason for his absence was hemiplegic migraine owing to work related stress.

49. Ms Skinner kept in regular contract with the claimant throughout his absence. A log of her telephone contract is produced at page 141/146.

50. On 1 3 September 201 6, the claimant accompanied by his TU representative, attended a long-term absence review meeting (page 151/153). A phased return to work was discussed and it was agreed that the phased return would not be included in the three-month extension of probation period. The claimants TU representative asked for a move of workplace for the claimant.

51 . Occupational health advice was sought, and OH reports were produced on 3 October and 24 November 201 6.

52. Under the heading ‘current capacity for employment’, the 24 November report stated: *'Mr McCluskey is likely to find it difficult to undertake manual handling activities within the workplace, such as lifting crates but could undertake computer based tasks and filing activities. His pace may be reduced whilst he is learning the new role and pace may also be impacted upon by his pain level.*
Mr McCluskey may benefit from the inhouse OHS assessment or if a further, more detailed assessment is required, management/HR may wish to consider an Occupational Therapist Functional Capacity Assessment/

53. The November report confirmed that the claimant was fit to return to his job and made recommendations for a phased return.

54. The report stated the claimant was able to undertake office-based activities. It also stated that a move to a new work location may resolve the previous perceived work-related stress and therefore an individual stress risk assessment may not be deemed necessary.

55. The claimant did not return to the Hamilton office, but commenced work in Glasgow.

56. When the claimant commenced work in the Glasgow office, he returned to

work initially on a phased return basis. A return to work meeting was conducted by Ms Strang who told the claimant that by that stage he had reached a trigger point for absence and that a stage 1 attendance management meeting would take place.

57. On 27 January 201 7 the claimant attended a stage 1 attendance management meeting, accompanied by a trade union representative (181 to 187). In the course of that meeting he asked about a risk assessment.

58. Gina McManus, the claimant's line manager in Glasgow carried out a stress risk assessment (page 167/173) on 7 February. That noted that the claimant was aware of his role and responsibilities and that he has worked with his line manager and colleagues to an agreed plan and had daily duties which he felt he could deal with and prioritise. It also noted that the claimant felt supported and received feedback on how he was functioning in the Unit.

59. The claimant's 9 month probation report had been completed by Ms Skinner in May, but it was not seen by the claimant as he was absent from work due to ill health. The claimant was assessed as unsatisfactory under performance and attendance, and satisfactory under conduct. The comments in the performance section of the report narrated the concerns due to finding documents in the claimant's drawer, and the manager's assessment that it had became apparent that the claimant struggled to work on his own and follow through tasks as required.

60. This section in the report also contained the following: *'Following Craig's six month probation report, I requested an experienced member of staff to take over Craig's training and warrants. I was concerned that his development was not coming forward as it should and this was discussed at his six month review. The member of staff started the retraining programme with Craig, with refresher training and going over his tasks to assist development within the unit.*
It was also agreed at the 6 month report that Craig should attend a Warrants Course at the Prosecution College.
I discussed with Craig on several occasions during this time that he should habitually take notes of all new tasks and ask questions if uncertain.
Craig continued to be trained and to receive daily training and instruction from experienced colleagues. After several weeks of intense training, Craig appeared to be grasping what was required within the unit.
However Craig continued to be easily distracted during this period leaving his desk for unaccounted periods of time and did not follow instructions or guidelines. His colleagues were aware of errors which were not brought to the attention of the manager during this time.
On 4th April I discovered documents/live warrants; search warrants, current and vital correspondence and several pleading diets within Craig's drawers. These documents were dated back over 5 months.
.. It has become apparent to me that Craig struggles to work on his own and follow through a task to a satisfactory required level and therefore it is with disappointment that I have to mark him as unsatisfactory. '

61 . The report narrated the documents which were dated over five months old had been found in the drawer of the claimant's ; the claimant had advised they were all in a trolley, but the cases referred to were all found in the drawers and incomplete. It was noted that that some of the explanations given by the claimant verbally did not cover all the documents retrieved, and some of

the explanations lacked clarity and some explanations turned out not to be as advised by the claimant.

62. On 20 February, the claimant attended his formal nine-month probation meeting where the 9-month report produced by Ms Skinner was discussed. This meeting was conducted by Ms Lovett; notes of the meetings are produced at 157 to 176.

63. It was explained at the outset that the purpose of the meeting was to discuss the claimant's 9 month probation report, which should have taken place in May, but had been postponed due to the claimant being absent on sick leave, and subsequently returning on a phased return basis. There was discussion about a number of issues during the course of the meeting, during which Ms Lovett advised the claimant that due to performance issues, a decision had been taken at the 9 month stage to recommend that the claimant's probation was extended by a period of three months in order to give him the opportunity to meet the standard required for the post of fiscal officer, and the extension would be effective from the date of that meeting. The claimant was advised of his right to appeal that decision, and the officer to whom he could lodge the appeal was identified. This decision, and his right of appeal, was also communicated to the claimant on writing.

64. On 31 March 201 7, the claimant was issued with a stage 1 warning under the respondent's attendance management (page 1 77).
65. In Glasgow the claimant worked on Custodies. He did not have any previous experience of this, but it was an entry level task for the post of fiscal officer.

66. By 20 February a decision was taken by Ms McManus, Glasgow, that the claimant should be placed on a performance improvement action plan (a PIP) on from 20 February Although the claimant's although the phased return ended on 13January, due to annual leave, and other business arrangements, the clamant had had a number of days when he was not at work in the period from 13 January until 20 February (page 265).

67. The performance plan was effective from 20th February until 19 th May and provided for review meetings to take place weekly, from 14 April 2017 until 2 May 2017.

68. The claimant's PIP report is produced at page 191 to 196. It contained an action plan, which recorded four areas where improvement was required. This was updating spreadsheets with the relevant data; case to court delivery of F1s to the clerk's office; confidence in dealing with enquires and understanding elements of tasks that requires specific outcomes; and understanding overall desk duties.

69. In respect of each improvement required the PIP set out an action plan, and details of the support which was provided in respect of each area, and the objectives.

70. On completion of the PIP, the line manager's comments in respect of each of the four areas where improvement was required. This indicated that there were still issues, and that ongoing assessment of dealing with tasks which remained unfamiliar to the claimant had been discussed with him, and continued monitoring was required.

71 . It was noted that there were still elements within the spreadsheets which required to be met, whereby spreadsheets ‘incoming/still to come cases’ are completed and all columns are added and correctly updated . i t was noted the claimant required to improve on regular delivery of F1s to the clerks and not to submit them in bulk. The submission of F1s to court in bulk created difficulty in the organisation of court business. It was noted that the claimant required to became more confident when dealing with enquiries by the telephone, and from outside organisations, and that he required more competent completion of the spreadsheets provided to the clerks/legal aid representatives for Undertakings were required as shortfalls exist. It was noted that files should be printed, placed in appropriate folders and submitted to the correct court. Lastly, it was noted that the claimant should gain experience in building confidence through a consistent approach in dealing with telephone calls to the clerk/cells.

72. On completion of the PIP, the claimant confirmed that he had undertaken all of the fiscal duties (197 to 198) with the exception of Custodies, as he had been removed from custodies.

73. By 18 May, Ms McManus had concerns regarding his performance, which she discussed with her line manager, Angela Mayne. Angela Mayne emailed HR on 18 May (page 199) to advise that the claimant’s performance continued to give rise to problems. She advised HR that the claimant continued to make errors, and that his errors accounted for delays in court and had left depute fiscals with insufficient information in court.

74. Ms Mayne advised HR that the claimant had many meetings with Ms McManus regarding his performance and agreed to a second training plan to try and bring the claimant to speed; she advised the claimant had signed off

on all aspects of the plan, but Ms McManus had yet to see an improvement in his performance. Ms Mayne also advised that the claimant had some personal issues.

75. The PIP ended on 19 May 2017. MsMcManus’s comment was that ongoing assessment of dealing with tasks which had been unfamiliar to the claimant had been discussed, and that continued monitoring was required.

76. The claimant was on annual leave for a period of three weeks commencing on 22 May. A decision was taken by the respondents to invite the claimant to a meeting to discuss his fixed term appointment. Barbara Strang, who is a Business Manager, was appointed to deal with this.

77. Ms Strang wrote to the claimant on 8th June, inviting him to a meeting to discuss the fact that his fixed term contract was due to end on 2 August 201 7. A meeting was arranged on 21 June 2017. The claimant was advised that he could bring a trade union representative or colleague with him to the meeting. He was also advised that the possible outcome of the meeting was that his contract would not be renewed.

78. Enclosed with the letter of 8 June, was a copy of the claimant’s absence printouts, his probation report, his PIP, his stage 1 attendance warning and associated notes of the stage 1 meeting, and his fixed term contract of employment.

79. Ms Strang emailed the claimant on 12 June asking if he could make himself available, so she could pass a letter to him. The claimant's trade union representative, Mr Cameron, responded on his behalf, questioning why this communication was sent by email and not phone, and querying the amount of time the claimant was given of the proposed meeting to hand over the letter. Mr Strang's email was sent at 15:36, and she asked the claimant to be available at 13:45. In any event, the claimant attended the meeting on 21 June accompanied by Mr Cameron.

80. Notes of the meeting are produced at pages 221 to 223. During the course of the meeting, Mr Cameron referred to the claimant's sickness record and indicated that he had no further sickness absences since returning to work on 19 December 2016. Mr Cameron also said that the claimant had asked to be taken away from the messenger role which he was performing at Hamilton which caused him issues due to his ongoing medical condition, but was told by Linda Skinner, that there was no one to replace him, and he had to continue that role, ignoring his health conditions. Mr Cameron submitted that as a result the claimant was doing three jobs, and the strain on his feet was a major issue. Mr Cameron submitted the claimant had been keen to come back to work but he had been advised by his health professionals that he was not fit to do so. The claimant wanted to return to work on 12 December, but he was told not to return until 1 9 December by David Casey.

81. Ms Strang indicated that Ms McManus advised that the claimant was not progressing as well as expected. The claimant said he had never done Custodies before and the people in the Hamilton office would be able to confirm this, and that they were was a lot to learn. Ms Strang said that the claimant's line manager had concerns about his performance which was recorded in the PIP.

82. During the course of the meeting with Ms Strang, the claimant said that his condition meant that he picked things up more slowly than others. Mr Cameron made reference to the claimant's medical certificates and indicated that the reason for his absence was work related stress, Mr Cameron said that the claimant had a brain related illness which should be classed as a disability, and that the respondents required to make allowances.

83. Ms Strang adjourned the meeting for around 10 to 15 minutes, in order to

consult with HR, and she took take HR advice about the position.
84. The meeting was resumed, and the claimant asked Ms Strang if she had a copy of his PAR. Ms Strang confirmed that she did, as well as copies of his PIP and attendance record.

85. The PAR was a review type document, which had been completed for the claimant, but which the claimant appealed after his dismissal. On appeal, it was decided that it was not appropriate for a PAR to be completed for the claimant. The claimant had been on sick leave for more than six months for the reporting year of 16/17, and therefore did not require a PAR.

86. Lastly, Mr Cameron submitted that others were on fixed term contracts had their contracts converted to permanent contracts.

87. Ms Strang then adjourned the meeting, for around 20 minutes, to consider the information before her. Ms Strang took into account the claimant's

probationary record, the terms of the PIP, and his attendance record. She concluded that the claimant's attendance, and performance did not meet the standards required of COPFS due to the ongoing performance issues, and that the claimant should be dismissed at the end of his fixed term contract, which should not be renewed.

88. She wrote to him on 27 June 2017 confirming this decision, and her letter stated as follows:
7 am writing to confirm, your employment with COPFS will finish on 2nd August 2017. The reason for the termination is due to the ending of your fixed term appointment and importantly that your attendance or performance do not meet the required standards for COPFS. I advised you at our meeting on 21 st June 2017 that you have a live Stage 1 warning in relation to your absences that was issued on 2nd February 2017 and that the Performance Improvement Plans that I referred to, dated 19th May 2017, demonstrate that your performance has failed to improve to an acceptable standard. '

89. The claimant was advised of his right to appeal that decision.

90. The claimant's trade union representative emailed Ms Strang asking for a copy of the notes of her telephone call with HR in the course of the appeal hearing, but she declined this request.
91 . The claimant wrote to Angela Mayne on 28 June 2017 (page 229) appealing the PAR, and she confirmed to him on 29 June that the PAR should not have been completed.

92. The claimant appealed the decision to dismiss him; a letter of appeal was drafted by Mr Cameron, in consultation with the claimant. This is produced at page 239 to 240 and set out six points of appeal.

93. These were firstly, that the claimant suffered from hemiplegic migraines, and the effects this had on his ability to perform tasks.

94. Secondly, the claimant had one long term absence due to workplace stress, and he had been placed on a stage 1 warning. It had been agreed that the respondents would monitor his absence for 12 months; the claimant had no further absences since his return to work on 19 December.

95. Thirdly in relation to the PAR, the claimant set out reasons why it should not have been completed.

96. Fourthly the claimant returned to work in January, and the PIP started on 20 February. The PIP should not have been implemented on the basis that the claimant's work had been assessed over too short a period. There should have been a period for review of three months before the PIP was implemented.

97. Fifthly, when claimant had transferred from Hamilton, a previous line manager had stated that he had knowledge and experience of dealing with Custodies, but this was not the case, and again reference was made to the speed at which the claimant could learn things.

98. Lastly, reference was made of the stage 1 meeting, and it was said that David

Casey had indicated a Workplace Risk Assessment would be carried out in the ciaimant's new workplace in Glasgow Sheriff Court, but this had not happened.

99. The claimant also provided a letter from his GP (page 243) which confirmed that he suffered from hemiplegic migraines and that his disability is not only physical, but also had cerebral effects that have on some level persisted, albeit they have improved somewhat.

100. The appeal was dealt with by Rosemary Fallon, the Assistant Head of Business Management. The claimant was invited to attend an appeal meeting, which he did accompanied by Mr Cameron. The appeal took place on 26 July and notes of the meeting are produced at page 249 to 262. The appeal lasted just under two hours, during the course of which, the claimant was able to advance all of his appeal points.

101. There was a discussion about a number of issues. In the course of the discussion the claimant said he did not manage the stairs easily in the Glasgow office due to his health condition, but that he just 'gritted his teeth' and used them. Ms Fallon asked if there were lifts available. The claimant responded that he didn't use the lifts, as the stairs were the quickest option and he didn't have time to wait on lifts.

102. The claimant's position at the appeal, among other things, was that other modern apprentices had been kept on, but that when he returned to work in the Glasgow Office, he was on a phased return; training had not been received until mid-January; and that Ms McManus had told him he was not going to be kept on.

103. After the appeal meeting, having heard what was said Ms Fallon decided to undertake some further investigation. She contacted Linda Skinner, the claimant's line manager in Hamilton by telephone, and obtained a statement from her (275 to 276). She also contacted Ms McManus, the claimant's line manager in Glasgow, and obtained a statement from her (277 to 278).

104. Ms Skinner confirmed that she completed the claimant's probation report at a 3 and 6 month stage. She advised that the six-month probation report was marked satisfactory, and that the report contained a lot of positive comments as it appeared the claimant was making good progress. Ms Skinner advised that the claimant had been moved to the Warrants Section where he was receiving training and shortly after the six-month probation report had been completed, an experienced trainer raised issues with her that she was finding it difficult to train the claimant. She was advised that the claimant did not appear to take anything on board, and that he was easily distracted, he was not taking notes, and he was making mistakes. She advised Ms Skinner of an occasion when she had been searching for a live warrant. The claimant was aware that she was searching for it and then produced the warrant from his drawer. At that time his trainer was moved to a different trainer, and Ms Skinner spoke to the claimant about the importance of taking notes.

105. Ms Skinner said that she had not previously been aware of any issues with the claimant's performance, during his initial training period his colleagues had not raised any issues, and that he was always helpful and willing when she spoken to him and that he was getting on well. She recorded that one Friday evening as she was about to leave work, and the claimant was still at

work, and was due to go on annual leave. On the Monday, when she returned to work, she found there were six cases missing from the court which the claimant had been working on. She phoned the claimant to find out where the cases were, and he claimed they were on the trolley. She reported that when looking for the papers, the claimant's drawer was checked, and cases were found in his desk. They had not been fully processed. She also reported there were a number of other items which alarmed her, to the extent that she phoned the business manager. She said she was concerned because of the extent of work found in the desk. There were live warrants, search warrants and non-actioned correspondence. When the claimant returned to work, she met with him and went through each of the items and explained the items which had been found in his drawer which included the six missing cases. Ms Skinner advised that she showed the claimant each of the items located within his drawer and took note of the explanation which he provided. She told him that she would type up this information and pass it to him to ensure he agreed with its accuracy. This document comprised of questions and responses from the claimant and included a note that the claimant had apologised and explained that he had a difficult year for personal reasons. The claimant had agreed the document and signed it off as accurate on 12 April 2016.

106. Ms Skinner advised that after the incident when the items were found in his drawer, the claimant was moved from the Warrants Section and put back to IPC because she took the view that he required the support and refresher training. She said she sat near him so that she could support him and provide him with the best advice and training.

107. Ms Skinner indicated that the claimant was not covering three posts at the time when he went on sick leave at the beginning of May. She said that he had moved him to what she considered to be lighter duties and he was moved back to IPC. She stated that he occasionally assisted at reception when completing the simple process of making up preliminary diets when there was no one requiring any assistance at reception.

108. Ms Skinner advised that they had been conscious of the claimant's health issues and work-related issues, she constantly checked on him to see how he was coping, and she always was met with positive comments. She stated that the claimant volunteered to provide assistance for the messenger who had sustained an injury to his back ,and she checked that he was okay with this and he confirmed that he was fine with the task.

109. Ms Skinner confirmed that the processing of custody cases was not part of the claimant's role in the Hamilton office.

110. Ms McManus' statement indicated that the claimant was on a phased return at the end of December 201 6 following a period of sickness absence and he was also on leave and it was January before he started back. She stated she was aware of the claimant's health issues and disability, and she wanted to make sure that he was okay. She confirmed that the claimant was not off sick at any time after he moved to Glasgow.

111. Ms McManus confirmed that no workplace assessment had been carried out at Glasgow, but arrangements were made for the claimant's chair to be brought from Hamilton. She said that she had spoken to the claimant shortly after he had received his own chair from the Hamilton office about the need

to have appropriate equipment and that if there were any issues, that he should let her know and she would progress that.

112. Ms McManus stated that their offices were on the first floor of the court, and she specifically told the claimant that he needed to take the lift. No concerns were raised about the claimant at the time.

113. She said the claimant told her that he wanted a transfer to Paisley, after a few weeks he withdrew that because he said he liked the office in Glasgow and was happy that they could work around his health issues.

114. Ms McManus stated that she was aware the claimant had been on sick leave before coming to Glasgow, and she offered him the opportunity of five or six modern apprenticeship days to catch up, and he was successful in completing his modern apprenticeship.

115. Ms McManus said that she asked the claimant to show him the notes he had taken during his training in Hamilton so that she could understand what he already knew. The claimant told her that his notes were missing.

116. Ms McManus' said her expectation was the claimant should have known more. Her understanding was that he had done mail, messenger, diets and warrants. She had been told the claimant had done time in IPC at Hamilton and she was told that he had experience of Custodies. Ms McManus said that she had to show the claimant how to put a custody case together. She also said that he did not know things about warrants that she would have expected him to know.

117. Ms McManus stated that because the claimant did not have any notes to show what he had done, she started at a normal (basic) level. She had some concerns about the claimant's performance and he was struggling to pick things up. She stated he was being trained by a very good trainer.

118. Ms McManus stated that she was aware the claimant had been on sick leave. She saw his probation report and checked if he was on any performance improvement plan. She said she spoke to Alison Lovett, the Assistant Business Manager at Hamilton, and noted there were some previous concerns about his performance and she decided to put him on a performance improvement plan (PIP) because she had concerns about his progress and she was aware that his probation report was due. She stated the performance improvement plan was put in place from 20 February to 19 May and that she met regularly with the claimant to review his performance. She stated at the end of the three month PIP, she decided the claimant was not yet at a level that she could sign off and she suggested an extension of one month was required.

119. Ms McManus stated that where the claimant had not picked things up, he would redo them as a refresher. She said the training programme was one where you tick and move on. She went through everything with the claimant again, and he had not reached a level which she could have signed him off. She said that she felt it would be better if the claimant started on Diets where the work is less complex.

120. Ms McManus said that she was advised to complete a PAR for the claimant and she had developed objectives for a performance improvement plan. She

indicated in this PAR that he did not yet reach the satisfactory level. She later discovered later the PAR had been appealed.

121. Ms Fallon also obtained the claimants flexi work records, which showed the number of days the claimant had worked at Glasgow.

122. Ms Fallon then considered all the information which she had. She did not consider the terms of the PAR, which by this stage had ben appealed and she was aware should not have been completed by Ms McManus.

123. On the basis of the information before her, Ms Fallon decided the claimant's appeal should not be upheld. She wrote to the claimant confirming this decision on the 2nd of August (page 267). Her letter included the statements from Ms Skinner and Ms McManus.

124. In reaching this decision, Ms Fallon took into account that the claimant's sickness absence in the first year for a modern apprenticeship included three separate periods of absence including a long-term sickness period of seven months. She considered the concerns relating to the claimant's performance which were recorded as being unsatisfactory at the time of his nine-month probation report 2016. She considered the report found serious issues relating to case related documents being recovered from his drawer, which had been discussed with the claimant in April.

125. Ms Fallon was satisfied that when the claimant returned to work at Glasgow Sheriff Court at the end of December 2016 after his long-term absence, on a phased return, although there was evidence to indicate that Glasgow understood incorrectly that he had knowledge of Custody processing, he was given full training on this process. Ms Fallon took into account the fact the claimant was put on a PIP on 20 February with the knowledge that his ninemonth probation report had been marked as unsatisfactory, and that there were concerns about his progress. She also took into account the fact the three-month improvement plan was extended on 19 May as the claimant's performance continued to be unsatisfactory.

1 26. Ms Fallon also dealt with each of the appeal points which had been presented by the claimant. In relation to appeal point 1 , she had acknowledged that the claimant had a condition and the effects of this upon him. She took the view however that the claimant had been regularly assessed by OH Assist , who had provided reports of 4 May, 10 August, 4 November and 24 November 2016. She did not find anything in those reports which indicated that the claimant was unable to perform the duties which he was assigned. She noted that the most recent OH report indicated the claimant had difficulty with manual handling but was fine for computer work, although his pace may be reduced during training periods and may be impacted by his pain levels. Ms Fallon took into account that a Stress Risk Assessment form was completed by his line managers at Hamilton and Glasgow respectively. Ms Fallon considered that the OH advice regarding the claimant had been followed and she considered that even allowing for the OH advise about the impact of the claimants condition, given the outstanding concerns at the conclusion of the three-month PIP, against a background of the claimant carrying out relatively straightforward work for a period of a year, she concluded that the claimant had not progressed as he should have.

127. In relation to the second appeal point, Ms Fallon took into account that the

claimant was placed on a stage 1 warning on 2 February 2017 and it was agreed his absence would be monitored for 12 months. This reflected the COPFS attendance management policy which indicates any warning will remain live for 12 months from the date of the letter. The letter template referred to that timescale, however at the point that the letter was issued, the claimant was on a fixed term contract which had less than 12 months to run. She acknowledged the reference to the timescales and the correspondence may raise expectations that a fixed term contract will be extended. Ms Fallon made the recommendation that the template would be altered.

128. In relation to the third appeal point, in relation to the PAR, she noted that the PAR had been withdrawn. Ms Fallon did not take the PAR into account

129. In relation to the fourth appeal point, which questioned the legitimacy of putting the claimant on a PIP given the period during which the claimant could have been assessed, as he did not return to work full time until January 2017. Ms Fallon considered the flexi records. She also noted that he returned to work on a phased return on 19 December, but that the flexi records showed a business absence for the first five days, which related to a period where there was no post available for him in Glasgow. The claimant was then on annual leave and holidays, before commencing his phased return on Monday 4 January. She acknowledged his flexi records shows the phased return increase from 2 hours per day in week 1 , 4 hours each day in week 2, and five full days from Monday 1 6 January. She concluded that Ms McManus had concerns about the claimant's performance, and he was placed on a PIP due to concerns about his early progress in Glasgow, and also because she was aware that the claimant's nine month probation report had been marked as unsatisfactory. Ms Fallon took into account that the claimant was placed on a training programme and received refresher training during this period, and that his performance was closely managed between 20 February until 19 May. At the end of that, there was the recommendation that the performance plan be extended. She considered that Ms McManus as an experienced manager was entitled to make the assessment that the claimant should be put onto this PIP when she did. Ms Fallon acknowledged that there was reference in the performance management guidance that welfare and HR should be consulted, but that such consultation was not mandatory, and she was satisfied that the PIP was appropriate action taken by the experienced manager.

130. In relation to the fifth appeal point, about the claimant's experience with Custodies, Ms Fallon noted the claimant had not had experience of Custodies in Hamilton, but she took into account that although Ms McManus may have understood that he had experience in Custodies while based in Hamilton, she put the claimant on a training programme which covered all aspects of processing of Custody cases. The training programme commenced at the beginning of January 201 7 during the claimant's phased return and continued throughout the three months of his performance improvement plan, however his performance did not improve.

131. In relation to the sixth appeal point regarding the failure to carry out a workplace assessment, Ms Fallon took into account that no workplace assessment had been carried out in Glasgow, but that one had been carried out in Hamilton, and the equipment which had been supplied further to that had been transferred from Hamilton to Glasgow. Ms Fallon took into account that Ms McManus had indicated that she had spoken to the claimant on a

number of occasions and asked him to use the lift, in response the claimant's concerns about having to use the stairs to transfer papers to court. Ms Fallon took into account that the claimant had also indicated that he was happy working in Glasgow and had withdrawn a compassionate transfer request.

132. Since termination of his employment, the claimant has been certified as unfit for work by his doctor, on the grounds of hemiplegic migraine, and stress. He has been unable to apply for work since the termination pf his employment.

133. The claimant has been in receipt of Severe Disablement Benefit, Disability Premium, and Personal Allowance, of varying amounts, which in the period from 21/08/17 to 2/5/19 are detailed in document 393 and total £7,215.17.

Note on Evidence

134. There was a significant amount of agreement in relation to a number of the relevant facts in this case, but there were some conflicts between the position of the claimant and respondent which the Tribunal had to resolve.

135. In the main the Tribunal found the evidence of the respondent's witnesses to be credible and reliable. The evidence of both Ms Strang and Ms Fallon was consistent with the documentary evidence before them.

1 36. There were a number of occasions on which both Ms Strang and Ms Fallon were unable to answer questions put to them by the claimant, for example about steps which might have been taken by the claimant's line manager in involving HR before extending his probation, however the Tribunal drew nothing adverse in relation to their credibility or reliability in respect of their inability to answer all the questions put to them by the claimant, but rather formed the impression that in accepting the limits of their involvement they were attempting to give an honest account of their involvement in the disciplinary and appeal process. In making its assessment of the credibility of the respondent's witnesses the Tribunal took into account the claimant's submission to the effect that they were unfamiliar with their own procedure. There were occasions on which the respondent's witnesses could not answer questions asked of them by the claimant about the procedures. While a failure to adhere to a policy may be a matter which impacts on the fairness of a decision to dismiss, the witness's inability to answerer some of the questions asked by the claimant did not in the Tribunal's view impact on their credibility, but rather fortified the Tribunal's conclusion that they were attempting to give honest answers to questions they were asked in cross-examination.

137. The Tribunal heard evidence from Mr Cameron, the claimants TU representative. While Mr Cameron expressed a view on a number of matters, the relevance of his evidence was confined to his role in providing accompaniment and support for the claimant in the disciplinary process, and there was no material conflict on this.

138. The Tribunal did not form the view that the claimant deliberately sought to mislead, but it did form the view that his perception was that he had been dealt with extremely unfairly, and this on occasion coloured his evidence to a significant degree. In cross-examination there were a number of occasions when he was unable to make appropriate concessions. For example, the claimant did not accept that he had signed the probationary reports, suggesting that they could have been signed instead by Linda Skinner. All

the probationary reports contain what bears to be the claimant's E signature, and the suggestion that he had not signed them was raised at any point prior to cross-examination. Similarly, the claimant initially denied in crossexamination that he had given Ms Skinner a note with his explanations of documents found in his desk drawer (page 1 26). Initially the claimant denied in cross-examination that he had provided this note, on the basis that it was not signed. When it was put to him in cross-examination that the style and grammar of the note was consistent with documents produced by him, and inconsistent with documents produced by his manager, the claimant then said that Ms Skinner had stood over him and made him write the note. He appeared to suggest the documents could not have been found in his drawer due to the fact that he was not at work. At no point prior to this during the hearing was it suggested by the claimant that Ms Skinner had either forced him to write the note, or that the documents had not been found. The inconsistencies in the claimant's evidence, and his inability to make appropriate concessions did impact adversely on the Tribunal's assessment overall of his credibility and reliability. Where relevant, this caused the Tribunal to prefer the written record of what had occurred where that conflicted with the claimant's evidence.

139. There was a conflict to the extent that the claimant suggested that Ms McManus had pre-determined that he would be dismissed and had told him this on 11 May.

140. It was the evidence of Ms Strang that there had been no pre-determination of the issue, and it was her decision to dismiss the claimant on the basis of the information before her at the disciplinary hearing. Ms Fallon also gave evidence that the appeal decision was hers alone, the Tribunal accepted the evidence of both these witnesses.

141 . The Tribunal has not found in the claimant's favour in this case, and therefore 5 did not have to go and consider the issue of remedy. The Tribunal however accepted that the claimant's condition has prevented him from working or seeking employment, and that this has been the case since his employment came to an end.

List of Authorities
The Tribunal was referred to the following list of authorities by Ms Smith.

Legislation
1. Employment Right Act 1996, sections 98, 119, 123 and 124
2. Income Support (General) Regulations 1987, Schedule 12 para 12 and para 13
3. The Employment Protection (Recoupment of Benefits) Regulations 1996 Regulations 1 to 11
4 Employment and Support Allowance Regulations 2008, Regulation 19 and Schedule 2, para 1

Textbook authorities
5. *Harvey on Industrial Relations and Employment Law Division DI, D[2524]*

Case Law
6 Abernethy v Mott, Hay & Anderson [1974] ICR 323
7 Hamblin v London Borough of Ealing -1975 [IRLR] 354

8 Post Office v Mughal [1977] IRLR 1 78
9 Alidair Ltd v Taylor 1978 ICR 445
10 British Home Stores v Burchell [1978] IRLR 379
1 1 White v London Transport Executive [1981] IRLR 26 1
12 Laycock v Jones Buckie Shipyard Ltd EAT 395/81
13 Iceland Frozen Foods Ltd v Jones [1982] IRLR 439)
14 Chubb Fire Security Ltd v Harper [1983] IRLR 311
15. Shook v Ealing London Borough Council [1986] ICR 314
16 Polkey v A E. Dayton Services Ltd 1988 ICR 142
1 7. Chandhok v Tirkey [201 5] IRLR 195
18 Khan v Stripestar Ltd EA TS/22/1 5
Case law - Remedy
19. Mansfield Hosiery Mills Ltd v Bromley [1977 IRLR] 30 1
20. Wilson v Glenrose (Fishmerchants) Ltd and Chapman EAT 444/91
21. Devine v Designer Flowers Wholesale Florist Sundries Ltd EAT 227/93
22. Software 2000 Ltd v Andrews [2007] ICR 825 at 835
23. Dignity Funerals Ltd v Bruce [2004] SC 59
24. Morgans v Alpha Plus Security [2005] IRLR 234
25 Optimum Group Services pic v Muir EAT/36/1 2
26 Z v A EAT/380/13

Submissions

142. Both parties provided written submissions supplemented by oral submissions.

Respondent's Submissions

143. Ms Smith provided extensive written submissions which she supplemented with oral submissions. She submitted the respondents had established the reason for dismissal and took the Tribunal to the facts which she submitted it should find in relation to the claimant's performance. She submitted at the principal reason related to performance.

144. Ms Smith then dealt with the reasonableness of the dismissal and referred the Tribunal to the well-known cases of **British Home Stores v Burchell,** and **Iceland Frozen Foods v Jones.**
145. She submitted the probation was a relevant factor, and she referred the Tribunal to the case of **Hamblin v London Borough of Ealing** which is the decision of a Tribunal in the first instance, and to the case of the **Post Office v Mughal.**

146. Ms Smith submitted that the claimant knew what was expected of him and that there was a proper appraisal of the claimant's performance, the problems of capability was identified, that training and supervision was provided, and that the claimant was given the chance to improve and warned of the consequences of failing to improve. She made submissions in respect of each these points, referring to the evidence which the Tribunal had heard.

147. Ms Smith submitted that the respondent is a Civil Service employer and was entitled to conclude that enough was enough and the decision to dismiss fell within the band of reasonable responses.

1 48. Ms Smith also submitted that the respondents followed a fair procedure under Section 98(4) of the ERA. The claimant was put on notice for the need to improve. Furthermore, the respondents had followed a fair procedure in

dismissing the claimant, and Ms Smith referred to the dismissal and appeal procedure which was undertaken. The Tribunal has to have regard to the whole procedure, if there was any defect in the decision at first instance, this was remedied on appeal.

149. Ms Smith referred to the ACAS Code of Practice and submitted this had been applied by the respondents in this case. Ms Smith submitted nothing should be taken from the respondent's failure to issue improvement notices. These are not required in terms of the policy. Nor had this been taken as appoint in the ET 1 . Nor could it be said that the claimant was subject to the respondent's performance policy. Probationers were specifically excluded from the remit of that policy.

150. Ms Smith dealt with the issue of remedy and submitted that as the claimant has been ill and unable to work since the termination of his employment, then no compensatory award should be made. There was no evidence linking the claimant's condition to his dismissal.

151 . If the Tribunal was within that point, she submitted the claimant had failed to mitigate his loss in failing to look for employment.

1 52. Ms Smith also submitted that it was difficult for the Tribunal, if not impossible to ascertain the exact amount which the claimant received in benefits because of the information provided by the claimant.

153. Lastly Ms Smith submitted that there should be a deduction to the compensatory award in the event the Tribunal was not with her in her previous arguments, to reflect the fact the claimant would have been dismissed in any event and any procedural error on the part of the respondents would have made no difference to the outcome.

Claimants Submissions

154. The claimant also provided written submissions. He submitted that Ms Strang and Mrs Fallon had both admitted in evidence that they were unfamiliar with their own procedure and processes when they made the decision to take away his livelihood without ensuring that the policies and procedures had been followed. He submitted that the HR and higher management had completely ignored his doctor's letters which stated he would learn at a slower pace and completely ignored the OH report.

155. The claimant submitted that a desk based position with filing would be the best to fit his condition. He submitted instead he was moved to a post which was unsuitable for him particularly walking up and down stairs to courts and cells. The claimant submitted he was not advised to use the lift as Ms McManus states in her statement, as there it was a public lift, he was carrying sensitive information to court, and he was told that he had to use the stairs due to data protection.

156. The Claimant submitted the respondents failed in the implementation of the procedures, by not issuing him with improvement notices, by including the PAR in the bundle of documents used to determine the decision to terminate his employment, by not treating him as a full-time member of staff within the procedures as stipulated in the Fixed Term Contract Procedures for Poor

Performance.
157. He submitted that Mrs Fallon freely admitted she had quickly read over the documents and made the decision to sack him on the quick read of his appeal file.

158. The claimant also asked the Tribunal to consider how a modem apprentice who was off for 7 months on sick leave due to work related stress, came back to work and was not off for 8 months, completed and graduated with all the other MA's but was the only MA to be sacked that the other MA's at the graduation ceremony who had worse sick leave than the claimant, but he was the only one not to be offered a permanent post.

Consideration

159. Section 94 of the Employment Rights Act (ERA) provides that an employee has the right not to be unfairly dismissed.
160. Section 98 provides:-
(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show -*
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) *A reason falls within this subsection if it -*
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.
(3) "In subsection 2(a) -
(a) "capability", in relation to an employee, means his capability assessed by reference to his skill, aptitude, health or any other physical or mental quality.
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.
In terms of Section 98(1) therefore the onus rests with the employer to establish a reason for dismissal. If the employer is successful in doing so, the Tribunal then has to go on to consider the reasonableness of the dismissal in terms of section 98(4)

161. The Tribunal reminded itself that in considering the application of Section 98(4) an objective test applies and the burden of proof is neutral.

162. The Tribunal began by considering the reason for dismissal. It obtained

guidance from the case of **Alidair Ltd v Taylor** 1978 ICR 445, referred to by Ms Smith and the Judgment of Lord Denning as follows; *'whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent'.*

163. The Tribunal also derived assistance from the test set out in the case of **British Home Stores v Burchell** 1978 IRLR 379. This case is commonly referred to in conduct dismissals, but the test which was laid down in that case is equally applicable here. What was said in that case was;
'In a case where the employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether dismissal is unfair and if a Tribunal has to decide whether the employer discharged the employee on the grounds of misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee for that misconduct at that time. This involves three elements. First, that there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case'.

164. While this is not a conduct dismissal, the respondents have to establish the reason for dismissal, and thereafter the Tribunal has to consider the reasonableness of the decision to dismiss under Section 98(4). That involves the Tribunal in considering did the employer honestly believe that the employee was incompetent or unsuitable for his job and were the grounds for that belief reasonable, after reasonable enquiry.

165. Dealing firstly with the reason for dismissal, the respondent has to produce evidence of poor performance to show that this was the real reason for dismissing the claimant. The Tribunal was satisfied in this case that the respondents had done so. At the point where the decision to dismiss was taken, the dismissing officer had the month probationary report which flagged serious issues, including that significant court documents had been found in the claimant's drawer, and that it had become apparent to the claimant's line manager that this had happened on a previous occasion, and that she had formed the view that the claimant struggled to work on his own and to follow through office tasks to the satisfactory level required.

166. The dismissing officer also had the PIP, completed by Ms McManus, which indicated four areas where improvement was required, and detailed the support which had been provided, and provided the line manager's assessment at the end of the 3 month training period to the effect that improvements were still required, and detailed the nature of the improvements which were still necessary.

1 67. The dismissing officer also had the claimant's absence record, and the stage 1 warning which had been issued to him.

168. By the time of the appeal, the appeal officer had this information, and also had statements from Ms McManus and Ms Skinner, which provided more

detail about the training which the claimant had been given, and the performances issues which had been encountered. She also had the claimant's only note about the documents found in his desk drawer, with manager's comments in respect of each of these.

1 69. The burden of proof which rests with the employer to establish the reason for dismissal is not a high one; the employer does not have to prove the reason to justify dismissal at this stage. The reason for dismissal has been described as a set of facts known to the employer, or beliefs held by him, which caused them to dismiss the employee. On the basis of the documentary evidence which the respondents had before them in the course of the disciplinary process, the Tribunal was satisfied that the respondents' disciplinary and appeal officers did believe that the claimant was incapable, and the Tribunal was satisfied that the respondents had established the reason for dismissal.

170. Having reached that conclusion, the Tribunal then went on to consider the reasonableness of the dismissal under section 98(4) and in doing so the Tribunal considered the second and third elements of the **Burchell** test.

171. The Tribunal began by considering whether at the stage when they formed their belief that the respondents had carried out as much investigation into the matter as was reasonable in all the circumstances. In considering the investigation the Tribunal considered not just what happened up to the point of dismissal, but also what had happened at the appeal. The Tribunal is concerned with the reasonableness of the whole investigation and procedure, and if there had been any defect in the first stage of the procedure, this is capable of being cured on appeal.

172. At the point the claimant was dismissed, he was asked to attend a meeting, he was advised of the purpose of the meeting, and he was told that he was at risk of a dismissal. He was provided with a copy of his absence printouts, the absence management warning and the notes of the associated meeting, his probationary report, and his PIP. The claimant was given an opportunity to state his case at that meeting. The claimant was given the right of appeal, which he took exercised. Thereafter, further investigation was carried out by Ms Fallon at the appeals stage. She obtained statements from the claimant's line managers in Hamilton and Glasgow, which provided her with further information. It was not unreasonable for Mrs Fallon to obtain statements after hearing what was said at the appeal. The claimant submits that unfairness arises from the fact that he was not provided with copies of these statements in advance of the appeal, but it cannot be said it was unreasonable for an employer to make further enquiry in response to matters raised in the course of the appeal. The claimant was given the opportunity to state his case fully at the appeal, he accepted this in cross-examination, and he had the benefit of trade union representation throughout.

173. The Tribunal were not satisfied that Ms Fallon, as submitted by the claimant, read over the documents and made the quick decision to dismiss him. Ms Fallon undertook a lengthy appeal hearing and made further enquiry with the claimant's line managers and issued a disposal letter which dealt with all the appeal points raised. None of this supported the conclusion that she had dealt with the claimant's appeal in a summary manner.

174. The Tribunal understood the claimant to complain about the reasonableness of the investigation, in that the PAR was included in the documentation when

the decision to terminate his employment was taken. The Tribunal was satisfied that even if Ms Strang had relied on the PAR which was included in the bundle of documents, that by the time the appeal was conducted the claimant had appealed PAR and Ms Fallon did not take it into account, and therefore it could not be said that the respondent's investigation was rendered unreasonable as a result of any reliance on the PAR at the dismissal stage.

175. Applying the objective standard of a reasonable employer, the Tribunal was satisfied that the investigation which was carried out by the respondents was one which was reasonable in the circumstances of this case.

176. The Tribunal then considered if the respondents had reasonable grounds in which to sustain their belief and the claimant's lack of capability. The Tribunal was assisted in considering this element of the Burchell test by the guidance given in the case of **Post Office v Mughal 1**977 IRLR 1 78 at page 1 80, where the EAT accepted that:-

"(a) *... management should set the standards of capacity and efficiency that are required. This inevitably involves an element of subjective judgment when individual probationers are assessed.*
(b) The employer has taken the probationer on trial. At the end of the trial period the employer must decide whether the employee

measures up to the standard which the [employer] has set up for its new recruits to the established staff.
(c) The probationer is, during the trial period, under continuous assessment and appraisal in a way that an ordinary employee is not.
(d) As the probationer is on trial and knows it, his failures may be strictly Judged as he is reasonably regarded as trying to do his best.
(e) In ordinary employment, it may not be easy for an employer to satisfy a tribunal that he has fairly dismissed an employee who comes up to average in capacity and performance. But a probationer is liable to be dismissed without remedy if the employer can satisfy a tribunal that the probationer did not come to the standard that the employer laid down for new recruits to the established staff.
(f) ...the employer is entitled to look at performance over the whole probation period, and improved performance at the end of the period may not outweigh reasonable doubts about capacity and personality which are founded on an earlier period. The question for the employer is: has this employee by his total record through the year demonstrated his suitability for established service?
(g) The question for the industrial tribunal is not the same as the question for the employer. This cannot be emphasised too strongly, as it would be a public disaster if it were thought that industrial tribunals had usurped the employer's responsibility for selecting probationers. "
... The question for the Tribunal is: Has the employer shown that he took reasonable steps to maintain appraisal of the probationer throughout the period of probation, giving guidance by advice or warning when such is likely to be useful or fair; and that an appropriate officer made an honest effort to determine whether

the probationer came up to the required standard, having informed himself of the appraisals made by supervising officers and any other facts recorded about the probationer?"

177. In light of the contractual documentation which was issued to the claimant, a copy of which was provided to him in advance of the disciplinary hearing, and the terms of the probationary report, it was not unreasonable for Ms Strang and Mrs Fallon to conclude that the respondents had set standards of capability and efficiency which were required. Paragraph 6 of the claimant's contract made clear to him that his adherence to the training agreement, attendance conduct, and/or any other aspect of his work during the probationary period were not satisfactory, then his probation may be extended, or his appointment terminated.

178. The respondents were also reasonably entitled to conclude that there had been continuous assessment and appraisal throughout the course of the claimant's employment. The claimant made reference in the course of his evidence the fact that he had not had an initial 6 week probationary meeting, however a probationary report had been completed for him after expiry of his initial 6 week employment, and his line manager had assessed his performance as satisfactory in each of the relevant categories. Applying an objective test, it therefore could not be said that anything significant turned on the fact that there wasn't a meeting, as the claimant had been appraised at that stage. The claimant had been appraised at the 3, 6 and 9 month stages and reports produced.

179. Ms Strang and Ms Fallon were reasonably entitled to conclude that the claimant had received training and guidance throughout his probationary period . There is specific reference in the probationary reports to the training provided. The terms of the PIP make it clear what training was provided to the claimant, and what the objectives were.

180. The respondents are also reasonably entitled to conclude that the claimant was given notice of legitimate concerns in the course of his meeting with Mrs Skinner after the documents were discovered in desk drawer in Hamilton. They were entitled to conclude on the basis of Mrs Skinners meeting with the claimant and the training she organised thereafter, that the claimant was given further advice, training and guidance as to the steps he should take. He was also made aware of concerns following his 9 month probationary report and his meeting with Ms Lovett, when he was told that his probation was to be extended and the reasons for that. He was given the right to appeal that decision, which he did not exercise.

181. The terms of the PIP also made clear the areas where the claimant had to improve. These were identified for him, as were the objectives, and the support which was provided to assist him in achieving those objectives. The respondent's officers also had the claimant's manager's view that improvement had not been achieved.

182. The claimant complained that he was put on to a PIP after only working for a very short time on a full time basis in Glasgow, and this led to unfairness. However applying an objective test of reasonableness, it could not be said that it was unreasonable for Ms Fallon to take the view that an experienced manager could legitimately put the claimant on to a PIP where she had concerns about his performance, and where the claimant's probationary

period had been extended by 3 months, taking it up to 12 months which is the maximum period envisaged, and therefore on the face of it, he had a limited time within which to establish his competence.

183. The Tribunal took into account that the claimant's submission that the respondents acted in breach of their own policies in failing to issue him with an improvement notice. Ms Smith counters this by submitting that the policy does not require improvement notices to be issued, due to the fact that it states, *'probationers can expect. ..*

184. The Tribunal is concerned with whether the respondents acted reasonably. Not ever failure to adhere to a policy is capable of rendering a dismissal unfair. While the respondents might be criticised for not issuing Improvement Notices, as set pot in their policy, the Tribunal accepted that as a matter of practice they did not do so, but that they issued PIP in an attempt to improve performance. The significant point is whether the respondents took reasonable steps to maintain appraisal by giving guidance by advice or warning when such was right to be useful or fair **(Post Office v Mughal).**

185. Notwithstanding the fact that improvement notices were not issued, the Tribunal were satisfied that the respondents had given the claimant notice and warning to the effect that there were concerns about his performance. It was also satisfied that they had put in place steps to provide him with training and guidance, in an attempt to meet their concerns, and eventually he was put on to a PIP. When a significant issue arose in Hamilton, Ms Skinner met with the claimant out with the key appraisal dates, to inform him of the issues, and obtain his comments on that, and thereafter provided him with additional guidance and training.

186. Against this background, applying an objective test, it could not be said that the respondent's failure to issue improvement notices meant that their treatment of the claimant during his probationary period was unreasonable, or that Ms Strang or Ms Fallon acted unreasonably in failing to conclude that it had been.

187. The claimant also submits that his dismissal was rendered unfair in that the respondents did not treat him as a full-time member of staff within the procedure stipulated in the Fixed Term Contract Procedures for a Person with Poor Performance.

188. The Tribunal was satisfied that there was no requirement for the respondents to apply this COPF Managing Poor Performance Policy and Procedure, (page 392) to the claimant, as it specifically states under paragraph 1 , that the policy applies to all employees who have completed their probation, and that probationary employees with performance issues must be dealt with in accordance with the probation policy.

189. The Tribunal was satisfied that Ms Strang and Mrs Fallon were entitled to conclude that the claimant was aware of what was expected of him, and that there had had been regular appraisal of the claimant's performance, where he was given feedback. They were entitled to conclude that after the 6 month stage he was advised that there was a serious issue, and given further training and guidance, and at the 9 month stage, the claimant was again advised of serious issues with his performance, and provided with an extension to his probationary period, which he was told he could appeal. No

appeal was lodged in respect of that extension. Performance issues they were further identified in Glasgow, when he was put on to a PIP and the performance issues were identified in that PIP.

190. The respondent's disciplinary and appeals officers were also reasonably entitled to conclude that the claimant was provided with training and supervision. The steps taken to train the claimant were set out in the probationary reports, the PIP, and at the appeal stage in the statements from Ms Skinner and Ms McManus.

191 . The respondent's dismissal and appeal officers were also reasonably entitled to conclude that the claimant was told the of the consequences for failing to improve. Specifically, when his probation was extended at the end of the 9-month stage, he was told this was being done to give him the opportunity to meet the required standards in order to pass probation. The claimant was also warned of the consequences of his failure to adhere to the respondent's absence management procedure in terms of the stage 1 warning which he received.

192. The Tribunal was satisfied that at the point when they took the decision to dismiss, the respondent's dismissal and appeals officers had reasonable grounds upon which to conclude that the claimant had not met the standards of capability required of a probationary fiscal officer, which was the post the claimant held.

193. The Tribunal was therefore satisfied that the three limbs of the **Burchell** test had been satisfied, and then went on to consider whether the decision to dismiss in these circumstances is one which fell within the band of reasonable responses.

1 94. In addressing this the Tribunal took into account the guidance given in **Iceland Frozen Foods Ltd v Jones** 1982 IRLR 439, in which it was said that -
(1) In applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;
(2) In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
(3) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another.
(4) *The function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.*

195. The Tribunal firstly considered the claimant's submission in relation to how the respondents dealt with other modem apprentices. He questioned how it could be that he, a MA who was off for 7 months on sick leave due to work related stress, came back to work and was not off for 8 months, completed and graduated with all the other MA's, but was the only MA to be sacked when other MA's had worse sickness absence. There was however no argument

of inconsistency of treatment before the Tribunal, and there was no evidence of any specification to support such an argument.

196. In considering whether the descsion to dismiss was one which fell with the band or reasonable responses, the Tribunal also took into account the claimant's submission to the effect that the respondents did not take into account the medical advice available to them as to his condition and how this impacted on him, in particular the OH advise and his GPs report.

197. In terms of the guidance in **Post Office v Mughal,** an employer has to inform themselves of the appraisals made by the supervising officer, and any other facts recorded about the probationer. A number of OH referrals were made by the respondents throughout the course of the claimant's probation and OH reports where produced, the last dated 24 November. These and the claimants GP letter were taken into account by Ms Fallon at the appeal stage.

198. Mrs Fallon took the OH advice into account, to the effect that the claimant would have difficulty with manual handling, but was fine for computer work, although his pace may be reduced during training periods and may be impacted by his pain level.

199. In reaching her decision to dismiss it could not be said to be unreasonable for Ms Fallon to take into account that the claimant was employed in an office to perform an administrative function. She accepted, as she was reasonably entitled to do in light of the evidence at the appeal hearing, which included that the claimant said it was his choice to use the stairs, that Ms MacManus had told the claimant to use the lift in response to concerns about having to use the stairs to transfer papers to court.

200. Ms Fallon took into account that a stress risk assessment had been carried out both at Hamilton and Glasgow. She took the view that the claimant had been working at relatively straightforward, she described as "entry level" work, for a period over one year, and at the conclusion of the 3 months performance improvement plan, following on an extended probationary period, there were still performance issues. Even taking into account the comments from OH about the claimant learning at a slower pace, she concluded that the claimant had not progressed as he should had.

201 . It cannot be said that her decision in this regard was one which no reasonable employer would have taken. It was not reasonable for Ms Fallon to take into account that the OH advice had been followed, that the claimant was confirmed fit for work, and that stress risk assessments had been carried out. It was not unreasonable for her to attach weight to the fact that significant concerns had been raised about the claimants performance which had resulted in the extension of his probationary period and that he had been placed on a PIP in the course of his extended probationary period which identified the areas where improvement was still required, that support had been provided, but this had still not led to the claimant achieving the required standards. It was not unreasonable for Mrs Fallon to take into account the occupational health advice, but to balance that against the other factors which she had regard to, and to reach the conclusion which she did.

202. The test which has to be applied by the Tribunal is an objective one. Applying that test it could not be said that the decision to dismiss the claimant at the conclusion of his probationary period, was one which no reasonable employer

would have taken, and that such a decision was one which fell out with the band of reasonable responses.

203. The consequence of this conclusion is that the Tribunal was satisfied the decision to dismiss was not unfair, and the claim is dismissed.

Employment Judge: L Doherty
Date of Judgment: 27 July 2019
Entered in register: 29 July 2019
and copied to parties